

COURT FILE NO.: CV-18-594281-0000
(Formerly Court file no.: 406/95)
DATE: 20220928

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS

Plaintiff

AND:

THE ATTORNEY GENERAL OF CANADA and HIS MAJESTY THE KING IN
RIGHT OF ONTARIO

Defendants

BEFORE: A.A. SANFILIPPO J.

COUNSEL: *Iris Antonios, Max Shapiro, Rebecca Torrance, and Robert Janes*, for the Plaintiff
Anusha Aruliah, Maria Vujnovic, and Tanya Muthusamipillai, for the Defendant
the Attorney General of Canada
*Manizeh Fancy, David Feliciant, Christine Perruzza, Shima Heidari, Julia
McRandall, Catherine Ma, and Lina Chaker*, for the Defendant His Majesty the
King in Right of Ontario

HEARD

(By videoconference): September 6 and 23, 2022

CASE MANAGEMENT ENDORSEMENT

[1] This Case Management Conference began on September 6, 2022 and was continued on September 23, 2022, to address two issues: (a) the request by the Defendants, the Attorney General of Canada (“Canada”) and His Majesty the King in Right of Ontario (“Ontario”) to extend the time for delivery of their expert reports; and (b) the ongoing clarification of the issues raised by the Plaintiff, Six Nations of the Grand River Band of Indians (“Six Nations”) through its Amended Statement of Claim, and thereby to be determined at trial. By the continuation of this Conference Management Conference, a third issue had emerged: the provision of a litigation expert report to a non-party.

A. The Expert Report Timetable

(a) Background

[2] The Expert Report Timetable was established at the Case Management Conference of June 12, 2020, and was set out in the Case Management Endorsement of June 16, 2020 at para. 29,¹ as follows:

- (a) The Plaintiff shall deliver their 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.

[3] The Case Management Endorsement of June 29, 2021, noted that this Expert Report Timetable would allow for the scheduling of the trial of this action in the Fall of 2022, and that the Court made available January 30, 2023 for the trial.

[4] This Expert Report Timetable was revised through agreement of the parties set out in a Joint Case Management Memorandum of July 16, 2021, further to discussions conducted at the Case Management Conference of June 29, 2021, and then implemented in the Case Management Endorsement of July 20, 2021. Six Nations made clear that it was prepared to proceed with the Expert Report Timetable without revision, but consented to the revisions sought by the Defendants, submitting that it was unlikely that Six Nations would consent to any further extensions. The “Revised Expert Report Timetable” of July 20, 2021 provides as follows:

- (a) The Plaintiff shall deliver their expert reports by ~~November 1, 2021~~ April 1, 2022.
- (b) The Defendants shall deliver their expert reports by ~~April 1, 2022~~ October 3, 2022.
- (c) The parties shall complete a compilation of all expert reports and supporting documents by ~~July 31, 2022~~ January 15, 2023.
- (d) The Plaintiff shall deliver any reply expert reports by ~~June 30, 2022~~ February 28, 2023.
- (e) The parties shall complete a compilation of all reply expert reports and supporting documents by March 15, 2023.
- (f) This proposed Expert Report Timetable would allow for the scheduling of the trial of this action on April 3, 2023.

¹ *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada*, 2020 ONSC 3747.

[5] At the Case Management Conference of March 1, 2022, Six Nations and Canada stated that they had jointly retained surveyors for the purpose of delineating lands that have been flooded (the “Joint Surveyors’ Report”) and expected to be in a position to deliver this report by June 30, 2022. On the consent of the parties, the Revised Expert Report Timetable was modified to include: (i) the deadline of June 30, 2022 for the delivery by Six Nations and Canada of their Joint Surveyors’ Report; and (ii) a deadline of January 6, 2023 for the delivery by Ontario of any responding report to the Joint Surveyors’ Report.

(b) Status of Delivery of Expert Reports

[6] At the Case Management Conference of June 7, 2022, Six Nations reported that it had served 11 of its 14 expert reports,² and that three further expert reports would be delivered by June 30, 2022. Canada reported, at that time, that Canada’s experts were making all reasonable efforts to meet the October 3, 2022 deadline for the delivery of defence reports, but that one of Canada’s experts was not expected to complete his report in time by reason of illness. Ontario submitted that it required additional time to respond to the Plaintiff’s expert reports due to several factors, including challenges in research and document access related primarily to the covid-19 pandemic, and the sheer volume of material relied on by the Plaintiff’s experts, including some documents said to have been newly delivered. Six Nations stated that, if required by the Defendants, they were prepared 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.

