CITATION: Six Nations of the Grand River Band of Indians v. The Attorney General of Canada and His Majesty the King in Right of Ontario, 2022 ONSC 7041
COURT FILE NO.: CV-18-594281-0000
DATE: 20221214

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Six Nations of the Grand River Band of Indians

AND:

The Attorney General of Canada and His Majesty the King in Right of Ontario

BEFORE: J.T. Akbarali J.

COUNSEL: *Robert Janes*, *Iris Antonios, Greg Sheppard* for the Plaintiff

Manizeh Fancy, David Feliciant, Christine Perruzza, Catherine Ma, Jennifer Lepan, Julia McRandall, Shima Heidari for the Defendant His Majesty the King in Right of Ontario.

Tania Mitchell, Sarah Kanko, Anusha Aruliah, Myra Sivaloganathan, Hasan Junaid, Katrina Longo for the Defendant the Attorney General of Canada.

Tim Gilbert, Thomas Dumigan, Jack MacDonald, Jonathan Martin, Dylan Gibb for the Defendant Haudenosaunee Development Institute.

Alex DeParde and Nuri Frame for Mississaugas of the Credit First Nation

Jeffrey Kaufman for Men's Fire, intervenor

HEARD: December 12, 2022

CASE CONFERENCE ENDORSEMENT

Background

[1] In this action, the plaintiff, the Six Nations of the Grand River Band of Indians, seeks declarations that one or both defendants, the Attorney General of Canada and His Majesty the King in Right of Ontario, breached fiduciary and/or treaty obligations owing to the plaintiff, and seeks equitable compensation and/or damages for the alleged breaches. The claim also seeks a declaration that one or both defendants is obliged to account to the plaintiff for all property, interests in property, money or other assets which were or ought to have been received, managed, or held by the defendants or their predecessors for the benefit of the plaintiff.

[2] The action involves the Haldimand Proclamation, which was issued on October 25, 1784. The Haldimand Proclamation describes that “His Majesty’s faithful Allies purchased a Track of Land from the Indians situated between the Lakes Ontario, Erie, & Huron”, and authorizes the

"Mohawk Nation and such others of the Six Nations Indians as wish to settle in that Quarter to take possession of and settle upon the Banks of the River commonly called Ouse or Grand River".

[3] It also involves the Simcoe Patent, a patent drafted on January 14, 1793, by which the plaintiff alleges the Imperial Crown, through John Graves Simcoe, the Lieutenant-Governor of Canada at the time, granted to the Six Nations forever certain territory beginning at the mouth of the Grand River where it empties itself into Lake Erie and running along the Banks of the Grand River for a space of six miles on each side of the river continuing to a place known by the name of the Forks, and from there along the main stream of the Grand River for the space of six miles on each side of the main stream.

[4] Among other things, the plaintiff alleges that the Crown failed to set aside for the Six Nations all of the lands which they were entitled to have reserved for them under the Haldimand Proclamation and Simcoe Patent, in breach of the Crown's treaty obligations to the Six Nations. It alleges that the Six Nations currently occupies and uses lands that consist of less than 4.8 percent of the lands allocated to them forever. The plaintiff claims that the Imperial Crown and its successors, including the defendants, made or permitted grants, sales, leases, permits or other dispositions purporting to grant title, rights of possession, occupation, use or other interests in parts of the lands described in the Haldimand Proclamation and the Simcoe Patent to persons who were not members of the Six Nations and in breach of the Crown's fiduciary duty, and that it did so without providing full or fair compensation to the Six Nations. The plaintiff alleges the defendants and their predecessors failed to account to the Six Nations.

[5] The action covers, in breadth and in depth, events that span over 250 years.

[6] The action was originally commenced in Brantford on March 7, 1995. It was transferred to Toronto on November 24, 2017. On January 5, 2018, Sanfilippo J. was assigned as case management judge. I took over that role on October 14, 2022.

[7] When Sanfilippo J. began case managing this litigation, the statement of claim had been amended three times. The parties had held the action in abeyance for a period of some six years to pursue settlement negotiations, which were ultimately unsuccessful. Discoveries had begun.

[8] Since that time, the claim has been amended again. The discovery process has either concluded or made significant progress, and the parties are in the midst of the exchange of expert reports, which will be crucial to fact-finding in the trial of this action.

