

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 Brittny Rabinovitch*, for the
Plaintiff

Carole Lindsay and Michael McCulloch, for the Defendant the Attorney General
of Canada

Manizeh Fancy, David Tortell and Stephanie Figliomeni for the Defendant Her
Majesty the Queen in Right of Ontario. Observing: *Noelle Spotton*, Ministry of
Indigenous Affairs (Ontario)

HEARD: December 11, 2018

5TH CASE MANAGEMENT ENDORSEMENT

A. Background

[1] The fifth case management conference (“5th CM Conference”) was conducted in this
action on December 11, 2018.

[2] The main issue addressed by the parties in the approach to the 5th CM Conference was
the issue that was directed in paragraph 8(b) of my Case Management Endorsement (Revised) of
October 5, 2018: namely, the assessment of discrete areas that might be capable of being
addressed individually.

B. Matters Addressed at 5th CM Conference

Identification of Discrete Issues for Resolution

[3] Paragraph 8(b) of the previous Case Management Endorsement (Revised) states, in
pertinent part, as follows:

Counsel will assess whether there are discrete areas of Crown involvement, including discrete areas of alleged Crown mismanagement that may be capable of being separated from the remainder of the issues in this action and addressed individually, or possibly in conjunction with issues similar in nature.

[4] The parties completed this task, in the course of a number of meetings. They identified and discussed five specific allegations of Crown mismanagement of Six Nation's resources that have the potential for discrete resolution. The benefit of undertaking this initiative is that early disposition of any of the specific areas identified has the potential to save significant time and resources for the parties, allow for efficiencies in the determination of these allegations and, ideally, provide meaningful principles, guidelines or framework for the determination of other claims.

[5] The parties jointly prepared and filed, prior to the 5th CM Conference, a memorandum that set out a proposal for preparatory meetings designed to develop a path for discrete determination of two of the five specific allegations identified: the Grand River Navigation Company ("GRNC") Investment Claim and the GRNC Expropriation Claim.

[6] The parties have agreed to explore whether the GRNC Investment Claim and the GRNC Expropriation Claim are suitable for discrete resolution, by considering the types of evidence that would be required, the admissions made in relation to these allegations, the severability of these claims from the remainder pleaded and the efficiencies of determination of these claims, and their sub-issues, in the context of the remainder of the claims in this action.

[7] Six Nations is in agreeable to participation in this initiative, but on the understanding that doing so will not otherwise delay or in any manner stall any other aspect of the overall prosecution and development of this action. This is clearly understood, and accepted by all.

[8] I reviewed the draft issues lists earlier delivered by each of the parties and, while it is clear that this exchange of issues did not produce agreement on a compendium of the issues raised by this action, I noted considerable overlap in the parties' identification of issues pertaining to the GRNC Investment Claim and the GRNC Expropriation Claim. Also, a review of the chart of admissions compiled from the plaintiff's various Request to Admit shows considerable admissions in relation to the facts underlying the GRNC Investment Claim and the GRNC Expropriation Claim. These factors support the exploration of the suitability of these claims for early determination.

[9] In considering this initiative, the parties should be mindful of the principles relating to partial summary judgment as set out in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 7 and addressed by the Court of Appeal in a number of cases, including: *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438; *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561; *Li v. Li*, 2017 ONCA 942; *Sirois v. Weston*, 2017 ONCA 1002; *Larizza v. Royal Bank of Canada*, 2018 ONCA 632; *Mason v. Mongenais*, 2018 ONCA 978.

[10] The timetable proposed by the parties consumes the full first quarter of 2019. While the plaintiff would prefer to see this process unfold more quickly, it does align with the completion of the parties' responses to the plaintiff's current Requests to Admit, which I will now address.

Status of the Plaintiff's Requests to Admit

[11] The plaintiff has advanced an extensive program of Requests to Admit as the desired means by which to achieve the objective of discovery, in order to ready this action for adjudication. In light of the historic nature of these claims, dating to pre-Confederation, the plaintiff determined that this was the most meaningful evidence-gathering process.