[7] The Defendants were directed to bring forward, at the next Case Management Conference, any issue pertaining to delivery of their expert reports understanding that, by then, all the Plaintiff’s expert reports would have been delivered. Indeed, by the time of the Case Management Conference of September 6, 2022, Six Nations had delivered their remaining three expert reports, on June 16, 2022, June 28, 2022, and June 30, 2022. Canada and Ontario had not delivered any expert reports.

[8] Canada submitted, at the Case Management Conference of June 8, 2022, that it would be able to deliver all of its expert reports except one by the deadline of October 3, 2022. In its Case Management Memorandum delivered in advance of the September 6, 2022 Case Management Conference, Canada submitted that: “While Canada expects to be able to provide some of its experts’ reports by October 3, 2022, an extension until April 28, 2023 will allow for the remainder of its reports to be provided.”

² Eight of the Plaintiff’s expert reports were served on April 1, 2022 in compliance with the Revised Expert Report Timetable, and one expert report was served by the Plaintiff on each of the following dates: April 6, 2022; May 30, 2022; June 3, 2022.

[9] Ontario stated that it will not be able to deliver any expert reports by the October 3, 2022 deadline established by the Revised Expert Report Timetable and sought an extension for all of its reports to April 28, 2023, except for one expert report that will not be finalized until June 2023.

(c) The Parties' Positions

[10] Six Nations submitted that as it served eight of its expert reports on time, and served six further expert reports on a rolling basis from April 6, 2022 to June 3, 2022, at most some two to three months after its deadline, that any extension required by the Defendants should be no more than the same two to three month period. Six Nations stated that, at most, such a "commensurate extension" would be fair and reasonable for only those reports that the Defendants are unable to serve on time. Six Nations stated that any further extension would be unfair and unreasonable.

[11] The Plaintiff and Canada sought an extension of time to November 2022 to serve the Joint Surveyors' Report, which Ontario did not oppose, on the agreement that Ontario would receive a commensurate extension of time to deliver its report responding to the Joint Surveyors' Report.

[12] Ontario emphasized that Ontario has submitted in Case Management since at least February 2022 that there were concerns and challenges to Ontario's delivery of expert reports by its deadline of October 3, 2022. These include: (a) historical documentation required by Ontario's experts was at times inaccessible, or had reduced accessibility due to the covid-19 pandemic; (b) disruptions caused by the pandemic, impacting the timing required for Ontario's experts to complete their expert reports; (c) the voluminous scope and breadth of the Plaintiffs' expert reports; (d) the production and use by Six Nation's experts of documents that were allegedly not within the documentary production database; (e) Six Nations' late delivery of certain of their reports, including the extension required for the Joint Surveyor's Report.

[13] Ontario submitted that except for one of its experts, Dr. Alexander Von Gernet, all the experts retained by Ontario will be able to deliver expert reports by April 30, 2023. Ontario stated that Dr. Von Gernet will not be able to deliver an expert report until June 30, 2023 due to current professional obligations and personal circumstances beyond his control. Ontario emphasized that an extension to April 30, 2023 would be only some 3-4 months beyond the commensurate extension stated by Six Nations in its alternative submission, and is required to ensure trial fairness. Ontario submitted that the expert reports are to assist the trial judge, and that every effort should be made in case management to ensure that all available evidence is ready for the trial.

[14] At the Case Management Conference of September 6, 2022, Canada stated that it will be able to deliver "some of its expert reports" by October 3, 2022, but otherwise supported Ontario's proposed revision to the Revised Expert Report Timetable. Canada pointed to the Plaintiff's service of expert reports beyond the time provided by the Revised Expert Report Timetable, and supported Ontario's submission that the extension is appropriate based on the volume and complexity of Six Nation's reports.

[15] Canada also emphasized that the timetable considerations, including any projected or targeted trial date, may be affected by other factors, such as the pending motion by the Haudenosaunee Development Institute (“HDI”) for intervention, joinder and a representation order, and other circumstances that have been identified through the case management process. Canada submitted that a suitable extension of time for the Defendants to properly address the Plaintiff’s expert reports is fair, necessary, reasonable, and practical.

