

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, 2023 ONSC 909

COURT FILE NO.: CV-18-594281-0000

DATE: 20230206

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: *Iris Antonios, Roberts Janes, Max Shapiro and Gregory Sheppard*, for the plaintiff

Manizeh Fancy, David Feliciant, Christine Perruzza, David Tortell, Catherine Ma, Jennifer Lapan, Julia McRandall, Shima Heidari, Lina Chaker for the defendant His Majesty the King in Right of Ontario

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

Tim Gilbert and Thomas Dumigan, for the proposed intervener, Haudenosaunee Development Institute

Jeffrey Kaufman, for the proposed intervener, Men's Fire

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

HEARD: February 3, 2023

CASE CONFERENCE ENDORSEMENT

[1] On February 3, 2023, I held a case conference in this litigation with the parties and with the proposed interveners. This conference was in follow up to my endorsement of December 14, 2022: *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.

[2] In this endorsement, I address the following issues:

- a. The content of the notice I ordered be delivered in my December 14, 2022 endorsement, to whom it ought to be delivered, and how the costs of the notice shall be paid;
- b. Whether a communications protocol with the court is necessary;

- c. Whether Men's Fire ought to be ordered to deliver a pleading.

Notice

[3] In para. 29 of my December 14, 2022 endorsement, I ordered that a notice go out to Haudenosaunee communities to better inform them of this action, and I set out the features required to be included in the notice, including that it must describe the defendants' position in the litigation.

[4] The defendants jointly drafted a paragraph setting out their position, which reads in part:

The tract of land described in the 1784 Haldimand Proclamation and 1793 Simcoe Patent, which was made available to the Six Nations people who wished to settle there, came from lands covered by a treaty made with the Mississaugas in 1783. **The lands were not Six Nations treaty lands and were not reserve lands...** [my emphasis]

[5] The plaintiff argues that the sentence emphasized above is inconsistent with admissions in the defendants' pleadings, and argues that including a statement that the Haldimand Proclamation did not create a reserve will inflame community tensions, and not advance the resolution of this action or wider reconciliation. It argues that, if the defendants want to take this position, they will be required to move to withdraw formal admissions in their pleadings, which the plaintiff will oppose.

[6] The defendants disagree that they have made any admissions to the effect argued by the plaintiff in their pleadings, and that it is for them to describe their position in the litigation, not for the plaintiff.

[7] Without deciding whether there are formal admissions to the contrary, which is an issue for another day, on a proper record, I am of the view that the defendants ought to be able to describe their position in the notice as they wish to. Including the emphasized statement in the notice does not amount to a determination that there are no admissions to the contrary in the defendants' pleading, or that the plaintiff accepts that there are no admissions to the contrary in the defendants' pleadings. Rather, it is simply a statement of the position the defendants advance in the litigation.

[8] To make it clear that the defendants' position is nothing more than their stated position, the notice shall include the words "Canada and Ontario's position is as follows:" at the beginning of the paragraph at issue.

[9] The next issue to resolve regarding the notice is the scope of its delivery. Ontario and Canada argue that, in addition to delivering the notice to the Haudenosaunee communities, the notice should also be delivered to Treaty 18 and Treaty 19 beneficiaries because it is efficient to do so, and will alert those communities to the litigation which may impact their rights, because there may be overlap between the lands that are the subject of the Haldimand Proclamation and the lands that are the subject of Treaty 18 and Treaty 19.

[10] The plaintiff argues that the only land back it seeks is lands held by the Crown, and denies that there is any overlap between their claims and lands that are the subject of Treaty 18 and Treaty 19. Moreover, it argues that expanding notice would amount to another barrier to access to justice for the plaintiff, and that the defendants' request is inconsistent with the Honour of the Crown, the

Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples, and prior jurisprudence.

[11] Expanded notice would, in my view, unduly complicate the litigation: *The Council of the Haida Nation v. British Columbia*, 2017 BCSC 1665, at para. 47.

[12] Furthermore, I accept the concern articulated by the British Columbia Supreme Court in *The Ahousaht Indian Band et al. v. The Attorney General of Canada et al.*, 2006 BCSC 646, at para. 29, that giving notice would put, in this case, the beneficiaries of Treaty 18 and Treaty 19 to a harsh choice, to either intervene in the action and become embroiled in complex, expensive litigation, or give up their claims relating to overlapping areas of land.

[13] This conclusion from *The Ahousaht Indian Band* was also adopted by the court in *The Council of the Haida Nation*, at para. 28. The court in *The Council of the Haida Nation* went on to conclude that a declaration in that action would only be binding on non-parties with an interest in the lands affected if they had received formal notice of the claim. In my view, expanding the scope of notice in this case is certain to be viewed as an invitation to Treaty 18 and Treaty 19 beneficiaries to join the litigation, adding complexity and delay, and foisting a responsibility on those beneficiaries that they may not want, to get involved lest they be bound by findings based on a record they had no hand in developing.

[14] The notice shall be delivered as contemplated in my endorsement of December 14, 2022, to the Haudenosaunee communities in the same manner as the notice previously issued, that is, through mail and publication as set out in Sanfilippo J.'s order of September 16, 2022.

[15] Given that the purpose of the notice is to ensure that the Haudenosaunee community is better informed about the action, the costs of the notice shall be borne equally by Canada, Ontario, Haudenosaunee Development Institute, and the plaintiff. The proposed intervener Men's Fire is proposing to play only a limited role in the proceedings, and it would not, in my view, be just to expect them to contribute to the costs of the notice. In addition, the Mississaugas of the Credit First Nation seeks to add to the factual record because the findings at trial in this action may impact it. It is not just to expect it to contribute to the cost of notice in these circumstances.

Communications Protocol

[16] The plaintiff seeks a communications protocol, arguing that it attempted to write me in early January 2023 about the issue that arose regarding the content of the notice, but was prevented from doing so due to the objections of the defendants.

[17] In my view, no special communications protocol is required. Communications between the court and the parties shall function as it always does. If the parties agree that one, some, or all of them shall write to the court, they may do so. If there is disagreement, the parties are free to seek a case conference with me to address it.

Pleading from Men's Fire

[18] The Haudenosaunee Development Institute asked me to order that Men's Fire deliver a statement of claim in the action. Men's Fire clarified the nature of its intended intervention at the

case conference, and since then, by way of an amended notice of motion. It seeks to intervene as a party on Haudenosaunee Development Institute's motion to intervene. If it is allowed to do so, it seeks to intervene in the action as a friend of the court.

[19] Given the roles it seeks in this litigation, it would be inappropriate to require it to plead.

Next Steps

[20] There is another conference scheduled for February 10, 2023, at which time I expect to address the issues that we discussed on February 3, 2023 relating to the venue for the intervention motions, and the cost of holding the proceedings on the Six Nations of the Grand River reserve. The parties consent, and thus I order, that the intervention motion of the Mississaugas of the Credit First Nation shall take place in Toronto. Thus, it is the motions of Haudenosaunee Development Institute and Men's Fire which will take place in the community.

[21] Certain other issues remain to be addressed at the conference on February 10 2023, including whether the website the plaintiff is developing in accordance with my endorsement of December 14, 2022 will have a known domain name in time for inclusion into the notice, and how the motion materials of the Mississaugas of the Credit First Nation will be made available to the public on the website or otherwise, in particular having regard to certain confidentiality concerns asserted by the plaintiff.

J.T. Akbarali J.

Date: February 6, 2023