

COURT FILE NO.: CV-18-594281-0000
(Formerly Court file no.: 406/95)
DATE: 20220826

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 Robert Janes,*, for the Plaintiff
Anusha Aruliah, Hasan Junaid, ~~Maria Vujanovic~~, ~~Edward Harrison~~, and Sarah Kanko, for the Defendant the Attorney General of Canada
Manizeh Fancy, David Feliciant, Christine Perruzza, Shima Heidari, Julia McRandall, Catherine Ma, ~~Insiyah Kanjee~~, and Lina Chaker, for the Defendant
Her Majesty the Queen in Right of Ontario
Tim Gilbert, Thomas Dumigan, Jonathan Martin, Dylan Gibbs and Jack MacDonald, for the proposed moving party, the Haudenosaunee Development Institute

HEARD

(By videoconference): August 15, 2022

CASE CONFERENCE ENDORSEMENT (REVISED)

[1] The Haudenosaunee Development Institute (“HDI”) submitted for filing a motion proposed to be advanced for the following relief: (i) an Order to add HDI as a party to this action, either pursuant to Rule 5.03 (joinder as necessary party) or Rule 13.01 (leave to intervene as an added party) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; (ii) an Order appointing HDI as a representative of the citizens of the Haudenosaunee Confederacy, pursuant to Rule 10.01 or 12.08.

[2] As I had ordered, as part of the Case Management of this action, that “no motion may be brought in this action before being considered at a case conference”,¹ HDI requested the scheduling of a Case Conference to speak to their proposed motion. This Case Conference was convened to hear submissions on the scheduling of the motion proposed by HDI.

[3] HDI pleaded in their proposed Notice of Motion, that HDI was established in 2017 pursuant to authorization by the Haudenosaunee Confederacy Chiefs Council (“HCCC”) and was delegated the role of facilitating meaningful engagement on development and infrastructure projects involving Haudenosaunee lands. HDI pleaded that the HCCC has delegated authority to HDI to advance the interests of the Haudenosaunee Confederacy.

[4] HDI submitted that they have a vital interest in the issues raised in this action and seek to have a role, without delaying or impacting the orderly development of this action for trial. HDI stated that they require production from Six Nations of the Grand River Band of Indians (“Six Nations”), the Attorney General of Canada (“Canada”) and Her Majesty the Queen in Right of Ontario (“Ontario”) (collectively the “Parties”) of the documents referred to in their pleadings, in order to complete HDI’s proposed pleading.

[5] Six Nations submitted that this action was initiated in 1995, and that since 2018 the parties have intensified the steps required to prepare this action for trial. In this context, Six Nations stated that it is unclear why HDI has only come forward now, and that there is also a lack of clarity regarding the nature and scope of involvement sought by HDI.

[6] Six Nations submitted that the first step is that HDI should deliver a pleading, to set out the nature of their claim and proposed involvement. The second step is a determination of whether HDI, alleged to be an unincorporated association, can represent others and, if so, the nature and scope of the representation. Third, Six Nations submitted that notice must be provided so that others who may be affected by HDI’s involvement would have an opportunity to come forward. And fourth, Six Nations submitted that HDI must provide a complete motion record on which the parties can assess the nature of HDI’s proposal for involvement in this action.

[7] Canada submitted that the issues raised by HDI’s proposed motion are, at this stage, largely between HDI and Six Nations. However, Canada stated that any proposal to add a party has an impact on the entirety of the action and that all should strive toward the most practical and least complicated way to determine the issues raised by this action.

[8] Ontario echoed the Plaintiff’s submission that it is challenging to put forward a position on HDI’s proposed motion without knowing the claims that HDI seeks to advance, or the precise nature of the involvement that HDI seeks. Ontario submitted that the trial process must allow for

¹ *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada*, 2018 ONSC 1289, at para. 22.

certainty and finality to the Parties in relation to the issues raised, and this requires clarity on who HDI represents in order to understand who would be bound by the determinations at trial.

[9] I accept Six Nations' submission, largely supported by Ontario and Canada, that the first step is for HDI to deliver a pleading, so that the parties can understand the nature of the claims and involvement that is being sought. HDI's proposed Notice of Motion, dated June 10, 2022, sets out in 57 paragraphs the grounds for their motion, but does not annex a draft pleading. HDI thereby did not explain whether they seek to intervene in the determination of the issues raised by Six Nations and/or advance claims of their own.

[10] Until the nature of HDI's proposed involvement is clarified, I do not accept that HDI is entitled to demand from the Parties the production of documents contained in the data base being assembled for the trial of this action. HDI submitted that the documents are needed to inform the preparation of their pleading. I found persuasive Six Nations' submission that if HDI has decided that they require involvement in this action, HDI must have determined, and should be able to set out the basis and scope of their proposed involvement independent of the production of documents from the Parties.

[11] As the documents sought by HDI from the Parties are, according to HDI, all referred to in the Parties' pleadings, as the Parties confirmed that all of the documents being requested are public in nature, and as HDI has agreed to pay the Parties their reasonable fees and disbursements for the production of the documents, I will order, on the Parties' consent, that the Parties produce to HDI those documents listed in Schedule "A" to their lawyer's letter of August 12, 2022. I will reserve to the Parties, however, the right to contest whether a document listed for production by the Schedule "A" Chart does properly arise from their pleading.

[12] I will establish a timetable for the production of the documents requested by HDI; the delivery of HDI's pleading; an opportunity for the parties to consider the issues arising from the pleading; and then a return to Case Conference to speak to the procedural steps that the parties consider are required to determine issues pertaining to HDI's proposed involvement in this action. None of the steps in this timetable will impact the ongoing preparation of this action for trial, including the Case Management Conference scheduled, by para. 14(g) of the Case Management Endorsement of June 8, 2022 (the "June 2022 CM Endorsement"), to take place on September 6, 2022 at 1:00 p.m.

Specific Case Conference Directions

[13] On the basis of the issues addressed at the Case Management Conference, and on the basis of Rule 50.13(6), I direct as follows:

- (a) On their consent, Six Nations, Canada, and Ontario shall, by August 22, 2022, produce to HDI the documents alleged by HDI to arise from the Parties' pleadings, as listed in Schedule "A" to Mr. Gilbert's letter of August 12, 2022 (the "Production Chart"), subject to the following:

- (i) HDI shall reimburse the Parties for their reasonable fees and disbursements for the production of the documents;
 - (ii) The Parties may challenge whether a document identified in the Production Chart properly arises from their pleading.
- (b) HDI shall, by September 9, 2022, deliver to the Parties their proposed draft pleading.
- (c) A further Case Conference shall be conducted on September ~~26~~ 16, 2022 at 2:30 p.m., by videoconference, to address the procedural steps that the Parties and HDI consider are required to determine the issues pertaining to HDI's proposed involvement in this action.
- (d) The Parties and HDI shall, by September ~~25~~ 15, 2022 at 1:00 p.m., each deliver a Case Conference Memorandum identifying the issues to be raised at the next Case Conference, and setting out their positions.
- (e) The Case Management Conference scheduled by para. 14(g) of the June 2022 CM Endorsement to take place on September 6, 2022 at 1:00 p.m., shall proceed, by videoconference, for the purposes set out in the June 2022 CM Endorsement. The parties shall deliver their Case Management Conference Memoranda in accordance with para. 14(h) of the June 2022 CM Endorsement.

[14] 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.

[15] 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: August 26, 2022
(Revised-August 26, 2022)