

COURT FILE NO.: CV-18-594281-0000
(Formerly Court file no.: 406/95)
DATE: 20220302

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, Hasan Junaid and Katarina Longo 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): March 1, 2022

CASE MANAGEMENT ENDORSEMENT

[1] A Case Management Conference was conducted on March 1, 2022 in this action, as provided by the Case Management Endorsement of January 24, 2022 (the “January 2022 CM Endorsement”).

A. Matters Addressed at Case Management

(a) The Issues List

[2] In accordance with sub-paragraphs 10(a) and 10(b) of the January 2022 CM Endorsement, the parties completed, by February 17, 2022, their exchange of lists of issues to be adjudicated at the first phase of the trial in this action, referred to as “Phase 1-Liability”. In accordance with sub-paragraph 10(c) of the January 2022 CM Endorsement, the parties filed their lists as addendums to their Case Management Memorandums.

[3] The Issue List filed by the Plaintiff, Six Nations of the Grand River Band of Indians, contains 59 issues for determination during the Phase 1-Liability trial. The Defendant, the Attorney General of Canada (“Canada”) did not add any issues to this list. The Defendant, Her Majesty the Queen in Right of Ontario (“Ontario”) added two additional issues.

[4] Canada and Ontario proposed the restatement or refinement of certain of the issues framed by the Plaintiff, and submitted some overlap. Canada submitted that the Plaintiff’s List of Issues raised issues that have not been pleaded, specifically referring to proposed issues #10, 19, 23, 47 and 49. Ontario was largely aligned with this submission but went further and submitted that elements of proposed issues #1, 2, 3, 28, 38 and 42 are also not pleaded in the Further Amended Statement of Claim.

[5] The Plaintiff disagreed, submitting that all the issues that it proposes to list for adjudication in the Phase 1-Liability trial are pleaded in the Further Amended Statement of Claim. The Plaintiff submitted, as well, that Six Nations is prepared to meet and confer with the Defendants on the Issues List but that this is more efficiently conducted after the Plaintiff’s delivery of their expert report, currently scheduled to be completed by April 1, 2022. Canada and Ontario agreed that the further development of the Issues List is best conducted after Six Nations delivers its expert report.

[6] On the consent of the parties, I will direct that the Issues List be preserved for further development at the next Case Management Conference, which will be conducted after Six Nation’s delivery of its expert report.

(b) Observation of Case Management Conferences by Non-Parties

[7] At the last Case Management Conference, Canada and Ontario consented to the request by the Mississaugas of the Credit First Nation to observe the Case Management Conferences in this action. Six Nations took this issue under consideration, to be brought forward to the next Case Management Conference: January 2022 CM Endorsement, para. 10(e)(i).

[8] Six Nations submitted that it does not consent to having non-parties attend and observe the Case Management Conferences in this action. Six Nations refutes the assertion that its claims have expanded beyond those that have been pleaded in the Further Amended Statement of Claim, submitting that the scope of the claims that Six Nations has advanced are discernable from its pleading, and submitted that the participation by non-parties would be inconsistent with the purposes and objectives of case management.

[9] The parties concurred that further consideration of non-party attendance at case management should be deferred until the completion of the development of the Issues List. The parties shall speak to this issue further at that time.

(c) Modification of Timetable

[10] Six Nations and Canada have jointly retained surveyors for the purpose of delineating lands that have been flooded. The surveyors are expected to be in a position to complete their report by

June 30, 2022. Six Nations and Canada seek an entry in the 2021 Revised Expert Report Timetable¹ for the completion of this report.

[11] Ontario submitted that it would require timetable scheduling for the delivery of any responding report and requested six months for this step.

[12] On the consent of the parties, the Expert Report Timetable will be modified to include the deadline of June 30, 2022 for the delivery by Six Nations and Canada of the surveyors' report, and a deadline of January 6, 2023 for the delivery by Ontario of any responding report to the surveyors' report.

(d) Impediments Resulting from Limitation in Access to Archives

[13] Canada submitted that access to archival resources in Ottawa has been hampered throughout the pandemic, wherein appointments were limited to 3-hour sessions with a maximum of 4 appointments per week, and even then, only depending on availability. Canada submitted that this was exacerbated by events in Ottawa in January and February 2022. Canada stated that the archives were closed on January 28, 2022, and that researchers can resume access on March 8, 2022. The parties submitted that this could have an impact on completion of their archival research and thereby also on completion of expert analysis.

[14] The parties did not seek any relief in regard to this limitation in access to archival resources, at this time, but caution that it has the potential to impact timetable requirements. The parties may bring this issue forward at a future case management conference, as they are advised.

A. Specific Case Management Directions

[15] 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 parties shall preserve the draft Issues List as currently developed, including the comments made by all parties in relation to this draft, for further consideration and development after Six Nations delivers its expert report, on or by April 1, 2022.
- (b) The parties shall be prepared to address, at the next Case Management Conference, the draft Issues list, its refinement and further development, and the submissions made by the Defendants that certain of the issues are not properly pleaded in the Further Amended Statement of Claim. The parties are encouraged to confer and discuss the

¹ The 2021 Revised Expert Report Timetable is set out in the Case Management Endorsement of June 16, 2020 (*Six Nations of the Grand River Band of Indians v. The Attorney General of Canada*, 2020 ONSC 3747), as modified by the Case Management Endorsement of July 20, 2021.

Issues List after Six Nations delivers its expert report, in anticipation of, and preparation for discussion at the next Case Management Conference.

- (c) The parties shall bring forward to the next Case Management Conference, and be prepared to address, 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.
- (d) The 2021 Revised Expert Report Timetable, as initially set out in the Case Management Endorsement of June 16, 2020 and modified in the Case Management Endorsement of July 20, 2021, shall be revised to include the following:
 - (i) Six Nations and Canada shall, by June 30, 2022, deliver their Joint Surveyors' Report.
 - (ii) Ontario shall, by January 6, 2023, deliver any responding report to the Joint Surveyors' Report.
- (e) All other terms of the 2021 Revised Expert Report Timetable shall remain in effect.
- (f) The next Case Management Conference shall be conducted on June 7, 2022, at 9:30 a.m., by video conference, using video connection coordinates that will be provided by the Court.
- (g) The parties shall, by June 3, 2022, at 4:00 p.m., deliver a Case Management Memorandum, of no more than four pages in length, as well as any attachments, setting out the issues to be addressed at the next Case Management Conference. If the parties should agree, they may deliver a joint Case Management Memorandum.

B. 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 June 7, 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.

[17] 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.

[18] 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: March 2, 2022