COURT FILE NO.: 406/95
DATE:20011019

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS	B.A. Jetten, K.E. Nicolson, for the Plaintiff
Plaintiff	
- and -	
THE ATTORNEY GENERAL OF CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	J. Leising; and J. August for the defendant, Canada
Defendants	
	HEARD: 15, 16 October, 2001

The Hon. Mr. Justice James C. Kent

REASONS FOR PRELIMINARY RULING ON MOTION

Six Nations efforts to conduct discovery of Canada have not progressed as this court anticipated in earlier rulings and orders made 27 July, 1999 and 11 September, 2000. It is the hope of the court that the end result of this motion will expedite the discovery process and enable the parties to focus the litigation on the real issues.

BACKGROUND:

[1] An order was made on consent 25 October, 1996 providing, inter alia, that the parties might submit written discovery questions to each other without prejudice to further oral discovery. This order was made in recognition of the fact that significant issues in this case would, for the most part, be addressed on the basis of ancient documentary evidence. Pursuant to the aforementioned order Canada was served with the plaintiff's written interrogatories and a request to admit. Canada responded to the request to admit and Six Nations then served Canada

with a further request to admit and a second set of related interrogatories. Canada was also served with a demand for particulars which sought particulars of the allegations set forth in certain paragraphs of Canada's Statement of Defence. Canada, for reasons that counsel then stated, refused to respond to the demand for particulars and Six Nations brought a motion to compel Canada to provide answers to both the written interrogatories and the demand for particulars. On 27 July, 1999 this court ordered that Canada provide responsive answers to the demand for particulars and the written interrogatories.

[2] Six Nations, feeling that the answers then provided by Canada to the written interrogatories and demand for particulars were not responsive, brought a motion returnable 11 September, 2000 requesting sanctions to ensure compliance with the July, 1999 order. At the commencement of the motion, an order was made, on consent, adjourning the motion sine die on terms. It was hoped by all that the terms of this much more specific order, to which the parties had consented, would provide an appropriate means of completing the discovery process. It has not. Six Nations now takes the position that even the most recent answers to the written interrogatories, the replies to the demand for particulars and the responses and answers to undertakings provided on an oral examination for discovery of Canada's representative are to a large extent unsatisfactory and asks that this court impose sanctions upon Canada in order to ensure greater compliance by Canada with its discovery obligations.

[3] The court will not, at this preliminary stage of the motion, assign responsibility for the lack of progress in the discovery process. That may, however, be necessary at the concluding stage of this motion. In the interim, the parties have agreed that:

a) Seven sample questions and answers would be submitted to this court for ruling as to the adequacy of the answers after hearing oral submissions.
b) Canada would provide a written response to the position of the Six Nations on the remaining answers.
c) Six Nations would reply in writing to Canada's written responses.
d) Where necessary, the court will rule upon the adequacy of the answers and provide such direction(s) as may be appropriate.
e) This motion will be adjourned pending the receipt of the written submissions of counsel.
f) Issues, including the terms upon which oral discovery will continue, sanctions, Canada's document list and costs will remain live and may be addressed upon the return of the motion.

LAW:

[4] Six Nations are entitled in the discovery process to make a full and free inquiry into matters in issue with questions that have, at minimum, a semblance of relevance. Canada's answers must be clear, frank and constitute full disclosure. More detailed and specific guidance for the discovery process in a large and complex case such as this is found in a decision of Hugessen, J. in the Federal Court. See *Montana Band and others v. The Queen and others* [1999] 4 C.N.L.R. 66. Counsel for both Six Nations and Canada would be well advise to re-read that decision and keep a copy available for reference when articulating their questions and answers.

THE QUESTIONS AND ANSWERS:

[5] 1. Undertaking No. 1 to question 680 on the oral examination of Franklin Roy. Reference: Attachments to Plaintiff's Factum Vol. 1, Tab D, page 11.

> Question: Provide all of Canada's knowledge, information and belief as to when and what compensation was paid to or credited to the Six Nations in respect of all the Simcoe Patent Lands, legal title to which the Crown conveyed to third persons since 1784?
>
> Answer: All of Canada's knowledge, information and belief as to when and what compensation was paid to or credited to the Six Nations in respect of all the Simcoe Patent Lands, legal title to which the Crown conveyed to third persons since 1784, is contained in the following documents: [a list of documents is then provided]

Providing a list of documents is not a full and complete answer. The undertaking was to provide information as to "when and what" compensation was paid not to merely refer the discovering party to where the information could be found. Canada is, therefore, directed to provide a fuller and more complete answer that contains the "when and what" information.

[6] 2. Undertaking No. 6 to Q 1211 on the oral examination of Franklin Roy. Reference: Attachments to Plaintiff's Factum Vol. 1, Tab D, p. 24.

