

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, and Brittiny Rabinovitch* for the
Plaintiff

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

Leonard F. Marsello and Stephanie Figliomeni for the Defendant Her Majesty the
Queen in Right of Ontario

HEARD: May 29, 2018

3RD CASE MANAGEMENT ENDORSEMENT

A. Background

[1] The third case management conference (“3rd CM Conference”) was conducted in this action on May 29, 2018. The discussion at the 3rd CM Conference continued the process of defining the facts capable of being admitted, which is well-underway through the use of requests to admit, while, at the same time, working toward agreement on the identification and characterization of the issues raised by the action. The objective is the continued preparation of this matter for trial, structuring the case for adjudication and also consideration of whether any discrete elements may be suitable for summary determination.

B. Matters Addressed at 3rd CM Conference

Requests to Admit

[2] The plaintiff has continued to develop a list of agreed-upon facts through the use of requests to admit. This process is intended to establish a factual record for use at trial while isolating areas of factual disagreement.

[3] In furtherance of these objectives, the defendants responded to the plaintiff’s request to admit of December 2017 within the May 15, 2018 time frame established at the second case

management conference (“2nd CM Conference”). The plaintiff submitted that these responses, when totaled with those that were received in relation to previous requests to admit, show that 79% of the facts requested to be admitted are admitted, 5% are denied and for 15% of the facts there are different responses given by Canada and Ontario, referred to by the plaintiff as “Inconsistent Responses”. There was no response to 1% of the facts proposed to be admitted.

[4] Counsel for the plaintiff submitted that Canada and Ontario ought to be encouraged to confer and collaborate on the Inconsistent Responses to determine whether they might provide a common response. Canada and Ontario reiterated that they are adverse in interest, having advanced crossclaims against each other, and have different interest in certain issues. As such Canada and Ontario are not able to provide a common responding position to certain of the facts proposed to be admitted simply by reason of their differing positions on certain of the issues in the action.

[5] The issue of Inconsistent Responses will be held over for further consideration at a case management conference conducted after the completion of the process of factual development through requests to admit.

[6] In accordance with section 5(a)(iii) of the case management endorsement of March 29, 2018 (the “2nd CM Endorsement”), the plaintiff’s further request to admit was delivered by May 15, 2018 (the “May 2018 RTA”). Canada has committed to use its best efforts to respond to the May 2018 RTA by December 31, 2018. Ontario has committed to response to the May 2018 RTA by February 28, 2019, although Ontario will use its best effort to complete its response sooner, if possible.

Issue Identification

[7] The parties have continued the process of issue identification. The steps outlined in paragraphs 5(b) of the 2nd CM Endorsement have been completed. Further, the counsel for the parties met, in advance of the case management conference, to discuss the issue list.

[8] The plaintiff prepared and distributed a further draft issues list with ‘track changes’ to identify those issues that the plaintiff considers pertinent to this action. This issue list modifies the issue list prepared by Ontario, which list was the focal point for the parties’ consideration and discussion on issues in the period since March, 2018.

[9] Ontario and Canada will consider the further draft of the issue list presented by the plaintiff and with the intention that Ontario and Canada would deliver a revised issue list to the plaintiff by mid-June and the plaintiff would return a further draft version to Ontario and Canada by the end of June, 2018, in contemplation of further development of a consolidated issue list.

[10] The parties are directed to continue with their collaborative efforts at development of a consolidated issue list for further consideration at the next case management conference. The objective is to determine whether agreement is capable of being achieved on the identification and characterization of the issues raised by this action and, if not, allow for consideration of how any disagreement might be addressed. The issue list will structure a framework for adjudication at trial. The discussion identified the possibility that discrete elements of this action may be

considered for summary determination once a consolidated issue list is concluded. The issue list will also assist in identification of expert evidence that may be required.

C. Specific Case Management Directions

[11] Further to the discussions conducted at the 3rd CM Conference, I provide the following specific case management directions:

Requests to Admit

- (a) Ontario and Canada will respond by November 13, 2018 to the Request to Admit delivered by the plaintiff on March 13, 2018, consistent with paragraph 5(a)(ii) of the 2nd CM Endorsement;
- (b) Canada will use its best efforts to respond to the plaintiff's May 2018 RTA by December 31, 2018. Ontario will respond to this request to admit by February 28, 2019 and will use its best efforts to respond earlier;
- (c) The Plaintiff anticipates a final request to admit of a comprehensive, "clean-up" nature. The timing for the delivery of such a final Request to Admit will be addressed at the next case management conference;

Issue Identification

- (d) The parties will continue with their ongoing collaborative efforts in development of a consolidated issue list. In furtherance of this objective:
 - (i) The parties will continue to exchange further versions of the draft issues list, consider the additions and modifications proposed by others and take any instructions that they consider advisable in relation thereto. The objective remains to advance the preparation of a comprehensive joint issue list.
 - (ii) The parties will forward to me, 4 days before the next case management conference, an updated version of the comprehensive joint issue list for discussion at the next case management conference.

Carry Forward Items

- (e) Discussions were conducted at the 3rd CM Conference regarding transcriptions of historical source documents and database issues. The parties have a clear plan and framework to proceed collaboratively with these issues. If any issue should arise pertaining to these matters, or any clerical or administrative issue affecting the orderly development of this action, it should be brought forward to the next case management conference.

Next Case Management Conference

- (f) The next case management conference will be conducted, in person, on August 14, 2018 at 10:00 am, being amongst the dates canvassed and pre-cleared with most counsel at the 3rd CM Conference. The location of this fourth case management conference will be provided as the date approaches. If counsel confer and agree that the next case management conference is more efficiently conducted by teleconference, also to allow for the involvement of any counsel who may be away from the office on August 14, 2018, they may communicate this by email to my judicial assistant in advance of the next case management conference.

Subsequent Case Management Steps

- (g) The case management directions provided by this endorsement, are in anticipation of advancing the subsequent case management steps identified in the 2nd CM Endorsement and carried forward, as follows:
- (i) Formulation of a set of agreed facts and identification of disputed facts in order that parties might give further consideration of their positions on facts currently denied. The defendants will continue with their responses to the plaintiff's requests to admit in order to advance the process of development of the factual record in this case;
 - (ii) Compilation of an agreed list of issues that would provide a schematic or template of issues to be addressed at pre-trial and then adjudication at trial;
 - (iii) Identification of issues on which expert evidence will be adduced and identification of experts;
 - (iv) Identification of possible areas on which resolution might be capable of being considered, either directly or through mediation;
 - (v) In light of the age of the action, consideration of whether amendments may be required to the pleadings to reflect the parties' current positions.

All parties should keep these issues in mind as objectives to be advanced, going forward.

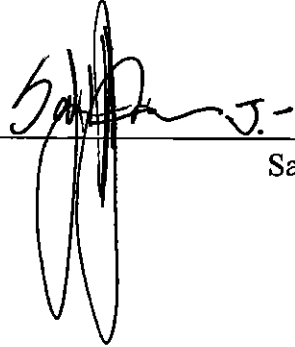
D. General Case Management Directions

[12] Any party who seeks to address an issue identified in this action between now and the next scheduled case conference of August 14, 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 judicial assistant, having first canvassed with all counsel their availability for such a case management conference.

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

[14] 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.

[15] 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: June 29, 2018