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 3604
COURT FILE NO.: CV-18-594281-0000
DATE: 20230614

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, Max Shapiro, Robert Janes K.C., and Gregory Sheppard*, for the plaintiff

Katrina Longo and Sarah Kanko, for the defendant The Attorney General of Canada

Manizeh Fancy, David Tortell and Brandon Fragomeni, for the defendant His Majesty the King in Right of Ontario

Tim Gilbert, Colin Carruthers, Thomas Dumigan, Jack MacDonald, Dylan Gibbs and Jonathan Martin, for the proposed intervener Haudenosaunee Development Institute

Jeffrey Kaufman, for the proposed intervener Men's Fire of the Six Nations Grand River Territory

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

HEARD: May 8, 9, 10 and 12, 2023

ENDORSEMENT

Overview

[1] In these reasons, I address motions brought by (i) the Haudenosaunee Development Institute ("HDI") and (ii) the Mississaugas of the Credit First Nation ("MCFN") to intervene as parties in this litigation. I also address (iii) the motion by Men's Fire of the Six Nations Grand River Territory ("Men's Fire") to intervene in the intervention motion brought by HDI and, if HDI is granted leave to intervene in the action, to intervene in the action itself as a friend of the court.

Brief Background

[2] At this stage, I set out some basic facts to orient the reader. As necessary, I will refer to the facts relevant to these motions in more detail in my analysis of the issues.

[3] The plaintiff, Six Nations of the Grand River Band of Indians ("SNGR") includes people from all six Haudenosaunee nations: the Seneca, Cayuga, Onondaga, Oneida, Mohawk and Tuscarora nations. The band is governed by an elected council.

[4] In this action, SNGR seeks an accounting and compensation for what it alleges are breaches of duty and treaty obligations by the Crown defendants ("Canada" and "Ontario") dating back to 1784, the time of the Haldimand Proclamation.

[5] SNGR argues that the Haldimand Proclamation set aside lands along the Grand River for the Haudenosaunee people who wished to settle there, and their progeny, as compensation for the homes and property that the Haudenosaunee lost after the American Revolution, during which the Haudenosaunee had been allies of the British Crown. SNGR argues that today, it has the use of less than 4.8 percent of the lands reserved by the Haldimand Proclamation.

[6] The action is over 28 years old, and is extremely complex. The breadth and the depth of the issues raised in this action are significant. The action covers about 250 years of history and involves a large tract of land. The dispute between SNGR and the Crown defendants concerns the extent of the lands set aside by the Crown defendants, whether certain lands were properly alienated, and whether the Crown (initially the British Crown, and now the Ontario and Federal Crowns as its successors) properly managed and accounted for SNGR's monies. SNGR seeks an accounting and compensation from the defendants.

[7] There are many reasons why the action has progressed slowly, including that it was held in abeyance for a lengthy period of time to enable the parties to undertake negotiations, which were not successful.

[8] This action was transferred to Toronto in late 2017. Sanfilippo J. began case managing it in January 2018; I was appointed case management judge in the fall of 2022. By that time, the action had made significant progress, and the parties were working to get to trial in 2023. However, also around that time, two, and then three, proposed interveners expressed their intention to seek leave to intervene in the action.

[9] First, HDI indicated it sought to intervene in the action as a party. HDI is the delegate of the Haudenosaunee Confederacy Chiefs Council ("HCCC"), sometimes called the Hereditary Council. The HCCC governed the Six Nations of the Grand River community until 1924, when the Canadian government passed an Order-in-Council replacing the HCCC with an elected council. At that time, the community began electing its council, first under *Indian Act*, R.S.C. 1985, c. I-5 processes, and subsequently under the SNGR's own custom election code, established following community consultation and referenda.

