

COURT FILE NO.: CV-18-594281-0000
(Formerly Court file no.: 406/95)
DATE: 20220608

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, Robert Janes and Rebecca Torrance* for the Plaintiff
Anusha Aruliah, Maria Vujnovic, Edward Harrison, and Sarah Kanko for the
Defendant the Attorney General of Canada
Manizeh Fancy, David Feliciant, Catherine Ma, Insiyah Kanjee, Shima Heidari,
Julia McRandall and Lina Chaker, for the Defendant Her Majesty the Queen in
Right of Ontario

HEARD

(By videoconference): June 7, 2022

CASE MANAGEMENT ENDORSEMENT

[1] A Case Management Conference was conducted in this action on June 7, 2022, as provided by paragraph 15(f) of the Case Management Endorsement of March 1, 2022 (the “March 2022 CM Endorsement”).

A. Matters Addressed at Case Management

[2] The March 2022 CM Endorsement directed, in paragraph 15(b) that the parties be prepared to speak to the refinement and further development of the Issues List, building on the proposed Issues Lists submitted by the parties at the last Case Management Conference. This was predicated on the anticipated delivery by the Plaintiff, Six Nations of the Grand River Band of Indians, of

their expert reports by April 1, 2022, in accordance with the 2021 Revised Expert Report Timetable, as modified by the March 2022 CM Endorsement.¹

[3] The Plaintiff has delivered 11 expert reports: 8 served on April 1, 2022, one served on May 30, 2022 and another served on June 3, 2022. The Plaintiff expects to serve 3 further expert reports by June 30, 2022, to complete the Plaintiff's intended delivery of 14 expert reports.

[4] The Plaintiff reported that the expert reports cite some 2,361 documents that are identifiable within the parties' productions, and about 1,245 primary source documents that originated in various archives but are not represented in the parties' productions. Of these documents, the Plaintiff has now produced 976 primary source documents to the Defendants and anticipates completing the production of the remaining primary source documents by June 30, 2022. The Plaintiff is also in the process of preparing for disclosure approximately 370 secondary source documents that the Plaintiff's experts have referred to but are not within the parties' productions. The Plaintiff will deliver these to the Defendants by June 30, 2022.

[5] Six Nations agreed with the submissions by the Defendant, the Attorney General of Canada ("Canada") and the Defendant Her Majesty the Queen in Right of Ontario ("Ontario") (collectively, the "Defendants"), that the further development of the Issues List is best addressed upon the Plaintiff completing the delivery of their expert reports and the additional supporting documents.

[6] The 2021 Revised Expert Report Timetable requires that the Defendants deliver their expert reports by October 3, 2022. This provided the Defendants with 6 months for the Defendants to respond after the Plaintiff's deadline for the delivery of the Plaintiff's expert reports (April 1, 2022). The Plaintiff is prepared to agree to a commensurate extension of time for the Defendants to respond to the Plaintiff's expert reports – measured by the extent of time by which the Plaintiff exceeded their deadline – if required.

[7] The Defendant, Canada, submitted that Canada's experts are making all reasonable efforts to meet the October 3, 2022 deadline for the delivery of defence reports, but that one of Canada's experts is not expected to complete in time by reason of illness. Canada submitted that there is a considerable amount of evidence raised by the Plaintiff's reports that requires consideration, including those parts of the supporting documentary evidence that are additional to the parties' current productions. Canada stated that the parties will be in a better position to address the Issues

¹ *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada*, 2020 ONSC 3747, at para. 29, as modified by the Case Management Endorsement dated July 20, 2021 at para. 2 (the "2021 Revised Expert Report Timetable"), as modified by the March 2022 CM Endorsement at para. 15(d) (to establish deadlines for Joint Surveyor's Report).

List, and to formalize the timing of further expert reports, once the Defendants have received all the Plaintiff's expert reports.

[8] The Defendant, Ontario, submitted that it requires additional time to respond to the 14 expert reports delivered, or anticipated shortly to be delivered, by the Plaintiff. Ontario submitted that the Plaintiff's expert reports delivered to date are cumulatively more than 1,100 pages in length and include over 3,000 citations or footnote references, with newly produced documents beyond the parties' production database. Ontario submitted that most of its experts will generally be on a schedule to deliver their reports within six months of receiving all the Plaintiff's expert reports, which would align with the protocol set out in the 2021 Revised Expert Report Timetable, but that Ontario has timing concerns with two of its expert witnesses. One of Ontario's experts has stated that a report cannot be finalized until June 2023, due to commitments in other active litigation; and a second expert requires until April 2023 due to challenges in research and document access related primarily to the COVID pandemic.

