

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 and Max Shapiro*, for the Plaintiff

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.

HEARD: March 22, 2019

6TH CASE MANAGEMENT ENDORSEMENT

A. Background

[1] In accordance with paragraph 15(e) of the 5th Case Management Endorsement dated December 13, 2018 (“5th CM Endorsement”), the 6th Case Management Conference was conducted in this action on March 22, 2019 (“6th CM Conference”).

[2] In advance of the 6th CM Conference, counsel for the Attorney General of Canada reported that a meeting of all counsel was conducted on March 1, 2019, pursuant to paragraph 15(a)(iii) of the 5th CM Endorsement, to discuss the potential viability of summary determination of certain discrete issues involved in this action. The parties continued their consideration of productive elements of this action suitable for severance and determination as they approached the 6th CM Conference.

B. Matters Addressed at the 6th CM Conference

Ongoing Consideration of Discrete Issues for Resolution

[3] The parties reported that they considered the possible development of a path for priority determination of two claims: the Grand River Navigation Company (“GRNC”) Investment Claim and the GRNC Expropriation Claim (collectively the “GRNC Claims”). The parties have reached the preliminary assessment that the GRNC Claims may not be appropriate for summary determination as they are not sufficiently severable from the remainder of the claims to achieve efficiency in adjudication: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 7, at para. 60;

Butera v. Chown, Cairns LLP, 2017 ONCA 783, 137 O.R. (3d) 561, at para. 34; *Mason v. Mongenais*, 2018 ONCA 978, at para. 22.

[4] The plaintiff submitted that the more appropriate claim for severance and summary determination may be the Welland Canal Flooding Claim: paras. 44-50 of the Amended Statement of Claim. The defendants submitted that they are prepared to consider the suitability of the Welland Canal Flooding Claim for summary determination, while they continue to assess the suitability of the GRNC Claims.

[5] The parties will consider these issues further at a meeting of all counsel scheduled for April 4, 2019.

[6] I encouraged the parties to continue with their consideration of discrete elements of the claim that might be suitable for partial determination while at the same time considering other possible procedural paths to ensuring their common objective of efficiency in the adjudication of the matters in dispute, including:

- (a) Severing or splitting the trial into separate hearings, in accordance with *Rule* 6.1.01. Any such bifurcation could be assessed according to category of claims, common elements of claims or groupings of issue of fact or mixed fact and law;
- (b) Constructing sequential phases for the structuring of the adjudication of the issues at trial. Any such structuring of phases could be in any number of forms that have as their common element the most efficient path to adjudication. Illustrations include addressing first any antecedent issues requiring determination as preconditions to the viability of all or select groupings of claims; structuring critical factual issues before legal issues; addressing liability before causation and damages.

[7] The parties appreciate that the ongoing consideration and assessment of ways by which this case may be efficiently advanced to adjudication through partial or staged adjudication is part of, and not in place any other aspect of the overall development of this action. Specifically, the parties understand that there will be no delay in the ongoing evidence gathering and preparation of this case for determination in its entirety while other options are being considered.

Status of the Plaintiff's Requests to Admit

[8] The plaintiff's ongoing program of Requests to Admit as the desired means by which to achieve the objective of discovery has now completed its first phase. The plaintiff has delivered nine Requests to Admit. The most recent, being a Request to Admit delivered on May 15, 2018, has now been answered by the defendants, in accordance with paragraph 15(b) of the 5th CM Endorsement.

[9] In accordance with paragraphs 14 and 15(c) of the 5th CM Endorsement, the Plaintiff has initiated the preparation of its proposed set of nine "clean-up" Requests to Admit that are intended to parallel the nine initial Requests to Admit. I will refer to these as the plaintiff's "Phase II Requests to Admit". The plaintiff stated that the first such Phase II Request to Admit will be delivered shortly, to be followed by two further Phase II Requests to Admit that are in an advanced stage of preparation and are projected to be delivered within the next thirty days.

[10] The defendants could not commit to a time frame for responding to such Requests to Admit as they have not had an opportunity to review and assess their scope and extent of detail.

[11] The plaintiff will consider the following: (i) expediting its preparation and delivery of all Phase II Requests to Admit so as to avoid a prolonged phase of continuous, sequential delivery of Requests to Admit with corresponding staggered time lines for response; (ii) fashioning certain of its Phase II Requests to Admit to address specifically those facts required for determination of the claim(s) being considered for priority in adjudication.

[12] At the next case management conference, I will hear submissions from the defendants on timelines for their response to all Phase II Requests to Admit at that time delivered. I will set a timetable for response, accordingly.

Evidence Gathering

[13] Again, no single step in case management precludes any other step that is considered by the parties to be productive in efficiently advancing this case to adjudication. As such, the defendants are at liberty to bring forward any evidence gathering process that they consider advisable, whether in the form of Requests to Admit, written interrogatories or otherwise.

[14] I encouraged the parties to include discussion of reciprocal evidence gathering process as part of their meeting on April 4, 2019. They may then bring forward to the next case management conference any timetable requirement that results from these discussions.

C. Specific Case Management Directions

[15] Further to the discussions conducted at the 6th CM Conference, I provide the following specific case management directions:

Timetable for Ongoing Meeting Regarding Discrete Issues

- (a) On the agreement of the parties, counsel will meet on April 4, 2019, and further on any date considered by them advisable, to discuss the possibility of enhancing efficiency in adjudication of the claims in this case through partial summary determination, severing or bifurcation, or phased adjudication at trial. The parties will also discuss any steps, and their timing, required in the ongoing evidence gathering necessary for the adjudication of this action in its entirety;

The Requests to Admit

- (b) The plaintiff will use its best efforts to deliver its first three Phase II Requests to Admit within thirty days. The timing for the defendants' response to these Requests to Admit, and any others at that time delivered, will be addressed at the next case management conference;

Next Case Management Conference

- (c) The next case management conference will be conducted, in person, on **April 25, 2019 at 9:00 am**, being a date convenient to all counsel and available to the Court;

- (d) The location of this 7th 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

- (e) In addition to the items specifically addressed already in this Endorsement, the following items are recorded from discussions at past case management conferences and 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.

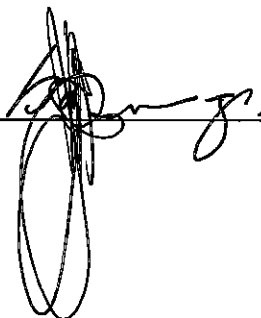
D. General Case Management Directions

[16] Any party who seeks to address an issue identified in this action between now and the next scheduled case conference of **April 25, 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: March 22, 2019