[10] HDI has been observing this litigation for many years. It participated in negotiations with the Crown defendants when the action was held in abeyance. At the very latest, it began considering whether to seek leave to intervene in the action in 2018. In 2022, with the prospect of

trial realistically looming, HDI brought its motion for leave to intervene, arguing that the Haldimand Proclamation did not reserve the lands in question for SNGR, but for all the Haudenosaunee people, of which SNGR is only a part. It sought a representation order to act for the Haudenosaunee Confederacy, and, according to the draft pleading it delivered, it sought to put an end to the litigation in favour of nation-to-nation negotiations between HDI, as HCCC's delegate, and the defendant Crowns. Alternatively, it sought an order joining its claim (to be issued) with this action. At the hearing, HDI narrowed the scope of the order it sought; in particular, it no longer seeks to represent the Haudenosaunee Confederacy but only HCCC. It also does not seek to serve its draft pleading, thus rendering the joinder issue moot. I address the relief sought by HDI in my analysis of its motion.

[11] By direction of Sanfilippo J., HDI provided notice of its intention to seek to intervene to other Haudenosaunee communities. Some of them wrote to raise concerns with the proposed intervention, including Men's Fire.

[12] Men's Fire is a group of men who belong to the Haudenosaunee Confederacy and belong to the Haudenosaunee community at the Grand River. They describe themselves as holders of the inherited right and responsibility under Haudenosaunee law to meet and discuss collectively issues and matters of concern to the communities of the Haudenosaunee Confederacy. They explain that they are empowered by the wampums of the Great Law. They consult their communities and Clan Mothers in their territories and then come together to exchange ideas and collectively decide on the best course of action through a process that is described in detail in the record.

[13] Men's Fire raises serious concerns about the suitability of HDI as a representative of the interests of the Haudenosaunee people at large, and is involved in its own litigation with HDI. Men's Fire raises concerns about HDI's finances, and financial transparency. Put bluntly, it is concerned that HDI is not occupied with advancing the interests of the Haudenosaunee people, but with advancing the financial interests of those people associated with HDI.

[14] As a result of their concerns, Men's Fire brings a motion to intervene as a party on the HDI motion to intervene to oppose it, and, if HDI is granted intervener status, Men's Fire seeks to intervene in the action as a friend of the court.

[15] In addition, MCFN also seek leave to intervene in the litigation as a party. While broadly supportive of SNGR's efforts to obtain compensation and accountability from the defendant Crowns, MCFN has become concerned that SNGR is relying on expert evidence of the history of MCFN and its traditional territory, which includes the lands described in the Haldimand Proclamation. MCFN states that its history, and the meaning of its treaties, is raised directly in at least some of the expert evidence delivered by SNGR. It argues that its interests will be impacted by any factual findings made by the court in this litigation, and it seeks to have a voice in the findings of fact as they relate to MCFN's treaties and history.

[16] SNGR opposes HDI and MCFN's motions to intervene. It raises many objections, but it is principally concerned with delay, and seeks to bring this action to trial as quickly as possible. Given that it relies on evidence filed by Men's Fire, it is fair to say SNGR does not oppose Men's Fire's intervention on the motion.

[17] Ontario takes no position on the HDI motion to intervene, but raises practical concerns about how to manage any intervention. It consents to the MCFN motion to intervene. Canada consents to HDI and MCFN's motions for intervention with certain terms.

[18] The Men's Fire and HDI motions were heard together, and the MCFN motion was heard two days later. Given the overlap in issues, I deal with all three motions in these reasons.

Conclusion

[19] For the reasons that follow, I grant Men's Fire leave to intervene in HDI's motion to intervene. I deny HDI's motion to intervene in the litigation; as a result, it is unnecessary to consider Men's Fire's motion to intervene in the litigation as a friend of the court. It is also unnecessary to consider HDI's motion for a representation order, or its motion for joinder. I grant MCFN's motion to intervene in the litigation as a party, subject to certain terms that I describe herein.

Issues

[20] The motions before me all raise substantially the same issue: whether the test for leave to intervene as a party under r. 13.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 is met with respect to: (i) Men's Fire on the HDI motion; (ii) HDI in the action; and (iii) MCFN in the action.

