COURT FILE NO.: 406/95
DATE:2002/03/01

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	

The Hon. Mr. Justice James C. Kent

REASONS FOR RULING ON MOTION

BACKGROUND:

[1] On 19 October, 2001, this court provided written reasons and a series of seven preliminary rulings on issues raised by Six Nations in volumes 1 and 2 of the attachment to its factum. Canada was required to provide written responses to the remaining issues within 30 days. Six Nations was allowed 15 days to reply to those responses. I have now had an opportunity to consider the responses and replies. Because the written submissions, responses and replies are specifically itemized with respect to undertakings, written interrogatories and demands for

particulars, I will in these reasons refer only to each specific item without setting it out together with the submissions of counsel.

OMITTED UNDERTAKINGS:

[2] There appears to be confusion as to whether and why several of Canada's undertakings were not answered. In a letter dated 5 December, 2001, counsel for Canada explains why Canada did not address the list of those undertakings as set out in Six Nations written reply submissions at Tab D, page 2. Because the listed undertakings were not the subject of submissions from both parties, they cannot be addressed on this motion.

MATTERS APPARENTLY NO LONGER IN ISSUE:

[3] The parties and their respective counsel are to be commended for their co-operation in arriving at agreement on so many of the matters formerly in issue. In accordance with the agreements that appear to have been reached, Canada is directed to confirm in writing its responses as stated by counsel in submissions on behalf of Canada as follows:

Undertakings:

a) Undertaking 2, day 2

b) Undertaking 8, day 3

c) Undertaking 18, day 3

d) Undertaking 19, day 3

e) Undertaking 20, day 3

f) Undertaking 24, day 3

g) Undertaking 14, day 5

h) Undertaking 15, day 5

Demands for particulars:

a) Demand 2 (b)

b) Demand 2 (c)

c) Demand 22

d) Demand 24 (b)

e) Demand 25

f) Demand 27 (a)

g) Demand 33 (a)

h) Demand 33 (b) – typographical error correction

UNDERTAKINGS REMAINING IN ISSUE:

Undertaking No. 3 (Day 1):

[4] Canada's response is adequate in the sense that its research is being conducted generally. The response does not, however, eliminate the possibility that Canada has in its research located documents that it considers irrelevant. Canada is therefore directed to clarify and specify which documents its considers irrelevant.

Undertaking No. 6 (Day 1):

[5] Canada appears to have made reasonable efforts to enlarge upon its response. Canada is, therefore, directed to confirm in writing its response as stated by counsel in submissions. The issue of whether the response is contradictory is for argument at trial or upon further motion.

Undertaking No. 3 (Day 2):

[6] Canada was directed by the order of this court made 19 October, 2001 (paragraph 5 of reasons then given) to provide a fuller and more complete answer that contained "when and what" information. No further order is required.

Undertaking No. 7 (Day 2):

[7] Canada appears to have made reasonable efforts to enlarge upon its response. Canada, is therefore, directed to confirm in writing its combined responses as stated by counsel in submissions.

Undertaking No. 10 (Day 2):

[8] The response, as enlarged, is almost complete. Canada, however, having agreed to treat documents lodged in the National Archives as within Canada's possession and control, is now obliged to confirm that it has verified that there are no "books of the province" located in the National Archives. Canada is directed accordingly.

Undertaking No. 17 (Day 3):

[9] The response provided by Canada is sufficient. It does not, however, answer whether Canada had any de facto or de jure control of the named trustees. Canada may wish to answer that or Six Nations may wish to ask further question(s) upon the continuation of the discovery process.

Undertaking No. 23 (Day 3):

[10] With respect to land transactions, Canada's answer, as enlarged, is responsive. With respect to monetary transactions, the principal objection of Six Nations is that Canada's interpretation of statutory provisions is incorrect. That is an issue for argument at trial or upon further motion. Canada is directed, therefore, only to confirm in writing its enlarged response as stated by counsel in submissions.

DEMANDS FOR PARTICULARS REMAINING IN ISSUE:

Demand 2(a) and 2(d):

[11] These demands address what the parties refer to as "obligations" "duties" and "liabilities". Such matters are capable of being discrete and finite. They may also be continuing and permanent. Canada may wish to provide clarification or Six Nations may wish to ask further question(s) upon the continuation of the discovery process. For the moment, however, Canada's response as enlarged, is adequate and Canada is therefore directed to confirm in writing its response as stated by counsel in submissions. Six Nations real objection is that the position is untenable. That is an issue for argument at trial or upon further motion.

Demand 2 (g):

[12] The demand is not, as Canada has argued, unclear and imprecise. Canada's further response seems to distinguish the operative words "imposed by", "result from" and "flow from" from one another. Such distinction is lost on this court and makes Canada's response appear to be contradictory. If the response is not contradictory, it must be read as if Canada is stating, "none, except those set out in sections 111 and 112 of the Constitution Act, 1867 and any legislation passed by Canada in relation to Indians and lands reserved for Indians". If that is Canada's intended response, Canada is directed to confirm that in writing. If that is not Canada's intended response, Canada is directed to provide a more responsive and specific reply to this demand.

Demand 2 (h):

[13] Any ruling on this demand hinges upon the response to 2(g) above.

Demand 28 (a) and (b):

[14] The enlarged responses are not full and specific but are adequate at this point in the litigation. If Canada intends this response to reply to Six Nations' claim for an accounting and equitable compensation, Canada is directed to so confirm in writing that that is its position.

Demand 30:

[15] To satisfy this demand for particulars, Canada should state allegations of fact, law or mixed fact and law that could give rise to a finding that, for at least 50 years and possibly as long as 200 years in some instances, Six Nations was aware of facts that supported an equitable claim and knew that those facts gave rise to that claim. If Canada's argument that the equitable defence of waiver through acquiescence applies entirely because Six Nations had the requisite knowledge as a result of the decision of the Supreme Court of Canada in *Miller v. The King*, then the demand is satisfied. If, however, Canada relies on anything further, particulars of alleged further facts and knowledge must be provided. Canada is therefore directed to confirm in writing that its position is as stated above or alternatively to provide particulars of those further facts and knowledge relied upon.

[16] It appears that Canada relies solely on the acquiescence branch of the doctrine of laches. If Canada intends to also rely upon the delay as rendering prosecution of the action unreasonable because Canada has altered its position in reliance upon Six Nations delay and is thereby prejudiced, particulars concerning that position must also be provided. Canada is directed accordingly.

WRITTEN INTERROGATORIES:

[17] Six Nations objections to Canada's answers to questions 3 (a) (i) (ii) and (iii) are addressed in these reasons above when considering demands 2 (a), 2 (d) and 2 (g). The request by Six Nations that stand-alone answers be provided is reasonable, but not one that this court would endorse by order.

ORDER:

[18] An order will go providing directions in accordance with the above rulings.

GENERAL:

[19] Other issues, including the terms upon which oral discovery will continue, as set out in my reasons of 19 October, 2001 at paragraph 6 remain live. This motion is adjourned to a date to

be fixed by the trial co-ordinator at Brantford on application by counsel. Any issue(s), at least initially, may be addressed by telephone conference call as stated at paragraph 13 of my aforementioned reasons.

The Hon. Mr. Justice James C. Kent

Released: 1 March, 2002

COURT FILE NO.: 406/95
DATE: 2002/03/01

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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: 1 March, 2002