> Question: What compensation, if any, was paid in return [for the land surrendered, referred to in] Exhibit 32 or if not paid, credited to the Six Nations? When was it paid, when was it credited and how was it arrived at?
>
> Answer: The Indian Department placed a valuation on the land before it was offered for sale[Canada's List of Documents, Claim 12, Docs. 328, 373 and 378; Claim 9, Doc. 36; Claim 10, Docs. 281 and 253; Claim 12, Doc. 406; Supp. 4, Claim 12, Docs. 28, 30, 36, 42, 48, 59 and 63].
>
> From time to time the Six Nations' Band council approved changes to the valuations. [Canada's List of Documents, Claim 8, Doc. 7; Supp. 3C, Claim 8, Doc. 1] See also Ontario's documents 70, 74, 75, 94, 101, 119, 136, 153, 161 and Ontario's microfilm productions MS892 reel 4 envelope 2 and envelope 3 for Order in Council 1653 and 1721; return Nov. 30, 1843 [pp. 3798-3810]; March 31, 1845 Order in Council [pp. 3824-5]; Nov. 18, 1844 Order in Council pp. 3818-9]; Envelope 12 for Dec. 22, 1842 Order in Council 1075 [pp. 3456-8]; Oct. 4, 1843 Order in Council 1366 [pp. 3464-7].

This is not a full and complete answer. The undertaking was to answer concerning what compensation was arrived at and paid or credited and provide specifics as to when that was done.

The referral to documents is inadequate, as previously indicated. Further, if as counsel for Canada submits, the specifics are not contained in the only available documents, that should be stated. Canada is, therefore, directed to provide a fuller and more complete answer.

[7] 3. Written Answer to Question 2(b) Reference: Attachments to Plaintiff's Factum Vol. 1, Tab 3 E, p. 4.

Request to admit: 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.

Answer:

The tests to establish aboriginal rights were set out by the Supreme Court of Canada in *R. v. Van Der Peet, [1996] 2 S.C.R. 507 and Delgamuukw v. B.C., [1997] 3 S.C.R. 1010.* According to *Van Der Peet*, the test for an aboriginal right to engage in particular activity requires, inter alia, that the practice of that activity predate European contact. According to *Delgamuukw*, a claim for "aboriginal title" requires a First Nation to establish, inter alia, occupancy of the land at the time of the assertion of Crown sovereignty. Whatever rights were conferred upon the Six Nations by the Haldimand Proclamation, these rights cannot satisfy either of the above tests.

Notwithstanding the above, it is Canada's position that the interest that the Six Nations has in its reserve lands is the same interest that other First Nations have in their aboriginal title lands. [See: *Guerin v. The Queen, [1984] 2S.C.R. 335 at 379.* See also: *Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010 at 1085.*]

While it would have been preferable for the answer to repeat the same words used in the request to admit, counsel for Canada satisfied the court during submissions that (i) Canada's position is that the "interest" the Six Nations had in its lands was the same as the "rights" it had in respect of the lands and (ii) That the use of the term "its reserve lands" has no intended meaning other than "its lands." Canada is therefore directed to confirm in writing the position stated by counsel during submissions.

[8] 4. Demand for Particulars #3:
Reference: Attachments to Plaintiff's Factum Vol. 2, Tab F3, p. 23.

Demand:

If Canada denies that the Imperial Crown had or owed fiduciary obligations to the Six Nations and, in particular, was under a fiduciary obligation to the Six Nations to hold,

protect, manage and care for the lands, personal property and other assets vested in the Crown for the benefit of the Six Nations, provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for such denial;

Reply:

Where the Imperial Crown had the discretion to accept or reject a proposed surrender of Six Nations' land, the Imperial Crown then had, at that time, a fiduciary obligation to ensure that such a surrender was in accord with the wishes of the Six Nations and not exploitative. Upon surrender, a fiduciary obligation then took hold to regulate the manner in which the ImperialCrown exercised its discretion in dealing with the land on the Six Nations' behalf. (See: *Guerin v. The Queen, [1984] 2 S.C.R. 335 and Blueberry River Indian Band v. Canada, [1995] 4 S.C.R.*

These were the Imperial Crown's only fiduciary obligations to the Six Nations.

During the course of submissions Canada asked that two further sentences be added to its reply as follows:

Canada understands the law to impose no other relevant fiduciary obligation. Canada knows of no other material facts that would support an assertion that additional fiduciary obligations exist, other than described above.

As expanded during submissions, the response is adequate. It would, however, have been preferable to explicitly make the denial of a fiduciary obligations regarding "personal property and other assets" rather than leaving it to be implied.

[9] 5. Demand for Particulars #19:
Reference: Attachments to Plaintiff's Factum, Vol. 2, Tab F19, p. 101.