Legal Principles Applicable to Intervention Motions

[21] I begin with a general recitation of the legal principles applicable to intervention motions before turning to consider each proposed intervention in turn. To the extent it is necessary to consider other legal principles, I do so in my analysis of each motion.

[22] Rule 13.01 applies when a person seeks to intervene in a proceeding as an added party, that is, with the ability to participate in the formation of the record by adducing evidence, conducting cross-examination, and otherwise enjoying all the rights of a party to the litigation. Rule 13.01 provides:

> (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> > (a) an interest in the subject matter of the proceeding;
> >
> > (b) that the person may be adversely affected by a judgment in the proceeding; or
> >
> > (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding

> and the court may add the person as a party to the proceeding and may make such order as is just.

[23] The onus rests on the moving party to demonstrate that it has met the requirements of the rule: see *Dorsey, Newton, and Salah v. Attorney General of Canada*, 2021 ONSC 2464, at para. 12; *Halpern v. Toronto (City) Clerk* (2000), 51 O.R. (3d) 742 (Div. Ct.), at para. 6.

[24] A proposed party intervener must first demonstrate that it meets one of the criteria set out in r. 13.01(1): see *Halpern*, at paras. 13-14.

[25] To establish an interest in the subject matter of the proceeding, the proposed intervener must establish a "genuine and direct interest in the outcome of the proceeding": *Halpern*, at para. 15.

[26] The court takes a liberal approach to the interpretation of r. 13.01(1)(a): see *Butty v. Butty* (2009), 98 O.R. (3d) 713 (C.A.), at para. 8.

[27] The matters a court considers are the nature of the case, the issues which arise, and the likelihood of the applicant being able to make a useful contribution to the resolution of the matter without causing injustice to the immediate parties: see *Halpern*, at para. 17, citing *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), at p. 167.

[28] A party will not make a useful contribution to a proceeding if the intervener simply proposes to repeat the issues put forward by the main parties, although some overlap may be permissible: see *Halpern*, at para. 18.

[29] If a proposed intervener establishes that one of the three criteria in r. 13.01(1) are met, the court turns to the second stage of the analysis under r. 13.01(2). At that stage, the court asks whether any delay or prejudice resulting from the intervention will not be undue: see *Halpern*, at para. 14.

[30] As put in *Halpern*, at para. 20, citing Epstein J. in *M. v. H.* (1994), 20 O.R. (3d) 70 (Gen. Div.), at para. 37, "the court's focus should be on determining whether the contribution that might be made by the intervenors is sufficient to counterbalance the disruption caused by the increase in the magnitude, timing, complexity and costs of the original action."

The Men's Fire Motion

[31] I turn first to Men's Fire motion to intervene on the HDI intervention motion. As I have noted, Men's Fire only seeks leave to intervene in the action as a friend of the court if HDI is granted leave to intervene. However, it seeks leave to intervene in the HDI intervention motion as a party in any event.

[32] HDI is the only litigant that actively seeks to exclude Men's Fire's proposed intervention on HDI's intervention motion. It argues that, apart from pressing and urgent circumstances, intervention is not permissible on a motion. HDI submits that r. 13.01(1)(a) refers to an interest in

the proceeding which, in its submission, must be interpreted consistently with the definition of "proceeding" in r. 1.03(1), that is, an action or application.

[33] Men's Fire has produced a wealth of jurisprudence to support the conclusion that, for purposes of r. 13.01, a motion may be considered a proceeding, especially when the issue that is at stake in the motion is the issue in which the proposed intervenor has an interest: see e.g., *M. v. H.*, at paras. 20-27; *Hollinger Inc. v. The Ravelston Corporation Limited*, 2008 ONCA 207, 89 O.R. (3d) 721, at para. 14; *Ontario (Attorney General) v. Stavro*, [1997] O.J. No. 6524 (Gen. Div.), at para. 6.

[34] As I explain below, Men's Fire satisfies all the criteria to be granted leave to intervene in HDI's intervention motion as a party.

