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 7158
COURT FILE NO.: CV-18-594281-0000
DATE: 20221219

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, Laura Dougan and Brittany Town,* for the Plaintiff

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

Tania Mitchell, Anusha Aruliah, Edward Harrison and Elizabeth Chan, for the Defendant the Attorney General of Canada.

HEARD: December 15, 2022

CASE MANAGEMENT CONFERENCE ENDORSEMENT

[1] In this action, of which I am case management judge, I hold two types of case conferences: one involving the parties to the action and the litigants who intend to seek leave to intervene in this litigation as a party (the case conferences), and another which includes only the parties to this action (the case management conferences). The purpose of the latter, of which this is one, is to continue moving the action towards trial in parallel with the process for the motions to intervene which are addressed in the case conferences.

[2] I am relatively new to the role of case management judge, having taken over from Sanfilippo J. on October 14, 2022. While I have held several case conferences since that time, this endorsement arises out of the first case management conference I have conducted in this litigation.

[3] The parties raise several issues that require procedural direction:

a. The identification of the claims and issues to be adjudicated in the first phase (the liability phase) of this bifurcated action;

b. Issues around the timetabling and delivery of expert reports;

c. Whether protection against disclosure and dissemination of expert reports not publicly filed is required.

[4] The parties filed detailed written submissions and gave over two hours of oral submissions on these issues. What follows are my determinations.

Identification of Claims and Issues

[5] The biggest issue between the parties at the moment relates to the identification and clarification of the plaintiff's claims. On delivery of the plaintiff's expert reports, and on receipt of certain answers from the plaintiff to written interrogatories, new issues were raised but the defendants do not know whether they are raised as additional claims, additional bases or grounds for the plaintiff's existing claims, or historical context for the existing claims.

[6] Ontario and Canada have each proposed methods of dealing with the uncertainty. Ontario, for example, proposes the plaintiff complete a chart which identifies the new issues by explaining whether the plaintiff seeks relief in connection with them on the basis breaches of fiduciary duty, or alleged treaty breaches, whether the plaintiff seeks declaratory or other relief, and whether the plaintiff seeks findings to support its claims of breach of fiduciary duty and treaty breaches in relation to the new issues.

[7] The plaintiff objects to any process outside the normal *Rules of Civil Procedure* to clarify its claims, arguing that the purpose of the proposed chart is unclear. Would it trump the pleading? Would it be read as if it were a pleading? The plaintiff also notes that a functional approach must be taken to pleadings in Aboriginal cases, where the function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought: *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, at paras. 20-23.

[8] I accept that a technical approach to pleadings would not serve the goal of justice for the Aboriginal group and its descendants, or reconciliation between that group and broader society: *Tsilhqot'in Nation*, at para. 23. I also accept that, in cases such as this one, we can expect the pleadings to be amended, and issues to be clarified, as the claim proceeds, and Elders come forward, and experts are engaged: *Tsilhqot'in Nation*, at para. 22. However, a functional approach to pleadings still requires that the issues are identified for the defendants if the trial judge is to have all the relevant evidence and be able to reach a just determination.

[9] The plaintiff suggests a demand for particulars be made. The defendants argue that some of the new issues appear nowhere in the pleading, so there is nothing to demand particulars of.

[10] I agree with the plaintiffs that we should not be inventing processes to deal with the lack of clarity about the purpose of some of the issues raised by the plaintiff and its experts. I also accept the defendants' argument that there is a lack of clarity about the plaintiff's case which makes it difficult for the defendants to take steps to meet it. Moreover, I agree that this needs to be clarified before trial to the extent possible. Without the necessary clarity for the trial process, we risk unnecessary lengthening of the trial, and adjournments and delays, or we risk an incomplete record. It is in no one's interest to proceed to trial without having addressed those risks as best as possible in advance.

[11] The defendants have identified, in the charts they have provided, the issues about which they seek clarity. They have identified paragraphs in the statements of claim where pleadings are made by way of example. They have identified answers to written interrogatories that simply refer

to lengthy chunks in the statement of claim, which answers are not helpful for clarifying the defendants' questions.