[16] Both Ontario and Canada committed that, if granted an extension to April 30, 2023 for the delivery of Defence Expert Reports, they would not seek any further revision to the Expert Report Timetable, absent truly exceptional circumstances currently unforeseen and unforeseeable. Both Ontario and Canada stated that, with this exceptionally limited qualification, their experts will be able to complete their expert reports in time for service by April 30, 2023, subject only to Ontario’s expert, Dr. Von Gernet, whose report would be served by June 30, 2023.

(d) Analysis - The Second Revised Expert Report Timetable

[17] The parties’ competing positions regarding revision to the Revised Expert Report Timetable must be analysed in the context of the objective, commonly shared by all parties, of a fair and just trial process. Six Nations seeks a schedule that will allow for the earliest possible trial date and emphasized the age of this action. Six Nations strongly opposed any change to the Revised Expert Report Timetable and any compromise of the objective of a trial in the second quarter of 2023. Fairness to Six Nations in achieving the earliest possible trial date must be balanced with fairness to the Defendants in presenting the expert evidence that they consider to be required for a just determination of the issues raised by this action.

[18] All parties have sought extensions to the Expert Report Timetable. Six Nations is correct that the extension that Six Nations sought, and the deadline that Six Nations missed, were modest when compared to the extensions sought by the Defendants. However, the nature and scope of the expert evidence required by the Defendants depends, at least in part, on the expert evidence adduced by Six Nations.

[19] I considered Six Nation’s submission that a “sequenced” or staggered timetable for delivery of the remaining expert reports could allow for defence expert reports to be served on a rolling basis as other litigation steps are ongoing, and reply reports sequenced or staggered thereafter, in the period leading to trial, or during trial. While this approach would serve Six Nation’s objective of the earliest trial date it would, in my determination, add unnecessary complication to the trial of this already complex action. I do not accept this type of timetable, as it would not result in an orderly development of this action for trial.

[20] In my view, effective case management requires that, where possible and practical, the development of the action in its pre-trial stage must minimize the potential for complications at trial by maximizing efficiencies. Notwithstanding the able submissions by counsel for Six Nations in opposition to any revision of the Revised Expert Report Timetable, including objection to any revision that extends the projected trial date, I am prepared to grant an extension of time for the

Defendants' delivery of their expert reports. However, this extension relies on commitments made by the Defendants that they will not seek any further extensions for delivery of their expert reports barring truly exceptional circumstances.

[21] The revision to the Revised Expert Report Timetable will cause the projected trial date to be moved from second quarter of 2023 to first quarter of 2024. However, I have concluded that the delay in proceeding to trial must be balanced against ensuring that all the required expert reports are in place prior to the start of trial.

[22] In revising the Revised Expert Report Timetable, I see no reason why Canada should not deliver the expert reports that Canada has ready for service by October 3, 2022. It is unclear how many of Canada's expert reports are ready for delivery now, but those that Canada has available now should be served by the original deadline of October 3, 2022. I will revise the remaining elements of the Revised Expert Report to adapt to the revised timing for delivery of the Defendants' reports. To balance fairness to Six Nations, Six Nations shall be at liberty to seek any extension to the timing for delivery of its reply reports as it considers necessary, upon receipt and consideration of the Defendants' expert reports.

[23] On these reasons, the Revised Expert Report Timetable shall be further revised as follows (deletions shown by ~~striketrough~~, addition by underlining):

- (a) ~~The Plaintiff shall deliver their expert reports by April 1, 2022.~~
- (a) The Defendants Canada shall deliver their expert reports by October 3, 2022 those expert reports that Canada has ready and prepared for service at that time.
- (b) Apart from paragraph (a), immediately above, the Defendants shall deliver all their expert reports by no later April 30, 2023, except the report expected to be delivered by Ontario as authored by Dr. Von Gernet, which shall be delivered by no later than June 30, 2023. Subject to any further Order of this Court, there shall be no revision to the deadline now established for delivery of the Defendants' expert reports except in exceptional circumstances.
- (c) Six Nations' and Canada's Joint Surveyors' Report shall be delivered by November 30, 2022, and Ontario's responding report shall be delivered by April 30, 2023. Ontario may speak to an extension for the delivery of a responding report to the Joint Surveyors' Report if necessary but absent exceptional circumstances, the deadline for delivery of Ontario's responding report to the Joint Surveyors' Report shall not exceed June 30, 2023.
- (d) The parties shall complete a compilation of all expert reports and supporting documents (except reply reports and supporting documents) by ~~January 15, 2023~~ July 31, 2023.

