CITATION: Six Nations of the Grand River Band of Indians v. The Attorney General of Canada, et al, 2018 ONSC 1289
COURT FILE NO.: 406/95
DATE: 20180223

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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

BEFORE: SANFILIPPO J.

COUNSEL: *Ben A. Jetten, Iris Antonios, Max Shapiro*, for the Plaintiff

Michael McCulloch, Jennifer Roy and Ben Mitchell, for the Defendant the Attorney General of Canada

Leonard Marsello, Tamara Barclay, Jennifer Lepan and Noelle Spotten for the Defendant Her Majesty the Queen in Right of Ontario

HEARD: January 31, 2018

1ST CASE MANAGEMENT ENDORSEMENT

A. Overview of Proceedings

[1] This action was initiated by statement of claim issued on March 7, 1995. The plaintiff, Six Nations of the Grand River Band of Indians, alleges that the defendants, Attorney General of Canada ("Canada") and Her Majesty the Queen in Right of Ontario ("Ontario"), or their predecessors, breached fiduciary and treaty obligations alleged to be owed and thereby seeks an accounting, declaratory relief, equitable compensation and references in connection with events that largely took place in the 18th and 19th centuries.

[2] This action was initiated in Brantford, Ontario, and was there subject to case management by Justice J.C. Kent. This action was transferred to Toronto, on consent, pursuant to the Order of Regional Senior Justice Morawetz dated November 24, 2017.

[3] On January 3, 2018, a request was made, on consent, for this action to be subject to case management. On January 5, 2018, I was appointed as the case management judge.

[4] The first case management conference was conducted on January 31, 2018 (the "1st CM Conference").

[5] This action had a lengthy period of active litigation, which resulted in the exchange of numerous affidavits of documents and document lists. In the result, the parties collectively produced over 31,000 documents. The discovery representative of Canada was examined for five days in 2000, both preceded by and followed by extensive motions on discovery issues.

[6] This action was placed in abeyance for a period of more than six years, on consent of all parties, but has since been taken out of abeyance and has entered a stage of renewed, active litigation.

[7] The parties agreed to a discovery plan in March 2016 which incorporated a detailed electronic discovery protocol. By continued use of this discovery plan, the parties are currently engaged in discovery and attempting to narrow factual issues in dispute before trial through a process of detailed requests to admit, supplemented by written discovery.

[8] To date, the plaintiff has delivered eleven requests to admit, of which ten have been answered, while Canada has delivered one request to admit, which has been answered. The plaintiff also delivered to Ontario, in April 2017, an instalment of written questions

B. Position of the Parties

[9] At the 1st CM Conference, the parties sought direction on a timetable leading to trial, including deadlines for: (1) delivery and responding to outstanding and pending requests to admit and written discovery questions; (2) completion of any other examinations for discovery; (3) motions arising from discoveries; (4) expert reports; and (5) the scheduling of a pre-trial conference.

[10] The plaintiff and Canada each produced their own versions of a proposed draft timetable that outlined their submissions on the timing considered necessary to foster the development of the procedural steps listed above. The timing proposed by each for the commonly-identified proposed steps varied widely. The plaintiff's proposed timetable provided precise timing parameters for steps leading to a pre-trial conference in late 2020. Canada's proposed timetable did not set time deadlines for completion of litigation steps in as much as it proposed time parameters prescribing ranges of time for steps to be completed, measured in multiple years, with no certainty or predictability of time within which the action will be ready for trial. Ontario did not propose a timetable on the basis of its submission that complex historical litigation is not well-suited to precise timetabling, particularly in the circumstances of this case which pleads causes of action that arise from pre-Confederation conduct.

[11] The plaintiff delivered a request to admit dated December 13, 2017 that has not yet been responded to by either Canada or Ontario (the "December 2017 RTA"). The plaintiff stated that it has in progress the preparation of at least one further lengthy request to admit that might be delivered in shorter phases.

C. Specific Case Management Directions

[12] While this action is undoubtedly complex, and has unique elements that contribute to its almost 23 year history, it is like all other actions in that it must be advanced to the point of trial readiness. The case management process is designed to assist in meeting this objective.