Demand:

Does Canada allege that "crediting the Six Nations' account for subscribed shares in the amount of £368.14 provincial currency" was full and fair compensation for the land patented to the Grand River Navigation Company; and

Reply:

At the time of the expropriation, the highest upset price at the last sales in the Town of Brantford was £1 per acre for unimproved lands. It was on this basis that the price was fixed for the expropriated lands. See Canada's List of Documents, Claim 6, Doc. No. 69.

It may be implied from the answer that Canada alleges both that £ 368.14 was full and fair compensation for the land patented to the Grand River Navigation Company and that the shares of that company obtained and credited to the Six Nations had that value at the time they were so credited. It would have been preferable for Canada to say that explicitly.

[10] 6. Demand for Particulars # 17: Reference: Attachments to Plaintiff's Factum Vol. 2, Tab, F8, p. 51.

Demand:

Specify whether Canada alleges that the Six Nations had the capacity necessary to instruct William Dickson as alleged in paragraph 33 and specify the nature of the proceedings that the Six Nations were capable of instituting and the necessary parties thereto; and

Reply:

Canada so alleges. As the instructions to Dickson were to recover money from John Claus, it is assumed that the appropriate proceedings would have included an action for the recovery of money. Under the circumstances of these particular facts, it is assumed that the necessary parties would have been the three trustees subsequently appointed by the Six Nations (Dunn, Markland and Baby) as plaintiffs and John Claus as defendant.

While it is difficult to understand from the information in the reply how any recovery proceedings would function in law or in practice, the reply is, nevertheless, responsive.

[11] 7. Demand for Particulars # 8:
Reference: Attachments to Plaintiff's factum Vol. 2, Tab F 8, p. 51:

Demand:

Specify what aspects of the fiduciary relationship referred to in paragraph 80 [of the statement of defence] are alleged not to give rise to a fiduciary duty; and

Reply:

Where the Crown in right of Canada ("Canada") has the discretion to accept or reject a proposed surrender of Six Nations' land, Canada then has, at that time a fiduciary obligation to ensure that such a surrender is in accord with the wishes of the Six Nations and not exploitative. Upon surrender, a fiduciary obligation then takes hold to regulate the manner in which Canada exercises its discretion in dealing with the land on the Six

Nations' behalf. (See: *Guerin v. The Queen, [1984] 2 S.C.R. 335 and Blueberry River Indian Band v. Canada, [1995] 4 S.C.R. 344.*)

This would be the extent of Canada's fiduciary obligations to the Six Nations. Canada states that it has no fiduciary obligations other than that described [in (c),] above.

While the combined replies set out have not been responsive in specifying what aspects of the fiduciary relationship do not give rise to a fiduciary duty, they do concede that the operative fiduciary obligation is that set out in *Guerin v. The Queen, [1984] 2 S.C.R. 335* and that Canada has that fiduciary obligation to Six Nations. It is implicit, therefore, that there are no relevant aspects of the fiduciary relationship between Canada and the Six Nations that do not give rise to a fiduciary obligation. If Canada intends to rely on paragraph 80 of its statement of defence to argue that some aspect of the fiduciary relationship between Canada and Six Nations does not give rise to a fiduciary duty a more responsive answer is required. Canada is directed accordingly.

GENERAL:

[12] As I observed over two years ago, in complex litigation of, perhaps, unprecedented magnitude, those individuals responsible for formulating questions and answering them do so with the utmost care and precision. No party or counsel wants to admit or agree to something that may later be pivotal in having the case decided against the position of that party or counsel. In those circumstances an answer can easily be perceived by opposing counsel with a suspicion that it is deliberately evasive, non-responsive or a tactical ploy calculated to mislead. This court is not persuaded that any of the aforementioned answers or replies could be so described. The fact that they may be so perceived, however, underscores the need for direct questions and direct responses. The maximum that "when you want a better answer, ask a better (usually shorter and more specific) question" would be a helpful guideline.

[13] The complexity of the issues in this litigation may require a greater and perhaps almost continuous involvement of the court in the discovery process. The full extent of that involvement, I leave for the return of this motion or to a case-management meeting. In the interim, I encourage counsel, where they have a difference of opinion, to arrange a telephone conference call through the trial co-ordinator. I will endeavor to provide directions and where possible rulings. Either party may request such a conference. It is my hope that by providing these written reasons for my preliminary ruling together with the offer of the conference call some additional guidance may be provided to counsel for both parties to the point that rulings on many answers may become unnecessary.

ORDER:

[14] An order will go providing directions to Canada in accordance with the above ruling as to answers and replies. A further order is made requiring Canada within 30 days of today to provide written responses to the remaining issues raised by Six Nations in Volumes 1 and 2 of the

Attachment, to the Plaintiff's Factum. Six Nations is ordered to provide any reply to Canada's responses within 15 days of receipt of Canada's responses. The motion is otherwise adjourned to a date to be fixed by the trial co-ordinator on application by counsel.

Order accordingly.

The Hon. Mr. Justice James C. Kent

Released: 19 October, 2001

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS

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