[12] Accordingly, I direct the parties to do the following:

a. The defendants shall each deliver a demand for particulars which shall, to the extent it can, seek particulars with respect to the matters raised in their charts. At the very least, the demand for particulars can address the claims made by way of examples. At this stage in the action, having delivered its expert reports, the plaintiff ought not need to rely on pleading by way of example any longer, but ought to be able to identify the bases for its claims fully.

b. The defendants shall identify the answers to written interrogatories that should be reviewed by the plaintiff, having now delivered its expert reports, to determine whether it is now able to provide greater clarity in its answers. In addition, the defendants may add to the written interrogatories to seek clarification of the matters raised in their charts.

[13] As I have noted, broad answers directing the defendants to multiple paragraphs in the statement of claim will not be helpful answers, and will not advance this litigation. Rather, the defendants have identified for the plaintiffs the issues about which they are unclear in the charts they have delivered. The plaintiffs should make every effort to use the response to the demand for particulars and the written interrogatories to address all of the questions raised in the charts meaningfully, with a view to clarifying their claims, and the bases for them, as distinct from the historical context of them, for the defendants.

[14] The plaintiff also advised that it is considering additional amendments to the statement of claim. It seems to me that a further amended statement of claim would be the most appropriate way to deal with the issues, and could avoid the need for the demand for particulars and written interrogatories. Accordingly, I direct the plaintiffs to consider whether the matters raised in the defendants' charts can be clarified by way of amendments to the statement of claim.

[15] In terms of timing for the steps I set out above, I direct as follows:

a. The defendants shall deliver demands for particulars and further written interrogatories, together with answers to written interrogatories it seeks the plaintiff to reconsider since having delivered its expert reports, by January 11, 2023.

b. By February 3, 2023, the plaintiff shall either deliver a response to the demand for particulars and to the written interrogatories contemplated in para. (a) above, or deliver an amended statement of claim that addresses the issues raised by the defendants in the charts filed for this case management conference.

c. I schedule a further case management conference on February 14, 2023 at 10 a.m. to address any ongoing lack of clarity in the plaintiff's claim. If the date is not needed for this, or any other, purpose, the parties may vacate it. If the date is inconvenient, the parties shall discuss amongst themselves other dates that would be convenient to all counsel and close in time to February 14, 2023, and provide

me with three options via email to my assistant. I will then reschedule the case management conference on a date convenient to all.

[16] Finally, with respect to the issues, there is some confusion between the parties with respect to the liability issues relating to the transfer of liability from the Imperial Crown to the undivided Crown, and the liability, if any, as between the Provincial and Federal Crown, which is a matter raised in the crossclaims.

[17] I agree that the question of the transfer of liability from the Imperial Crown to the undivided Crown is a matter for the first phase of the bifurcated trial, while the respective liability of the Provincial and Federal Crowns, if any, is reserved to the second phase of the bifurcated trial.

Delivery of Expert Reports

[18] The plaintiff has served its expert reports with the exception of a surveyor's report it is procuring jointly with Canada. The expected delivery date for the surveyor's report has been extended several times. Most recently it was timetabled for delivery on November 30, 2022, but the plaintiff and Canada advise that it is not ready yet. Unfortunately, they have no information on how much longer the report will take.

[19] The timetable contemplated that Ontario would have until April 30, 2023 to deliver its responding report to the joint surveyor's report, and that, if an extension was necessary, absent exceptional circumstances, the extension would not go past June 30, 2023.

[20] Given that the plaintiff and Canada cannot even begin to guess at when their joint report might be delivered, having outside dates for the delivery of Ontario's responding report is not realistic. This is particularly so because, among other things, I am advised that weather has made the work of the surveyor more difficult. Weather is thus also likely to affect the work of Ontario's responding expert.

[21] Accordingly, I vacate the date for delivery of Ontario's responding surveyor's report (April 30, 2023), and the outside date for an extension, if necessary (June 30, 2023). The timeline for delivery of Ontario's responding report will be addressed once the joint report is delivered. I direct the plaintiff and Canada to follow up with their expert and report back to me by way of email to my assistant by January 6, 2023 with respect to the timeline for delivery of the joint report.

[22] Canada has delivered two expert reports. One — the report of Professor McCalla — was delivered on October 3 2022; Canada is compiling the supporting documents for that report for delivery and expects to deliver the bulk of the supporting documents by December 23, 2022, with the remaining few documents to be delivered in January 2023. The second expert report was delivered with its supporting documents.