[13] A succinct statement of the purpose of case management, and counsel's role in relation to it, is set out by Justice F.L. Myers in *Schenk v. Valeant Pharmaceuticals International, Inc.*, 2017 ONSC 5101 at paras. 5 and 6 (Ont. S.C.J.):

> "The purpose of this case management process is to resolve the lawsuit as efficiently, affordably and proportionately as the interests of justice allow. The proceeding will be managed to move forward efficiently but not urgently. There should always be at least one process step scheduled and being actively pursued. Parallel scheduling of multiple steps should be expected.
>
> Parties and counsel are required to cooperate on procedural and scheduling matters so as to ensure there is a fair process for all. (See the Commentary under Rule 5-1.1 of the *Rules of Professional Conduct* "[t]he lawyer must discharge this duty … in a way that promotes the parties' right to a fair hearing in which justice can be done") and also *Bosworth v. Coleman,* 2014 ONSC 6135)."

[14] Effective case management requires that the action be moved forward expeditiously, in the circumstances of each case, mindful of the need for efficiency and proportionality, always with at least one process step scheduled and being actively implemented.

[15] The 1st CM Conference did not allow sufficient time to identify means by which the procedural development of this action can effectively be enhanced through the development of a realistic timetable to guide the progress of the next stages of this action.

[16] As such, a further Case Management Conference will be conducted, in person, on March 26, 2018 at 9:00 am, a date canvassed and understood to be available to all counsel. My judicial assistant will advise of the location of this second Case Management Conference ("2nd CM Conference") as its date approaches.

[17] Counsel for the plaintiff will, in anticipation of the 2nd CM Conference, prepare a compilation of all facts on which agreement has been reached by reason of the ten requests to admit delivered by the plaintiff that have been responded to by Canada and Ontario and the one request to admit that has been delivered by Canada and responded to by the plaintiff and Ontario (the "Compilation of Agreed Facts"). This is intended to enhance a common understanding of the factual elements on which agreement has been reached and to allow, then, for an understanding of the factual development required to address areas of factual dispute or under-development, in order to prepare this matter for trial. This is also intended to allow for discussion on possible expert evidence required and the possibility of separating and addressing distinctly and individually discrete issues that may be suitable for partial summary determination.

[18] The plaintiff will work toward distribution of the Compilation of Agreed Facts in advance of the 2nd CM Conference to allow an opportunity for its review prior to discussions that day.

[19] In the meantime, the steps in this action are not to be held in abeyance. In particular, the timing for responding to the December 2017 RTA, and any such further requests to admit that may be delivered since the 1st CM Conference, is not stayed.

D. General Case Management Directions

[20] Parties and counsel are required to cooperate on procedural and scheduling matters so as to ensure there is a fair and just process for all, consistent with Rule 1.04 and with the principles of proportionality, fairness and efficiency set out in *Hryniak v. Mauldin,* 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 28: "The principal goal remains the same: a fair process that results in a just adjudication of disputes."

[21] Delegation to junior counsel is invited, including the presentation of argument, appearances at case conferences or assisting in the questioning of witnesses with whom they have worked, without concern that it be viewed as over-staffing in the consideration of any cost award.

[22] No motion may be brought in this action before being considered at a case conference.

[23] Broad application of Rule 50.13 will be used to address and resolve matters raised at case conference, in circumstances where this is possible. Counsel ought to expect that procedural orders and directions will be made at case conferences, in accordance with Rule 50.13(6), on informal notice of the issue to be addressed.

[24] Any party who seeks to address an issue identified in this action between now and the next scheduled case conference of March 26, 2018 and who considers that a case conference would assist in expeditious and efficient handling of any such issue, may request the scheduling of a further case conference by email to my assistant in the same manner that the first case conference was organized.

[25] The requirement of preparation, issuance and entry of a formal order is hereby dispensed with in accordance with Rule 77.07(6).

Sanfilippo J.

Date: February 23, 2018