- (e) The Plaintiff shall deliver any reply expert reports by ~~February 28, 2023~~ November 20, 2023, but is at liberty to request a further extension at least commensurate with extensions of time provided for the delivery of expert reports by the Defendants.
- (f) The parties shall complete a compilation of all reply expert reports and supporting documents by ~~March 15, 2023~~ December 31, 2023.
- (g) This proposed Expert Report Timetable would allow for the scheduling of the trial of this action on ~~April 3, 2023~~ a date after January 1, 2024. The parties may speak to the scheduling of the trial date at Case Management upon completion of the delivery of the Defendants' expert reports on June 30, 2023.

B. The Issue List

[24] From the earliest days of the Case Management of this action in 2018, the parties have worked on the development of an Issues List for use at trial.³ This process has been paused at times but has produced agreement on the identification of many issues, although disagreement on others. Through this process, the parties have developed detailed issues lists, but disagreement persists on the full list of issues and whether certain of the issues are properly founded in the current pleadings.

[25] At the Case Management Conference of January 20, 2022, the Defendants submitted that their interpretation of the Plaintiff's responses to interrogatories was that the Plaintiff was purporting to advance claims and relief beyond that pleaded in the Plaintiff's Amended Statement of Claim. The Defendants contended that the scope of the Plaintiff's claims requires precise identification, both as a matter of trial fairness, so that the Defendants know the case that they have to meet, and for trial efficiency, to avoid the necessity of myriad trial rulings regarding whether certain claims have been pleaded.

[26] After reviewing the Plaintiff's expert evidence, Canada correlated the expert evidence against its issues list, together with the Plaintiff's answers to written examination for discovery and submitted that Canada identified unpleaded claims. Canada prepared Charts to illustrate the allegedly unpleaded claims.⁴ Canada submitted that motion practice may be required to determine whether the issues sought to be advanced by Six Nations properly arise from its pleading.

[27] Ontario submitted that this action raises 14 "Discrete Claims for which Relief is Sought", but that clarity is required regarding claims and allegations that Ontario considered were either unpleaded or insufficiently particularized in the Amended Statement of Claim. Ontario pointed to

³ See, 2nd Case Management Conference Endorsement, heard March 26, 2018, issued March 29, 2018, at para. 5(b).

⁴ Canada Case Management Memorandum of September 1, 2022, Appendix "A" (Canada's List of Pleaded Claims/Issues – Correlated); Appendix "B" (Canada's List of Unpleaded Claims - Source: Discoveries); Appendix "C" (Canada's List of Unpleaded Claims - Source: Plaintiff's Expert Reports).

responses to written interrogatories that, in Ontario's view, do not allow the Defendants to understand the scope of the claims advanced by Six Nations. Ontario prepared a 10-page chart with 46 areas of inquiry, referred to by the parties as the "Schedule "D" Chart"⁵, that Ontario has asked Six Nations to answer to clarify the basis in the pleadings for the claims asserted by Six Nations and the issues raised by them for trial.

[28] Six Nations submitted that disagreement related to whether claims are properly pleaded and thereby raise issues for determination at trial, should be left to the trial judge, although they could be identified prior to trial by the parties' delivery of notices of objection to evidence that they consider is beyond the pleadings. Six Nations also submitted that the parties could exchange demands for particulars as a tool to continue the development of the issue list.

[29] Six Nations, Canada and Ontario agree that the issue list requires further development for the purposes of the trial but disagree regarding the process most efficient to clarifying the claims that arise from the pleadings and the issues that thereby require determination. The tools identified by Ontario and Six Nations – the use of the Schedule "D" Chart or the use of demands for particular – would provide clarity on the claims advanced and the issues list, as would further use of Requests to Admit. I am not persuaded that motion practice is required to define the issues list because, in my view, the identification of claims and issues can be efficiently refined in case management.