[23] The rest of Canada's expert reports will be delivered in accordance with the most recent timetable, that is, by April 30, 2023, with the exception of one report, the author of which is unfortunately experiencing serious health issues. At the moment, Canada understands that the expert will be able to complete the report, and it expects to have an update as to timing in January 2023.

[24] I direct Canada to provide all the supporting documents remaining for Professor McCalla's report by January 20, 2023. Also by January 20, 2023, Canada shall update me by way of email to my assistant with respect to its best information regarding the timeline for the delivery of the report from the expert who is in ill-health.

[25] Ontario has not yet delivered its expert reports. I addressed above the timing for delivery of Ontario's responding surveyor's report. For the most part, its other reports are currently expected to be delivered in accordance with the most recent timetable regarding exchanges of expert reports.

[26] One issue has arisen. Ontario's expert that is scheduled to deliver his report on June 30, 2023 has indicated that he cannot address all the issues he was asked to address in the available timeframe. Ontario indicates that this is, in part, because, due to the lack of clarity around the plaintiff's claims, addressed above, it did not appreciate the breadth and the focus of one particular claim relating to Brantford, Ontario.

[27] Ontario is seeking a different expert to address the Brantford claim and hoping to do so by the June 30, 2023 deadline. For the moment, no order is necessary. Ontario shall update me by way of email by February 6, 2023 with respect to its efforts to locate a new expert and the anticipated timing for delivery of the report relating to Brantford.

[28] Ontario raises other issues more generally, indicating that, to the extent it has been able to retain or redirect expert witnesses to address issues raised in the plaintiff's expert reports that it did not anticipate from its pleading, it has done so, but this is problematic for the experts given the time available for them to deal with these additional issues. Ontario also indicates that the work of the experts may be further impacted by gaining more clarity about the plaintiff's claims, and by whether any of the proposed interveners obtain leave to intervene, and if so, how they intend to add to the record or expand the issues. These concerns do not require any orders, at least at this stage. These are bridges to cross if and when we get there.

Protection of Expert Reports from Disclosure and Dissemination

[29] Finally, the plaintiff seeks an order that the defendants agree that they will not provide any of the plaintiff's unfiled expert reports to any third parties prior to trial except for purposes directly related to this litigation, and that if they do so, they agree to provide the expert report to the recipient on the basis that it is confidential, that it not be shared with anyone else except those persons whom it is necessary for the recipient to assess the report, and that it only be shared if those persons agree that they will treat the report as confidential.

[30] This request arises because Ontario shared one of the plaintiff's expert reports with counsel for the Mississaugas of the Credit First Nation, which had expressed an interest in attending case management conferences, and which, since viewing the report, has in fact moved to intervene.

[31] Canada does not object to the plaintiff's proposed order, assuming that it is a mutual order, and not only directed at the defendants, an amendment with which the plaintiff is content.

[32] Ontario objects to the proposed order, noting that the expert reports deal with publicly available information, while protective orders generally are geared towards protecting sensitive,

proprietary information. Moreover, it indicates that it provided the report to counsel for purposes of exploring whether the Mississaugas of the Credit First Nation had information which would be useful in response. In the result, doing so put the Mississaugas of the Credit on notice that the scope of the factual issues in this case would, in its view, affect its interests, and it has moved to intervene. Ontario argues that notice to a potentially affected party, while not the purpose of its approach to counsel, is salutary in any event.

[33] In my view, some clarity around the disclosure of expert reports to non-parties would be useful.

[34] First, I agree with Ontario's submission that counsel must be free to provide the report to its experts and potential experts for the purpose of retaining experts and preparing its responding record. I do not agree with the plaintiff that provision of an expert report to a third-party retained or potential expert requires any protective order. Rather, that is a normal part of the litigation process. No party should be required to disclose the name of a potential or retained expert unless and until it is prepared to commit to delivering a report from that expert.

[35] However, no party shall disclose an expert report of another party to any non-party who is not a retained expert or a potential expert without first raising the intended disclosure in the case management process. Doing so will allow the parties to raise any concerns they may have about the intended disclosure, and allow me to provide direction with respect to the disclosure, if it is necessary.

J.T. Akbarali J.

Date: December 19, 2022