[9] Ontario renewed its concern that the nature of the claims and the character of the relief sought by the Plaintiff may be extending beyond the scope of the Plaintiff's pleadings.

[10] Considering the agreement of all parties that further development of the Issues List and any revision to the 2021 Revised Expert Report Timetable requires completion of delivery of the Plaintiff's expert reports, these issues will be held down pending the Plaintiff's delivery of their further anticipated reports by June 30, 2022. The Defendants submitted that they require one month to consider the Plaintiff's expert reports and assess the impact of this expert evidence on the Issues List and on the timetable requirements for delivery of certain of their responding expert reports. The Plaintiff was content that the Defendants be provided with this time and require one month to then assess the Defendants' positions. The parties will then return to Case Management to speak to the 2021 Revised Expert Report Timetable and the Issues List.

[11] All parties recognize that the 2021 Revised Expert Report Timetable is an integral part of the development of this action for adjudication. All parties thereby recognize the importance of continuing to work toward achieving the objectives set out in the 2021 Revised Expert Report Timetable, notwithstanding that they will be heard, at the next Case Management Conference, on an extension of the time periods set out in the 2021 Revised Expert Report Timetable to address the Plaintiff exceeding the time stipulated for the delivery of the Plaintiff's expert reports, and timing concerns affecting certain of the Defendants' experts.

[12] The Defendants reported on receipt of notification of a potential motion by a non-party, Haudenosaunee Development Institute ("HDI") for leave to intervene in this action. The Defendants submitted that this would require scheduling, should the motion be advanced. Should a motion be brought for intervention, the parties may request that the next Case Management Conference be brought forward to address scheduling for the hearing of this motion, as necessary, with the involvement of the moving party: Rule 50.13.

[13] Last, the Plaintiff reported that the parties have established a working group to assemble the documents required for trial. Ontario submitted that counsel for all parties have engaged in continuous discussions relating to a Joint Book of Documents, but that this work cannot advance fully until all expert reports are delivered, together with all supporting documentation. Ontario submitted that the process of compiling electronic Joint Books of Documents for trial purposes could take three months.

B. Specific Case Management Directions

[14] 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) Notwithstanding the requirements of the 2021 Revised Expert Report Timetable, the Plaintiff shall, by June 30, 2022, complete the delivery of their expert reports.
- (b) The Plaintiff shall, by June 30, 2022, deliver to the Defendants the further and additional documents supporting the Plaintiff's expert reports that are not contained within the parties' productions.
- (c) The parties shall be prepared to address, at the next Case Management Conference, the further development of the Issues List.
- (d) The Defendants may seek revision of the 2021 Revised Expert Report Timetable at the next Case Management Conference, following the completion of the Plaintiff's delivery of expert reports, in accordance with the process set out immediately below.
- (e) The Defendants, Canada and Ontario shall, by July 29, 2022, deliver to the Plaintiff their position on: (i) proposed revision to the 2021 Revised Expert Report Timetable; (ii) further development or refinement of the Issues List, including identification of any issues said to be outside the scope of the action, as pleaded.
- (f) The Plaintiff shall, by August 26, 2022, deliver to the Defendants their responding position on: (i) the Defendants' proposed revision to the 2021 Revised Expert Report Timetable; (ii) the Defendants' proposed further development or refinement of the Issues List, including identification of any issues said to be outside the scope of the action, as pleaded.
- (g) The next Case Management Conference shall be conducted on September 6, 2022, at 1:00 p.m., by video conference, using video connection coordinates that will be provided by the Court.
- (h) The parties shall, by September 1, 2022, at 1:00 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. The

parties' Memorandums should include copies of the written submissions set out in paragraphs 14(e) and (f), immediately above. The Plaintiff's Memorandum should set out a list of the expert reports delivered and the timing of their delivery, to frame submissions on the anticipated responding reports and their timing.

- (i) The parties are encouraged to continue their collaborative effort at development of the electronic joint database for use at trial, in the form of electronic Joint Document Books.
- (j) Any party who seeks to address an issue identified in this action between now and the next scheduled case conference of September 6, 2022 at 1:00 p.m. and who considers that an earlier 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 conference and their concurrence with the out-of-court communication, in accordance with Rule 1.09. The party requesting the urgent case conference shall submit: (i) a list of three dates and times on which counsel for all parties are available to attend; and (ii) a memorandum of no more than two pages setting out the basis for the request and listing the issues to be addressed.

C. General Case Management Directions

[15] 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.

[16] 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: June 8, 2022