[35] I turn first to the question of whether Men's Fire has a genuine and direct interest in the proceeding. Men's Fire's motion to intervene was brought in respect of HDI's motion for party intervener status, or alternatively joinder, and a representation order.

[36] In its notice of motion, HDI seeks an order permitting it to represent the Haudenosaunee Confederacy, which includes Men's Fire. Men's Fire raises serious concerns about HDI's ability and authority to represent the Haudenosaunee Confederacy. Men's Fire also describes its responsibility under Haudenosaunee law to collectively discuss issues and matters of concern to the communities of the Haudenosaunee Confederacy, including through consultation with their communities and Clan Mothers in their territories, to decide on the best course of action. Men's Fire's interest in the HDI motion is not simply to raise its own concerns about HDI's proposed representation of it, but also to fulfil its responsibility to voice concerns of Haudenosaunee persons and Clan Mothers, who have instructed it to intervene in HDI's motion.

[37] There is evidence in the record of opposition among other Haudenosaunee groups or individuals to HDI's motion. Men's Fire's evidence supports its contention that, in accordance with Haudenosaunee law and custom, it speaks for others besides itself, and besides the plaintiff, in the Haudenosaunee community.

[38] Moreover, Men's Fire, as a member of the Haudenosaunee community at the Grand River, is impacted by SNGR's action, and has an interest over and above the general public in its efficient resolution. Men's Fire's evidence is not just relevant to the representation order sought by HDI, but also to the balancing exercise in HDI's intervention motion under r. 13.01(2).

[39] I note that, at the hearing, HDI withdrew its request for a representation order permitting it to represent the Haudenosaunee Confederacy and limited its representation order request to an order permitting it to represent HCCC only. In my view, that late withdrawal does not render Men's Fire's interest moot (and no one argued that it did). For one thing, HDI's decision to withdraw its request to represent the Haudenosaunee Confederacy may have been affected by Men's Fire's evidence and argument.

[40] More importantly, by the time HDI withdrew its request to represent the Haudenosaunee Confederacy, Men's Fire's evidence had been engaged with by the parties and relied upon in the motion with respect to issues that remained live, even after the narrowing of the relief sought by HDI. Men's Fire has raised concerns and proffered evidence on issues regarding HDI's authority,

transparency, and accountability which, while relevant to HDI's original representation order request, is also relevant on HDI's motion more broadly, in terms of HDI's suitability as a representative of anyone, including HCCC, and with respect to the balancing exercise that must take place under r. 13.01(2).

[41] Moreover, Men's Fire can make a useful contribution on HDI's motion, given the evidence it has adduced, which I described above, and which has been relied on and responded to by the other parties on HDI's motion.

[42] I thus find that Men's Fire has a sufficient and direct interest in the proceeding, and meets the criterion under r. 13.01(1)(a). There is no need to go further to consider if it meets the other criteria under rr. 13.01(1)(b) or (c).

[43] Turning to the balancing exercise under r. 13.01(2), Men's Fire's participation in the motion proceeded in tandem with HDI's motion, and so has caused no delay or prejudice to any party. Thus, there is no need to consider whether the usefulness of its contribution outweighs any prejudice caused, or what terms might mitigate the prejudice.

[44] I grant Men's Fire leave to intervene in HDI's motion to intervene in this action.

HDI's Motion to Intervene as a Party in the Litigation

[45] At the outset of the hearing, HDI advised that it was no longer seeking an order allowing it to represent the Haudenosaunee Confederacy, but only HCCC. It also indicated that it no longer sought to serve its draft pleading. Despite the withdrawal of the draft pleading, I take note of what was in it in assessing the role HCCC through HDI proposed and proposes to play in this litigation, and in the context of HDI's motion.

[46] Notably, among other things, the draft pleading, titled "Statement of Defence, Counterclaim, and Crossclaim of the Intervener" sought a declaration that SNGR is not entitled to the relief sought in its statement of claim, and a mandatory order "directing the defendants to participate in nation-to-nation negotiation and/or mediation" with the HCCC.