[30] Having fully canvassed the parties' positions on the continued development of an issue list for trial, and noting that all parties recognize the continued importance of pre-trial refinement of the claims advanced and the issues arising from them, I will afford the parties additional time to consider and confer on the most efficient process to clarify the claims advanced in this action and develop the list of issues that will be presented for adjudication. The parties shall be prepared to speak to this issue further at the next case management conference.

C. Provision of Litigation Reports to Non-Parties

[31] Six Nations reported that it had come to their attention that a counsel for a non-party was provided with at least one of the Plaintiff's expert reports. Upon inquiry to the Defendants, Six Nations was advised that Ontario had shared reports with counsel for a non-party. Six Nations submitted that Ontario should not have disclosed its expert reports with a non-party without Six Nations' knowledge and consent, and without first raising the issue in case management.

[32] Ontario submitted that the litigation expert report is not subject to a deemed undertaking rule. However, had Ontario notified Six Nations of its intention to deliver any of their litigation expert reports to a non-party in advance of trial, Six Nations would have had an opportunity to consider and to have raised, at case management, any terms that Six Nations considered appropriate for the provision of any litigation expert reports to non-parties. This could have been

⁵ Schedule "D" to Ontario's Case Management Conference Memorandum of September 6, 2022.

in the nature of a protective order to provide protection to the disclosure of documents considered confidential, in this case litigation expert reports, pending the trial: *Behold Control Equipment Inc. v. Race Mechanical Systems Inc.*, 2020 ONSC 4643.

[33] Any party may bring forward, to the next case management conference, any terms that they consider to be necessary to provide protection to the disclosure of litigation expert reports produced in this action pending the trial of this action.

D. Specific Case Management Directions

[34] I order as follows:

1. The parties shall deliver their expert reports in accordance with the following timetable, which will be referred to as the “Second Revised Expert Report Timetable”:
 - (a) Canada shall deliver by October 3, 2022 those expert reports that Canada has ready and prepared for service at that time.
 - (b) Apart from paragraph (a), immediately above, the Defendants shall deliver all their expert reports by no later April 30, 2023, except the report expected to be delivered by Ontario as authored by Dr. Von Gernet, which shall be delivered by no later than June 30, 2023. Subject to any further Order of this Court, there shall be no revision to the deadline now established for delivery of the Defendants’ expert reports except in exceptional circumstances.
 - (c) Six Nations’ and Canada’s Joint Surveyors’ Report shall be delivered by November 30, 2022, and Ontario’s responding report shall be delivered by April 30, 2023. Ontario may speak to an extension for the delivery of a responding report to the Joint Surveyors’ Report if necessary but absent exceptional circumstances, the deadline for delivery of Ontario’s responding report to the Joint Surveyors’ Report shall not exceed June 30, 2023.
 - (d) The parties shall complete a compilation of all expert reports and supporting documents (except reply reports and supporting documents) by July 31, 2023.
 - (e) The Plaintiff shall deliver any reply expert reports by November 20, 2023, but is at liberty to request a further extension at least commensurate with extensions of time provided for the delivery of expert reports by the Defendants.
 - (f) The parties shall complete a compilation of all reply expert reports and supporting documents by December 31, 2023.
 - (g) This proposed Expert Report Timetable would allow for the scheduling of the trial of this action on a date after January 1, 2024. The parties may speak to the

scheduling of the trial date at Case Management upon completion of the delivery of the Defendants' expert reports on June 30, 2023.

2. At the next Case Management Conference, the parties shall be prepared to speak to the following:
 - (a) The process required for identification of the claims raised by the pleadings and the list of issues requiring determination at trial.
 - (b) Any terms that any party considers necessary to provide protection to the disclosure of litigation expert reports produced in this action pending trial.
 - (c) Any other issue that any party considers necessary to efficiently advance this action to trial.
3. The parties will be notified of the date for the next Case Management Conference.

E. General Case Management Directions

[35] Broad application of Rule 50.13 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, 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.

[36] 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.

Change in Case Management

[37] By reason of my assignment to the Toronto Region's Estates Team, the ongoing Case Management of this action will be re-assigned to a Judge in the Toronto Region's Civil Team. The parties will be notified of the Civil Team Judge who will be appointed Case Management Judge for this action. I extend my thanks to all the lawyers who have been involved in the Case Management of this action over the past four years for their professionalism in the development of this action through case management.

A.A. Sanfilippo J.

Date: September 28, 2022