[9] Shortly before I became involved, in August 2022, the Haudenosaunee Development Institute ("HDI") indicated that it intended to move to be included in the action as a party intervener and seek a representation order. HDI alleges that the rights under the Haldimand Proclamation and Simcoe Patent belong to all Haudenosaunee people. HDI states that the Haudenosaunee Confederacy Chiefs Council ("HCCC") is part of the traditional government of the Haudenosaunee people, and has been continuously holding Council at Ohsweken, Ontario for over 230 years. HDI states that the Chiefs of the HCCC are empowered by Haudenosaunee law to make decisions and resolutions concerning the interests of the citizens of the Haudenosaunee Confederacy (that is, the Haudenosaunee people) including as related to land within Canada's borders, on behalf of the Haudenosaunee. HDI states that HCCC has delegated to it the authority to advance the interests of

the Haudenosaunee Confederacy in this proceeding in accordance with the traditions, customs, and practices of the Haudenosaunee Confederacy.

[10] HDI also states that it is not trying to displace the plaintiff, but rather, that the plaintiff is a sub-group of the wider Haudenosaunee Confederacy that it seeks to represent in this litigation.

[11] Sanfilippo J. ordered that HDI deliver a draft pleading so that the scope of its intended intervention be made clear. He also ordered that notice of HDI's proposed intervention be given broadly to the Haudenosaunee community, including by publication in various outlets and through direct distribution. As a result of that notice, a number of responses were received. Some responses raised objection to the idea that it would be for the Superior Court of Justice to determine the identity of the rights holder, on the basis that this is a question to be determined under Haudenosaunee laws and legal traditions.

[12] One response came from the Men's Fire of the Six Nations Grand River Territory. While it agrees that the rights of the Haudenosaunee people are affected by this litigation, it disagrees that HDI has the authority under Haudenosaunee law to represent them. It has delivered its own Notice of Motion to intervene as a party.

[13] Another Notice of Motion to intervene as a party has been delivered by the Mississaugas of the Credit First Nation. The Mississaugas of the Credit argue that the rights asserted by the plaintiff, or the Haudenosaunee Confederacy more broadly, are asserted within the territory of the Mississaugas of the Credit, and in respect of which the Mississaugas of the Credit and the Crown entered into a series of treaties within the meaning of s. 35 of the *Constitution Act, 1982*. They argue that they possess certain rights protected under s. 35 as Aboriginal rights flowing from their historic and contemporary use, occupation, and control of their territory, including self-government, harvesting rights, and Aboriginal title to certain lands and waters.

[14] The Mississaugas of the Credit state that they have, in recent years, entered into various agreements with the defendants to this action establishing confidential negotiations and processes to settle their outstanding claims, the scope and content of which are determined, in part, by their Aboriginal and treaty rights. They state that this action deals with lands within their territory and directly engages their history, rights, and interest. They submit that factual findings about the Mississaugas of the Credit's history, treaties and rights will have to be made in this litigation, and that those findings will impact the continuing relationship between the Mississaugas of the Credit and the Crown. They also state that findings of fact or conclusions of law with respect to any asserted rights of the Six Nations within the Mississaugas of the Credit's territory would impact the Mississauga's of the Credit's ability to exercise their rights and jurisdiction. They seek to join the litigation as a party intervener to introduce Elder and expert evidence on issues that engage their rights and interests.

[15] Two responses were received from Haudenosaunee groups who asked for an adjournment of the intervention motion for two months to allow them time to consider their positions. On November 15, 2022, I released an endorsement by which I vacated the then-scheduled dates for the intervention motion (originally expected to proceed at the end of January 2023) to allow for the additional time that these groups sought.

Parties' Submissions Regarding Process Issues

[16] Prior to the November 15, 2022 conference, I had asked the parties to consider whether the court's usual approach to litigation was the best process to use in this case, where Indigenous laws, legal orders, history, and traditions are engaged, particularly as it may relate to the question of the identity of the rights holder. HDI offered some suggestions in advance of the November 15, 2022 conference, but with insufficient time for the other parties to consider those suggestions and respond. Accordingly, I scheduled a further conference for December 12, 2022, to allow for sufficient time for the parties to formulate their positions and ideas on the appropriate process to employ.

[17] HDI proposes a process with increased openness and inclusion, broad notice about the action and the issues it engages, and meaningful engagement with Indigenous legal traditions. For example, it suggests opening case management proceedings to the public and making materials available to the public, including expert reports. It proposes broad notice to Haudenosaunee communities setting out, among other things, the decisions the court is being asked to make, the positions of the parties, and the likely consequences of the decisions. It suggests direct engagement by the court with Haudenosaunee legal traditions facilitated by an *in situ* approach allowing interested persons, including Chiefs and Clan Mothers, to address the court informally to speak to the process for the intervention motion.

