

CITATION: Six Nations of the Grand River Band of Indians v. The Attorney General of Canada, et al, 2020 ONSC 3230

COURT FILE NO.: CV-18-594281-0000
(Formerly Court file no.: 406/95)

DATE: 20200525

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 Rebecca Torrance*, for the Plaintiff

Anusha Aruliah, Michael McCulloch., Alexandra Colizza and Tanya Muthusamipillai, for the Defendant the Attorney General of Canada

Manizeh Fancy, David Tortell, Stephanie Figliomeni and Insiyah Kanvee for the Defendant Her Majesty the Queen in Right of Ontario.

HEARD: May 14, 2020

CASE MANAGEMENT ENDORSEMENT

[1] The 11th Case Management Conference in this action was initiated on April 21, 2020, in accordance with paragraph 7(e) of the 10th Case Management Endorsement dated December 9, 2019. This 11th CM Conference was not completed that day, but adjourned to be continued on May 14, 2020, for the reasons set out in my Case Management Endorsement issued May 1, 2020. In brief, I adjourned the CM Conference on April 21, 2020 to allow the parties additional time to consider and discuss the most efficient process to advance this action to trial in 2022, and to work collaboratively on a timetable to complete trial preparation steps within this timeframe.

[2] On May 13, 2020, each party delivered a written memorandum, in accordance with paragraph 7 of the May 1, 2020 CM Endorsement. By reason of the COVID-19 pandemic, and the resultant restriction in court operations effective March 17, 2020, as set out in the *Notice to Profession, the Public and the Media Regarding Civil and Family Proceedings*, suspending regular

court operations effective March 17, 2020,¹ this case management conference was conducted by teleconference rather than in person.

A. Issues Addressed

[3] The parties made further submissions on the trial process and the procedure and timing for trial preparation.

(a) Trial Process

[4] Throughout this case management process, the parties have considered and discussed ways that the extensive issues raised by this action could be prepared for adjudication in a manner that would allow this action to proceed to trial promptly and efficiently. All parties recognized that if this action were to proceed to adjudication as a trial of all issues, referred to by one party as a ‘mega-trial’, its trial date would be more distant than if advanced in a staged or phased manner, or with certain discrete issues identified for determination in sequence. Also, the parties assessed whether the determination of certain issues might render unnecessary the adjudication of other issues, or might narrow the scope of the remaining issues. All parties shared the commitment to pursuing the most efficient, expeditious, fair and just manner of structuring this action for trial.

[5] Although the parties shared these objectives and engaged in extensive discussions through many meetings, they had not, by the initiation of this 11th CM Conference on April 21, 2020, agreed on a trial process. They identified three trial structures: trial of the whole; phased trial, or; severed/ bifurcated trial. The parties’ trial timing estimates showed that an adjudication of a ‘trial of the whole’ would necessitate a much more distant scheduling for the initiation of trial than a phased trial or severed/ bifurcated trial. A trial of all issues was thereby inconsistent with the objective of initiating the adjudication of this action in 2022.

[6] In the time between the initiation of this 11th CM Conference on April 21, 2020, and its conclusion on May 14, 2020, the parties engaged in numerous further discussions and while they came to agree on the trial structure, they could not agree on its terms. Specifically, the parties agreed that the trial of this action would be bifurcated into phases but could not agree on the degree of bifurcation.

[7] A bifurcated trial structure with the use of phases has been used in other litigation involving complex claims involving historic evidence, such as *Restoule v. Canada (Attorney General)*,² which was heard as a bifurcated summary judgment motion, and *Chippewas of the Saugeen First Nation*,³ wherein Matheson J. rendered an order on January 16, 2020 formatting the trial into two stages, namely: Phase 1, the issue of liability; Phase 2, the issue of apportionment of liability in

¹ The *Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media*, dated May 13, 2020 and effective May 19, 2020 has now superseded the earlier *Notice to Profession*.

² 2018 ONSC 7701.

³ 94-CQ-50872CM and 03-CV-261134CM1.

the crossclaims and remedies. These cases, like the within action, raise complex and novel issues, and have efficiently been adjudicated in stages, as a fair, effective and economic way to deal with large-scale litigation.

