CITATION: Six Nations of the Grand River Band of Indians v. The Attorney General of Canada, et al, 2020 ONSC 3747
COURT FILE NO.: CV-18-594281-0000
(Formerly Court file no.: 406/95)
DATE: 20200616

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., and Tanya Muthusamipillai, for the Defendant the Attorney General of Canada

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

HEARD: June 12, 2020

CASE MANAGEMENT ENDORSEMENT

[1] The 12th Case Management Conference was conducted in this action on June 12, 2020, in accordance with paragraph 17(6) of my Case Management Endorsement of May 25, 2020.[1] The purpose of this Case Management Conference was to address the additional timetable steps required in the period after April 30, 2021 to develop this action for trial, given that the 11th Case Management Conference resulted in the implementation of a Timetable to April 30, 2021.

[2] The additional timetable steps were grouped into two categories: (a) the sequencing and timing for the parties' delivery of expert reports, and; (b) the timing for the completion of steps in the pre-trial stage, which included agreed statements of fact; chronology; map books; compendia

[1] *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada, et al*, 2020 ONSC 3230 (the "11th CM Endorsement").

and *aide memoires*; timing of any pre-trial motions; timing for the pre-trial conference; any further mediation, and; trial management (collectively the "Pre-Trial Steps").

[3] The parties agreed, in advance of the 12th CM Conference, to defer the setting of formal deadlines for the completion of the Pre-Trial Steps. On their consent, I direct as such. The Pre-Trial Steps will be brought forward at a future Case Management Conference.

[4] The 12th CM Conference focused on the timetable for the delivery of expert reports.

A. Timetable for the Delivery of Expert Reports

[5] *Rule* 53.03 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 governs the timing of delivery of expert reports. The time frames set out in *Rule* 53.03 are minimum ("not less than") deadlines for the delivery of reports prior to the pre-trial conference. The parties must file a "Timetable for Service of Expert Reports" to set the action down for trial, in accordance with sections 68 and 69 of the "Consolidated Practice Direction for Civil Actions, Applications Motions and Procedural Matters", (July 1, 2015) in the Toronto Region. In a case of this complexity, involving a lengthy trial that requires detailed trial management, structuring the timing for the delivery of expert reports is critical and, the parties agree, calls for more time than the minimums set out in *Rule* 53.03.

[6] The parties disagreed on the process by which their expert reports would be delivered and their timing. The Plaintiff submitted that all parties should be ordered to deliver their expert reports at the same time, each would deliver responding reports at the same time, and similarly there would be a reciprocal exchange of any reply expert reports ("Simultaneous Timetable"). The Defendants submitted that the Plaintiff should deliver its expert reports, followed by the Defendants' expert reports in response, and then reply expert reports ("Sequential Timetable").

(i) Process for Delivery of Expert Reports

[7] The Plaintiff contended that a Simultaneous Timetable would ensure procedural reciprocity, meaning that all parties would receive the same procedural rights, and thereby fairness, and would be efficient in that the timing for completion of the expert report phase of the trial preparation would be expedited. The Plaintiff contended that *Rule* 53.03 requires that any party intending to call an expert witness, whether in furtherance of advancing a claim or defending a claim, must serve a "primary report". The Plaintiff based its submission on the wording of *Rule* 53.03, which provides that "[a] party who intends to call an expert witness at trial" shall do so within the time frame set out in *Rule* 53.03(1).

[8] The Plaintiff submitted that if the Defendants were permitted to deliver reports in the nature of responding reports after the delivery of the Plaintiff's report, that the Defendants would have an advantage in that they could tender expert opinion evidence that is broader in scope than just responding to an opinion expressed by the Plaintiff expert. This submission did not address the role of reply expert reports or supplementary reports.

[9] The Plaintiff submitted that simultaneous exchange of expert reports will allow the Plaintiff to know of the expert evidence on which the Defendants rely at the same time as the Defendants learn of the expert evidence supporting the Plaintiff's case. The Plaintiff contended that otherwise the Plaintiff would have to guess which facts and defences the Defendants intend to support with expert evidence. The Plaintiff did not explain how it would be in a better position to focus its experts in report preparation when receiving a defence expert report at the same moment as the Plaintiff's delivery of its completed expert reports.

[10] The Plaintiff relied on two cases, but neither proved supportive of the Plaintiff's position that the parties' expert reports should be delivered simultaneously. The Plaintiff referred to the principles expressed in *Ault v. Canada (A.G.)*, that the purpose of *Rule* 53.03 is to "enable all parties to understand the strength of the opposing parties' case, to facilitate the early resolution of as many issues as possible and to enable all parties to prepare for trial in an efficient and cost-effective manner." [2] In *Ault*, the Court also stressed that a party is not expected to guess about whether an opposing party will be able to adduce expert opinion evidence favourable to its case and is entitled to adequate notice of such possible evidence.[3] I did not hear any disagreement from the Defendants about these principles, nor would I have expected any.