[18] Other parties raise some concern about opening case management proceedings to the public, which could make them unwieldy, and curtail frank discussion. There is also concern about making documents available to the public before they are publicly filed. The other parties expressed concern with HDI's suggestion that the court visit Haudenosaunee communities, suggesting HDI's suggestion was confusing and not well-developed. Moreover, while there is precedent for *in situ* visits to Indigenous communities to obtain evidence, there is no such precedent for doing so to obtain submissions on procedural issues.

[19] Men's Fire supports HDI's suggestion of broad notice, but queries whether notice might be better given on resolution of the litigation, whether by settlement or adjudication. Men's Fire also raises logistical concerns around notice, including that some community members will not have access to the internet, computers or email, and some may be unable to read English, or any language, making it difficult to provide meaningful notice.

[20] For its part, the plaintiff promotes a motion process that includes notice, given HDI's intention to seek an order appointing it as a representative of the entire Haudenosaunee Confederacy, which comprises many communities and over 100,000 people in Canada and the United States. However, it notes that to a significant degree, wide notice has been achieved through the notice order made by Sanfilippo J.

[21] The plaintiff is also concerned with avoiding delay, given the age of the action.

[22] The plaintiff seeks an accessible motion procedure, providing for the motion to be heard in the courthouse in Brantford, or to be webcast. Ontario notes that it might be possible to hold the motion in a travelling court that could convene on the Six Nations' Reserve.

[23] Finally, the plaintiff suggests that the procedure employed must also respect the laws of the Six Nations of the Grand River Elected Council, and its decision to engage, through the plaintiff, the Canadian court system to resolve this claim, which it describes as reserve-based. The plaintiff argues that the court ought not to deal with any issues of Haudenosaunee legal orders or law until it determines whether the threshold requirements applicable to the representation and intervention orders sought by HDI are met.

[24] Canada proposed that I consider appointing an *amicus curiae* to assist me with the intervention motion, but the suggestion did not find much support among other parties who either considered it premature, or unnecessary, in view of the diverging viewpoints that are already before me and being thoroughly briefed.

[25] The parties all broadly agree that the motion brought by the Mississaugas of the Credit First Nation is qualitatively different than those brought by HDI and Men's Fire, and suggest that the motion ought to be heard immediately before or after the motions of HDI and Men's Fire for the sake of efficiency.

Determinations

[26] I have considered the parties' written and oral submissions. I turn now to my determinations regarding the process for the intervention motions.

Openness, Inclusion, Notice

[27] First, I have concluded that it would not serve the goal of efficiently managing this litigation to make case conference proceedings public. The litigation is complex, and access to justice encompasses not just transparency, but also progress. In my view, keeping case management conferences limited to invitees only will facilitate progress in this action. At the same time, a measure of transparency can be obtained by publishing case conference endorsements on CanLII as I intend to do.

[28] However, I am of the view that a publicly available website, on which the parties' motion or trial materials that have been publicly filed with the court (including pleadings but not including case conference material) are accessible, would promote understanding of this litigation among the Haudenosaunee people. Some of these materials are now available on the website of counsel for HDI, which is not currently a party to the litigation. It seems most appropriate to me that one of the current parties to the litigation take primary responsibility for maintaining such a website, and I would welcome a volunteer from among them to do so.

[29] I accept the suggestion of HDI and Men's Fire that a notice ought to go out to Haudenosaunee communities to better inform them of the action. In my view, this notice must include the following features:

a. It must disclose the process the court will follow with respect to the intervention motions (as set out in these reasons, together with any necessary follow-up directions).

b. It must describe what the plaintiff is seeking in the lawsuit and its position.

c. It must describe the defendants' positions.

d. It must describe that HDI and Men's Fire are each seeking to intervene as parties, the goal of their participation, and how their positions differ from the plaintiff's and from each other's position.

e. It must describe that the Mississaugas of the Credit First Nation is seeking to intervene, and why.

f. It must direct the reader to the website on which the publicly filed materials will be maintained, as well as contact information for a person who can provide copies of the materials to anyone without internet access.

g. It must contain contact information, including at least one phone number, for at least one counsel for each of the parties and proposed parties so any interested person may make enquiries.

h. It must be written in plain English, easy to understand, and as brief as possible. If feasible, it shall be translated into the Haudenosaunee languages spoken by the communities to which it will be delivered.

i. It shall be distributed in the same manner as the notice previously issued.