[8] The disagreement between the parties on the degree of bifurcation focused on whether the trial should be structured into two phases or four phases. The Plaintiff proposed two liability phases each followed by a phase to determine remedies and crossclaims relating to the specific liability determinations adjudicated within each phase. This would result in a “Liability 1” phase, grouping together those claims which the plaintiff considered could be tried together and for which significant fact gathering work had already been completed. The Liability 1 Phase would be followed by a “Remedies and Crossclaims 1” phase. The Plaintiff proposed that, next, a “Liability 2” phase would be conducted, grouping together the remaining claims, followed by a “Remedies and Crossclaims 2” phase.

[9] The Attorney General of Canada (“Canada”) and Her Majesty the Queen in Right of Ontario (“Ontario”) proposed jointly that the trial be structured into two phases: with all issues of liability determined in Phase 1; and all issues of remedies and crossclaims determined in Phase 2. They contended that this would significantly reduce the potential for inefficiencies from overlapping evidence and intertwining issues that could result from subdivision of liability into two phases and thereby also splitting adjudication on remedies and crossclaims into two phases. They contended that there would be the potential for inconsistent findings between the two liability phases and the two remedy/crossclaim phases. Further, Canada and Ontario maintained that staging four adjudicative steps, each with intervening periods of time required for adjudication and possibly appeal, would result in a much longer time to have full determination of all issues raised by this action than a two-phase process.

[10] I accept that a four-phase adjudicative process would take longer for full determination than a two-phase process. Any inefficiencies through overlapping and duplication would be eliminated or minimized in a two-phase process, as would any inconsistency in findings or result. The trial judge hearing the liability issues would have available the evidence on all issues at the same time in order that all matters raised by the parties could be determined by the same court at the same time. With fewer phases, the number of intervals between trial stages would be reduced.

[11] Six Nations submitted that the determination of all liability issues at once could stall the initiation of a trial in 2022 or could dramatically expand the time required for adjudication of all phases. I am not persuaded of this but acknowledge that the assessment of the validity of these concerns will become clearer over the next year, as the parties complete the further steps required to prepare this action for trial in 2022. And, of course, the preparation of this action for trial, the timing of trial and its anticipated completion may be affected in unexpected ways by the continued uncertainties and complications presented by the COVID-19 pandemic.

[12] Recognizing that the parties have an agreement on bifurcation of this action into phases for determination at trial, acknowledging that ultimately the decision concerning the manner by which the trial will proceed will be made by the trial judge, and keeping in mind that the purpose of case management is to prepare the action for trial in the most efficient manner possible, I concluded as follows: this action shall be organized for a bifurcated trial, on consent, divided into Phase 1

liability and Phase 2 remedies and crossclaims, subject to the direction of the trial judge and reserving to all parties further submission and consideration on subdivision of Phase 1 and Phase 2 after the parties advance this action to the pre-trial stage, being after April 30, 2021.

(b) Timetable

[13] The parties filed detailed proposed timetables that were thoroughly addressed and considered at the 11th CM Conference.

[14] While the parties sought different timing for the remaining steps required to prepare this action for trial, the Plaintiff uniformly asserting more narrow timelines while the Defendants had broader timing requirements, they all had as their objective that the Timetable ensure fairness through procedural reciprocity. The Timetable was built on this principle.

[15] The parties agreed that the first stage of the Timetable will address amendment to the pleadings. The pleadings were drafted over two decades ago and each party will have an opportunity to consider amendments to bring them up-do-date with recent developments in the law and ready for trial. The parties concurred, through their draft timetables, that all oral and written examination and all documentary production must be completed in time to prepare a joint database of all documentary productions by April 30, 2021. All further discovery steps required must be completed by April 30, 2021, in order to keep this action on track for trial in 2022.

[16] The time available for the 11th CM Conference allowed for submissions on a Timetable for the pleading and discovery steps to April 30, 2021, leaving for the next case management conference submissions and determination on the remainder of the Timetable. This will include expert reports, agreed statements of facts and compendia, and pre-trial motions and conferencing.