[11] But *Ault* did not explicitly address the issue of simultaneous or sequential exchange of expert reports. Rather, the principles stated in *Ault* were part of a ruling on the scope of cross-examination of an expert at trial. As such, while I accept its broad principles underlying the process for delivery of expert reports, I do not find that it supports the Plaintiff's position regarding the proposed process for simultaneous exchange of expert reports.

[12] Of more specific application, the Plaintiff relied on *Sam v. British Columbia*, where the Court imposed a simultaneous expert report exchange deadline under the B.C. *Rules of Court, 1990*, B.C. Reg. 221/90.[4] As the Plaintiff fairly pointed out, however, the Court subsequently implemented a sequential timetable for delivery of expert reports to relieve hardship that was later identified in the delivery of expert reports.[5]

[13] The Defendants jointly submitted that Sequential Timetable provides for greater efficiency because it allows the Defendants to understand the expert opinion evidence underlying the Plaintiff's case and to focus their responding experts to those precise issues. They emphasized the Supreme Court of Canada's statement that complex Indigenous litigation involving historical facts often require expert evidence to clarify the particulars supporting the claim.[6] This necessitates, the Defendants contended, that the Plaintiff deliver its expert report first to allow for a better

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[2] 2007 CanLII 55358 (Ont. S.C.), at para. 33.
[3] *Ault*, at para. 34.
[4] 2012 BCSC 1269, at paras. 1, 20-21.
[5] *Sam v. British Columbia*, 2014 BCSC 632, at para. 36.
[6] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, 2 S.C.R. 257, at paras. 21-23.

understanding of the case that the Defendants have to meet and to better focus their expert input. They submitted that this best observes the Supreme Court's caution, expressed in the context of historic land claim litigation, that the efficient trial of an action must align the claims advanced by the Plaintiff with the defences presented by the Defendants.[7]

[14] The Defendants showed that a sequenced approach to the delivery of expert reports is commonly used in large-scale Indigenous litigation, relying on *Restoule v. Canada (Attorney General)*,[8] *Southwind v. Canada*,[9] *Fletcher v. Ontario*,[10] *Alderville First Nation v. Canada*,[11] *Slate Falls Nation v. Canada (Attorney General)*,[12] and *The Chippewas of the Saugeen First Nation and The Chippewas of the Nawash First Nation v. Canada (Attorney General)*.[13] The Defendants submitted that the use of a Sequential Timetable for delivery of expert reports used by these cases applies equally and directly to the present action.

[15] The Plaintiff has not shown that the exchange of expert reports in this case ought to be any different than that used consistently in other cases involving historic facts and complex land claims. The Plaintiff did not establish any basis or present any authority or principle that would support an Order that the Defendants be required to deliver their expert reports at the same time as the Plaintiff's delivery of its expert reports.

[16] *Rule* 53.03 sets out a process for the delivery of an expert report, a responding expert report and, since January 1, 2019, supplementary reports and those responding to them. This process cannot be viewed in a vacuum, but rather in the context of its role in civil litigation. The plaintiff has the burden of proving its case, and the defendant is put to a response. In this structure, if the Plaintiff determines that it must seek to adduce expert opinion evidence as part of its case, it must do so within a specified time frame, allowing the Defendants an opportunity for response. The Defendants are not required to presume or speculate as to the expert evidence that the Plaintiff may lead but rather are entitled to know the expert evidence that will form part of the Plaintiff's case.

[17] The Plaintiff has long-declared its intention to rely on expert opinion evidence at trial, as would be expected in a case of this nature. The Defendants have a right to respond to any such expert opinions, as part of its objective of meeting the case advanced by the Plaintiff. I see nothing

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[7] *Lax Kw'alaams Indian Band v. Canada*, 2011 SCC 56, 3 S.C.R. 535, at para. 41: "The trial of an action should not resemble a voyage on the *Flying Dutchman* with a crew condemned to roam the seas interminably with no set destination and no end in sight."
[8] 2018 ONSC 7701.
[9] 2017 FC 906.
[10] 2016 ONSC 5874.
[11] 2014 FC 747.
[12] 2007 CanLII 1928 (Ont. S.C.).
[13] Court File Nos. 94-CQ-50872CM and 03-CV-261134CM1 (Ont. S.C.).

in *Rule* 53.03 that obligates a defendant to respond to expert opinion evidence supporting the Plaintiff's case before the expert opinion evidence is received.

[18] I do not accept the Plaintiff's position that it requires simultaneous delivery of expert reports in order to best understand the Defendants' positions in response. I do not see how the simultaneous exchange of expert reports will assist the Plaintiff in their stated objective of focusing their experts as the Plaintiff's experts will have completed their reports before simultaneous receipt of the Defendants' reports. In any event, the parameters of expert opinion are defined by the pleadings.[14] Further, the Plaintiff has discovered through the detailed Request to Admit process of those defences that the Defendants intend to support their defence with expert opinion evidence.

[19] The Plaintiff's concern that the Defendants' expert reports may be broader than strictly necessary to respond to the Plaintiff's experts can be addressed through reply or supplementary reports, if necessary. I will schedule time for the Plaintiff's reply expert evidence.