[30] The parties shall cooperate to draft the notice for my approval, with the goal of the notice being distributed on January 6, 2023, so as not to be lost in the busyness of the holiday season.

Engagement with Indigenous Legal Traditions

[31] HDI is the sole party suggesting that the court hold *in situ*, informal proceedings to gather submissions about process, and suggests I begin with the HCCC. However, the HCCC is adequately represented in these proceedings and has made its submissions regarding process. It is not clear to me that I could expect to learn anything different were I to conduct *in situ* proceedings with the HCCC. At the same time, doing so would delay the proceedings.

[32] No one has suggested that *in situ* proceedings would be helpful in terms of gathering any evidence that might assist with HDI's representation motion. I can see that it is possible that *in situ* proceedings might assist in gathering evidence relevant to determining the correct rights holder to advance the claims in this litigation if it becomes necessary to do so after the intervention motions are adjudicated. As I understand it, the parties' position is that the intervention motion can proceed without such evidence gathering.

[33] I see value in engaging with the Haudenosaunee Confederacy by hearing the intervention motions, in person, on the land that is at issue in this proceeding. Doing so would allow greater access for the community to the court's proceedings and, I hope, be welcomed as a sign of respect for the community. In my view, it would be appropriate to convene this court to hold its hearing on the intervention motions on the lands of the Six Nations of the Grand River Band of Indians, that is to say, in the community that is represented by the elected plaintiff in this litigation,

assuming the plaintiff has available space that can accommodate the court, and assuming that the plaintiff would welcome the court to its lands for this purpose.

[34] I raised this possibility at the case conference and no party raised any objection. I note that counsel for Ontario has indicated their willingness to work with the Ministry of the Attorney General and Court Services to arrange for court to be held in the plaintiff's community if that is found to be appropriate.

[35] If the plaintiff does not have the space, willingness, or ability to facilitate the conduct of the court's proceeding on its land, or if Ontario cannot facilitate the *in situ* hearing on the plaintiff's land by arranging for all the usual aspects of a court hearing there, the hearing will proceed at the Brantford courthouse.

[36] With respect to the question of the role in these proceedings of Haudenosaunee laws and legal orders, I see wisdom in the plaintiff's position that this court ought not to stray into areas of Haudenosaunee laws and legal orders carelessly or thoughtlessly (these are my words), and perhaps not at all. The parties before me on the case conference have each chosen to engage the dispute resolution mechanisms of this court, and it is those in which I have expertise. It is the rules of this court and the laws it applies, which the parties before me have sought out, where my work ought to begin, and ideally where it ought to end, if that can be done in a manner that is respectful of Haudenosaunee laws, legal orders, history, and tradition.

[37] Finally, I conclude that, given the number of parties, each of whom is thoroughly briefing me on the issues that are arising, at this juncture, it is not necessary to appoint an *amicus curiae* to assist the court. This determination can be revisited if appointing an *amicus curiae* becomes useful in the future.

Timetable

[38] I conclude that the parties require a timetable to advance this litigation to the intervention motions which ought to be heard one after the other. The plaintiff proposed a timetable in November that likely requires some amendment. The timetable must leave room for those groups who sought additional time to consider their positions to participate in the intervention motions if they wish to do so. At the same time, the timetable must ensure the litigation moves forward at a reasonable pace, especially in view of its age.

[39] Accordingly, I set the following timetable:

a. Mississaugas of the Credit and Men's Fire to deliver their complete motion records by January 9, 2023;

b. Any other party wishing to participate in the motions to intervene shall notify counsel for the parties and proposed parties by February 3, 2023;

c. Responding materials to Mississaugas of the Credit and Men's Fire motion materials to be delivered by February 6, 2023;

d. Case conference to be held on February 10, 2023 at 10 a.m. by videoconference at which the parties, proposed parties, and any other party who has advised that it wishes to participate in the intervention motions shall attend for purposes of addressing the preparation and filing of any additional required materials. If no such other party indicates an intention to participate, the parties may vacate this date unless it is needed for any other purpose;

e. Cross-examinations to be completed by March 10, 2023;

f. Moving party factums to be delivered by March 31, 2023;

g. Responding factums to be delivered by April 24, 2023;

h. Motion to be heard beginning May 8, 2023, for four days.

[40] As I have not canvassed these dates with counsel, I am open to revising them if there are scheduling conflicts. In that case, counsel should consult among themselves and attempt to agree on a timetable that accommodates counsel's availability and provide it to me.

[41] In accordance with rr. 59.04(1), 77.07(6) and 1.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, 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.

J.T. Akbarali J.

Date: December 14, 2022