B. Specific Case Management Directions

[17] Further to the issues addressed at the 11th CM Conference, I order as follows:

- (1) On consent, subject to the direction of the trial judge, the trial in this action shall be bifurcated to be conducted in phases.
- (2) Subject to the direction of the trial judge, and with reservation to all parties to seek, at the pre-trial stage, further refinement or definition of the phases of trial to be bifurcated, this action shall be organized for trial in two phases: Phase 1, for determination of liability on all claims advanced; Phase 2, for determination of remedies and the crossclaims.
- (3) Subject to further Order of this Court, including subject to the completion of the steps set out in Case Management for the preparation of this action for trial, the trial of this action will be conducted in 2022, on a date to be fixed by the Court.
- (4) The parties shall advance this action for trial in accordance with the following Timetable:

Pleadings Amendment:

- (a) The Plaintiff shall attend to any amendment of its Statement of Claim by June 15, 2020, either on the consent of the Defendants or by bringing a motion for leave to amend. Ontario shall, within this time frame, notify the Plaintiff of its position regarding the amendment of its Statement of Claim;
- (b) Canada and Ontario shall attend to any amendment of their Statements of Defence by August 31, 2020, either on the consent of the parties or by bringing a motion for leave to amend;
- (c) The Plaintiff shall, by September 30, 2020, deliver any Reply to any Amended Statements of Defence;
- (d) Canada shall, by September 30, 2020, deliver any Amended Statement of Defence and Counterclaim to Ontario's Crossclaim.

Requests to Admit

- (e) The Defendants shall serve any Requests to Admit by October 30, 2020.
- (f) The timing deadline for the Plaintiff and Plaintiff by Crossclaim to respond to any Requests to Admit served by the Defendants shall be brought forward to the Case Management Conference scheduled immediately after the Defendants' service of any Requests to Admit.

Productions and Discovery

- (g) The parties shall, by November 30, 2020, comply with any additional documentary production made necessary by any expansion in the scope of material documents resulting from the pleading amendments, to ensure ongoing compliance with Rule 30.03.
- (h) All parties may serve written questions on discovery by October 30, 2020;
- (i) All parties shall answer any written questions on discovery by December 30, 2020;
- (j) All parties may serve, by January 29, 2021, any written questions on discovery that follow-up on answers provided to previous written questions on discovery ("Follow-Up Written Questions");
- (k) All parties shall answer any Follow-Up Written Questions by February 26, 2021;

- (l) The parties may conduct any oral examinations, considered supplementary to the written examination questioning, by March 30, 2021;
 - (m) The parties shall, by March 30, 2021, complete all documentary production further to their continuing obligation of documentary production in compliance with Rule 30.07;
 - (n) Any party who seeks to schedule a motion for relief arising from the discovery process, including written and oral examinations for discovery and document production, shall do so by April 30, 2021;
 - (o) The parties shall complete a Joint Electronic Database of documentary productions by April 30, 2021.
- (5) I reserve to the parties the right to seek extensions of time in relation to certain Timetable steps, in the following circumstances:
- (a) In regard to paragraphs 17(4)(g) and 4(m), should an extension of time be required to address impediments to documentary production arising from inaccessibility of document retrieval from archive by reason of the COVID-19 pandemic; or
 - (b) In regard to paragraphs 17(4)(i) and 4(k), should the scope or volume of the written questions, or the source of consultation or research required for their response, render the available time insufficient to provide full and fair response.
- (6) A further Case Management Conference shall be conducted on June 12, 2020 at 1:00 pm, by teleconference or videoconference, with call-in coordinates for a teleconference, or the connection coordinates for a videoconference, to be provided. The parties shall be prepared at that time to address the further timetable steps required to develop this action for trial in the period after April 30, 2021 (“Additional Timetable Steps”), including the following:
- (a) The sequencing and timing for the parties’ delivery of expert reports;
 - (b) The timing for the parties’ completion of the following:
 - (i) Agreed statement(s) of facts;
 - (ii) Chronology;
 - (iii) Map Books;
 - (iv) Compendia and *aide memoires*;

- (v) Aide memoires.
 - (c) The timing for any pre-trial motions;
 - (d) The timing of the pre-trial conference and Trial Management Conference.
- (7) The parties shall serve and deliver to me, by email to my judicial assistant no later than June 10, 2020 at 1:00 pm, a Memorandum, of no more than four pages in length plus any attached material, setting out their positions in relation to the Additional Timetable Steps, as well as any other issues related to the orderly development of this action for trial. Should the parties reach an agreement on these issues, they may deliver a joint written submission.

C. General Case Management Directions

[18] Any party who seeks to address an issue identified in this action between now and the next scheduled case conference of June 12, 2020 and who considers that a case conference would assist in expeditious and efficient handling of any such issue, may request the urgent scheduling of a case conference by email to my judicial assistant, having first canvassed with all counsel their availability for such a case management conference and their concurrence with the out-of-court communication, in accordance with Rule 1.09.

[19] 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.

[20] 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: May 25, 2020