[20] Last, the concern expressed by the Plaintiff that the Defendants' request for a Sequential Timetable is part of a design on their part to "push back the ultimate trial date from 2022" is unproductive and unfounded in this case management. I observe that all parties have worked collaboratively through the case management process, all committed to an efficient and effective, just and fair trial process for this complex litigation, now with a common objective of reaching trial in 2022. Further, from the timetables proposed, there is no material difference in the timing of completion of the expert evidence stage by a simultaneous or a sequential exchange of reports.

[21] I thereby conclude that a sequential process will be implemented for the delivery of expert reports in this action.

(ii) Timing for Delivery of Expert Reports

[22] All parties measured the amount of time that they require for production and delivery of their expert reports from April 30, 2021. This is the deadline for completion of the parties' Joint Electronic Database of documents.

[23] I acknowledge that this will be the date by which the parties' documentary production and examinations will be completed. However, the parties have had considerable time to consider the expert opinion evidence that they require. Indeed, the issue of expert opinion evidence has been under discussion between the parties since this action was first assigned into case management in January 2018.[15] The parties have not had to wait until now to address the expert opinion evidence

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[14] *Lax Kw'alaams Indian Band*, at para. 43.
[15] *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada, et al*, 2018 ONSC 1289.

that they require, and remain at liberty to advance, or to continue to advance, the development of their expert opinion evidence.

[24] The Plaintiff proposed the following timing for a Sequential Timetable: Plaintiff's delivery of their expert reports by November 1, 2021; Defendants' delivery of expert reports by April 1, 2022; Plaintiff's delivery of reply expert reports by June 30, 2022. The Defendants had initially proposed slightly longer dates but agreed to the dates proposed by the Plaintiff.

[25] While I would have considered favourably a schedule that would have seen the completion of the expert report stage earlier, I will direct the timing agreed to by the parties.

B. Pleading Amendments

[26] Paragraph 17(4) of the 11th CM Endorsement of May 25, 2020 directed the Plaintiff to attend to any proposed amendment of its Amended Statement of Claim by June 15, 2020. The Plaintiff attended to this further amendment and has obtained the consent of the Defendants to the issuance of its Further Amended Statement of Claim.[16]

[27] The Plaintiff is unable to process the issuance and filing of its Further Amended Statement of Claim, on consent, as the Court office is not currently accepting filings for pleading amendments due to the suspension of regular operations resulting from the COVID-19 pandemic. At the same time, the Defendants are under time constraints for any amendment to their Statements of Defence due to the Timetable deadlines for them to attend to any pleading amendment.[17]

[28] Accordingly, I grant leave for the Plaintiff to amend, with immediate effect, its Amended Statement of Claim, in the form of the Further Amended Statement of Claim attached as Tab 2 to the Plaintiff's Case Management Conference Memorandum dated June 10, 2020. The Plaintiff shall later issue and file its Further Amended Statement of Claim once the Court office resumes regular operation to ensure that the Further Amended Statement of Claim is included in proper, issued form in the Plaintiff's Trial Record.

C. Specific Case Management Directions

[29] Further to the issues addressed at the 12th CM Conference, I order as follows:

(1) The parties shall deliver their expert reports in accordance with the following Timetable:

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[16] Tab 3, Plaintiff Case Management Conference Memorandum dated June 10, 2020; Consent of the Defendant Canada, dated May 20, 2020; Consent of the Defendant Ontario, dated May 27, 2020.
[17] 11th Case Management Endorsement, at paras. 17(4)(b), (c), and (d).

(a) The Plaintiff shall deliver its expert reports by November 1, 2021;

(b) The Defendants shall deliver their expert reports by April 1, 2022;

(c) The Plaintiff shall deliver any reply expert reports by June 30, 2022;

(d) The parties shall complete a compilation of all expert reports and supporting documents by July 31, 2022.

(2) The following Pre-Trial Steps shall be scheduled at a future case management conference:

(a) Agreed statement(s) of facts, Chronology, Map Books, compendia and *aide memoires*;

(b) The timing for any pre-trial motions;

(c) The timing of the Pre-Trial Conference, any further mediation and the Trial Management Conference.

(3) I grant leave for the Plaintiff to amend its Amended Statement of Claim in the form of the Further Amended Statement of Claim annexed as Tab 2 to the Plaintiff's Case Management Conference Memorandum dated June 10, 2020. Notwithstanding *Rule* 59.05, and in accordance with *Rules* 77.07(6) and 1.04, this order is effective from the date that it is made and is enforceable without any need for entry and filing, and without the necessity of a formal order. The Plaintiff shall nonetheless submit a formal order for original signing, entry and filing, and pleading amendment, when the Court returns to regular operations.

(4) The next Case Management Conference shall be conducted on September 10, 2020 at 1:00 pm, in person if Court operations allow, but otherwise by videoconference or teleconference, with connection coordinates for a videoconference, or call-in coordinates for a teleconference, to be provided.

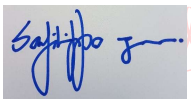
D. General Case Management Directions

[30] Any party who seeks to address an issue identified in this action between now and the next scheduled case conference of September 10, 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.

[31] 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.

[32] 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 16, 2020