[12] Paragraph 5(a)(ii) of the 2nd Case Management Endorsement, and paragraph 11(a) of the 3rd Case Management Endorsement, directed Ontario and Canada to respond by November 13, 2018 to the Request to Admit delivered by the plaintiff on March 13, 2018. The parties reported that this has been completed.

[13] Paragraph 11(b) of the 3rd Case Management Endorsement directed Canada to use its best efforts to respond by December 31, 2018 to the Request to Admit delivered by the plaintiff on May 15, 2018. Ontario was directed to respond to this Request to Admit by February 28, 2019. Both Canada and Ontario stated that they are on track to respond to these Requests to Admit in the time stipulated. This means that the defendants expect to have fully responded to the plaintiff's Requests to Admit by February 28, 2019.

[14] In the meantime, the plaintiff is preparing for delivery certain "clean-up" Requests to Admit, to specific areas and pleaded claims, as a final step in the completion of this phase of the plaintiff's discovery. These "clean-up" Requests to Admit are expected to be finalized and served commencing in January 2019 and continuing thereafter. The defendants will initiate the process of responding to them upon receipt, and may bring forward, at the next case management conference, any submission that they would like to make concerning the timing required for them to complete their responses to these Requests to Admit. This timetable step was incapable of being addressed at this, 5th CM Conference, as the defendants had not yet seen these further Requests to Admit.

C. Specific Case Management Directions

[15] Further to the discussions conducted at the 5th CM Conference, I provide the following specific case management directions:

Timetable for Preparatory Meetings Regarding Discrete Issues

- (a) On the consent of the parties, counsel for the parties will consider the summary litigation viability of the GRNC Investment Claim and the GRNC Expropriation Claim according to the following timetable;
 - (i) By the week of January 14, 2019, Canada and Ontario will provide Six Nations with a draft joint issues list and workplan for the GRNC Investment Claim and the GRNC Expropriation Claim;
 - (ii) By the week of February 4, 2019, Six Nations will provide comments on the draft joint issues list and workplan;
 - (iii) By the week of February 25, 2019, the counsel for all parties will meet in person to attempt to finalize an issues list and a workplan, with a view to

delivering those materials to the Court at the next case management conference.

The Requests to Admit

- (b) As directed in the 3rd Case Management Endorsement, at para. 11(b), Canada will use its best efforts to respond by December 31, 2018 to the Request to Admit delivered by the plaintiff on May 15, 2018, and Ontario will do so by February 28, 2019;
- (c) The plaintiff is at liberty to deliver any “clean-up” Requests to Admit that it considers advisable. The further schedule for the completion of this phase of discovery will be addressed at the next case management conference;
- (d) The defendants may bring forward, at the next case management conference, their timing requirements to fully respond to any such further Requests to Admit.

Next Case Management Conference

- (e) The next case management conference will be conducted, in person, on **March 22, 2019 at 9:00 am**, being a date agreed upon as convenient to all counsel and available to the Court;
- (f) The location of this sixth 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, they may communicate this by email to my judicial assistant in advance of the next case management conference.

Bring Forward Items

- (g) The following items are carried forward to a future case management conference:
 - (i) The issue of leave to amend the current pleadings, and the timing of any such amendments;
 - (ii) The identification of areas or issues on which expert evidence may be adduced, and the timing of the retention of any such experts;
 - (iii) Any other issue that any party considers necessary for the efficient development of this action for adjudication, in whole or in part.

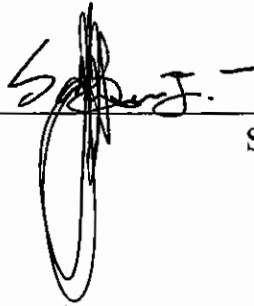
D. General Case Management Directions

[16] Any party who seeks to address an issue identified in this action between now and the next scheduled case conference of March 22, 2019 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.

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

[18] 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.

[19] 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: December 13, 2018