

COURT FILE NO.: CV-18-594281-0000
(Formerly Court file no.: 406/95)
DATE: 20220124

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: A.A. SANFILIPPO J.

COUNSEL: *Iris Antonios, Max Shapiro and Rebecca Torrance* for the Plaintiff

Anusha Aruliah, Maria Vujnovic, Edward Harrison and Hasan Junaid for the
Defendant the Attorney General of Canada

*Manizeh Fancy, Insiyah Kanjee, Catherine Ma, David Feliciant, Shima Heidari
and Julia McRandall* for the Defendant Her Majesty the Queen in Right of Ontario

HEARD

(By videoconference): January 20, 2022

CASE MANAGEMENT ENDORSEMENT (REVISED)

[1] In advance of the Case Management Conference conducted on January 20, 2022, the parties filed Case Management Memoranda that showed a difference in approach to the continued preparation of this action for adjudication. The Plaintiff proposed to address the action items specified in the Case Management Endorsement of July 20, 2021 (“July 2021 CM Endorsement”), including the status of the preparation of this action for trial; the scheduling of a Pre-Trial Conference, including through the filing of a “Certification Form to Set Pre-Trial and Trial Dates” and a “Timetable for Service of Expert Reports”; and the preparation of the trial data base and tools for the trial judge, including an agreed statement of facts, joint chronology and glossary.

[2] The Defendants submitted that there is a more fundamental, foundational issue that must be addressed pertaining to the scope of the action, the nature of the claims and the character of the relief being sought. The Defendants submitted that their interpretation of the Plaintiff’s responses to interrogatories is that the Plaintiff is purporting to advance claims and relief beyond that specifically pleaded in the Plaintiff’s Amended Statement of Claim. The Plaintiff disagreed, and contended that the Defendants are seeking to delay the orderly progression of this action to trial, including the delivery of their expert reports in accordance with the Expert Report Timetable, which the Defendants denied.

[3] The Defendants contended that the scope of the Plaintiff's claims requires precise identification at this time, principally for two reasons. First, the Defendants are entitled to know the case that they will be required to meet at trial, as a matter of trial fairness, and for the reasons explained by the Supreme Court in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, at para. 43: “[p]leadings not only serve to define the issues but give the opposing parties fair notice of the case to meet, provide the boundaries and context for effective pre-trial case management, define the extent of disclosure required, and set the parameters of expert opinion.”

[4] Second, the Defendants submitted that if the Plaintiff seeks relief beyond that claimed, there may be interested parties who may seek to speak to their role or interest in the expanded issues. The Defendants stated that it would be inefficient, from a standpoint of trial management, for such issues to be left to trial, and contended that they must be dealt with in the pre-trial stage through case management. The Defendants referred to communications delivered by lawyers for Haudenosaunee Development Institute, and by the lawyers for Mississauga of the Credit First Nation who have asked to observe the Case Management Conferences as part of their consideration of a possible motion to intervene.

[5] It would be inefficient for the parties to argue at trial whether a claim sought to be advanced by the Plaintiff has been properly pleaded and is thereby within the scope of claims to be adjudicated. The parties require clarity and certainty of the claims that will be presented for adjudication. There is a disagreement regarding whether that has been achieved resulting, according to the Defendants, from answers provided by the Plaintiff during the discovery process. In my view, the parties must identify and define the issues requiring adjudication which, according to the Plaintiff, arise expressly from the Amended Statement of Claim.

[6] This step was contemplated as part of the preparation of this action for trial, specifically in the Case Management Endorsement of May 25, 2020, wherein the trial was bifurcated into phases, reserving, to the pre-trial stage, the precise refinement or definition of the issues to be presented for adjudication in each phase.¹

[7] For these reasons, I will direct that the parties identify and list the issues to be determined during the first phase of this trial, specifically, “Phase 1 - Liability”. This will allow for further

¹ *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada*, 2020 ONSC 3230, at paras. 12-13: “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.” Also, Order at para. 17(2).

consideration and submission on the foundation of the claims with the scope of this action as currently pleaded.

[8] Regarding the request by the lawyers for the Mississauga of the Credit First Nation to observe the Case Management Conferences in this action, the Defendants consented to this party's request while the Plaintiff has the request under continued consideration. This issue will be brought forward to the next Case Management Conference to allow the Plaintiff an opportunity to formulate its position on this request and, if opposed, for the Defendants to make submissions. However, should the Plaintiff, in the interim, consent to the lawyers for the Mississauga of the Credit First Nation observing the next Case Management Conference, the Plaintiff shall so state in their next Case Management Memorandum and the lawyers for this non-party will be provided with video coordinates to observe the next Case Management Conference.

[9] The other issues brought by the parties for consideration at case management, including Pre-Trial Conference, possible impact of the pandemic on remaining evidence gathering and documentary production, and timing of expert reports consistent with the Expert Report Timetable, may be brought forward to the next Case Management Conference to be addressed once issues pertaining to the scope of the action are first considered.

A. Specific Case Management Directions

[10] On the basis of the issues addressed at the Case Management Conference, and having provided the parties with notice under Rule 50.13(6), I direct as follows:

- (a) The Plaintiff shall, by February 3, 2022, deliver to the Defendants a list of issues to be adjudicated at trial under "Phase 1 - Liability", referencing the paragraph(s) in the Amended Statement of Claim on which they are based.
- (b) The Defendants shall, by February 17, 2022, deliver to the Plaintiff their comment, modifications, or proposed amendments to the Plaintiff's list of issues to be adjudicated at trial under "Phase 1 - Liability".
- (c) The parties are encouraged to confer and discuss their positions as set out in the materials exchanged pursuant to paragraphs 10(a) and 10(b), above, and shall then deliver, by 1:00 p.m. on February 23, 2022, a Case Conference Memorandum, of no more than four pages in length, setting out the issues to be address at the next Case Management Conference. If the parties should agree, they may deliver a joint Case Conference Memorandum. The parties shall attach, to their Case Conference Memorandum, the materials exchanged pursuant to paragraphs 10(a) and 10(b), above, together with any refinement to those materials resulting from further discussions.
- (d) The next Case Management Conference shall be conducted on February 25, 2022 at 2:00 p.m., by video conference, using video connection coordinates that will be provided by the Court.

- (e) In addition to the issues arising from the list of issues to be set out for the “Phase 1-Liability” trial, the parties shall be prepared to speak to the following at the next Case Management Conference:
- (i) Non-party participation as observer(s) at the Case Management Conferences, for the purpose of their assessment of possible intervention, including process for any motion(s) for intervention.
 - (ii) Any issues caused by the ongoing pandemic to the existing timetable for the development of this action for trial.
 - (iii) Those matters set out in paragraph 5(d) of the July 2021 CM Endorsement.
- (f) Notwithstanding sub-paragraph 10(e)(i), if the Plaintiff consents to the lawyers for the Mississauga of the Credit First Nation observing the next Case Management Conference, the Plaintiff shall so state in their Case Management Memorandum and the lawyers for this non-party will be provided with video coordinates to observe the next Case Management Conference.

B. General Case Management Directions

[11] Any party who seeks to address an issue identified in this action between now and the next scheduled case conference of February 25, 2022 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.

[12] 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.

[13] In accordance with *Rules* 59.04(1), 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.

A.A. Sanfilippo J.

Date: January 24, 2022 (Revised)