[47] HDI has alleged that the Haudenosaunee Confederacy is the treaty partner of the Crown in the Haldimand Proclamation, noting that SNGR did not exist at the time that the Haldimand Proclamation was entered into. In effect, it alleges that the Haudenosaunee Confederacy is the holder of the rights that SNGR seeks to enforce, and that SNGR is only a sub-group of the rights-holder.

[48] HDI correctly notes that the question of the identity of the rights-holder under the Haldimand Proclamation is not the issue on this intervention motion. The question is whether HDI ought to be given leave to intervene as a party in this proceeding.

[49] SNGR raises a number of concerns with HDI's intervention motion: (i) the motion is an abuse of process because HDI's proposed intervention is a collateral attack on the elected governance and membership of SNGR; (ii) HDI has no proper interest in the proceeding; and (iii) HDI's intervention would cause injustice and delay. Although some of these concerns were argued

as stand-alone grounds to dismiss the motion, I address them principally in the context of the test for intervention under r. 13.01(1).

Does HDI meet any of the criteria under r. 13.01(1)?

[50] At first blush, HDI appears to have a sufficient, genuine, and direct interest in the proceeding. It argues that the plaintiff is only a subset of the true rights-holder under the Haldimand Proclamation. In its motion materials, it seeks an order allowing it to represent the interests of the Haudenosaunee Confederacy, which it claims is the true holder of the rights that SNGR seeks to assert in this litigation. Given its claim to the rights that SNGR asserts in its motion materials and draft pleading, it looks as though the Haudenosaunee Confederacy may be adversely affected by a judgment in SNGR's action. Moreover, given that HDI claims to represent the interests of the alleged holders of the rights SNGR asserts, it seems that there exists between SNGR and HDI a question of law or fact in common.

[51] But things are not as they seem.

[52] HDI has structured its motion materials and pleading in such a way as to make it appear to meet the criteria in r. 13.01(1), but a closer examination of the facts that underlie its interest in this proceeding lead me to the conclusion that its interest in this proceeding is not genuine or sufficient, and that it fails to meet any of the criteria under r. 13.01(1). In the paragraphs that follow, I explain why I reach this conclusion.

[53] First, it is important to note that HDI, in its motion materials, seeks to represent the Haudenosaunee Confederacy in making claim to the rights asserted by SNGR in reliance on the Haldimand Proclamation, but according to the draft pleading it now seeks to withdraw and its evidence on cross-examination, HDI's objective is to put an end to SNGR's attempt to litigate its claim in this court in favour of an order requiring the defendants to engage in nation-to-nation negotiations with HCCC.

[54] There is a long history of conflict between HCCC and SNGR. Three times, the court has litigated issues arising out of this conflict relating to whether SNGR or HCCC is the proper governing body of the Six Nations people within the Grand River community:

a. In *Logan v. Styres et al.* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.), a HCCC representative sued SNGR's elected council to restrain the surrender of Six Nations reserve land which the elected council had negotiated to sell to a third party. The HCCC representative argued that the Orders-in-Council establishing and continuing the elected council were beyond the power of the Canadian Parliament because Six Nations Indigenous peoples were allies of the Crown, not subjects. The court rejected the argument and held that the Orders-in-Council were effective.

b. In *Davey et al. v. Isaac et al.*, [1977] 2 S.C.R. 897, the court addressed a situation where HCCC attempted to remove the elected council by barricading the Council House. The elected council sought an injunction, in response to which HCCC argued that SNGR was not a band under the *Indian Act*, and thus the Orders-in-Council removing HCCC as the band's government were of no force. The Supreme

Court of Canada rejected this argument, concluding that SNGR was a band, and that the removal of HCCC as its government was lawful.

c. In *Hill v. Canada* (1998), 151 F.T.R. 285 (F.C.), Leroy Hill, who is currently the HCCC secretary, sued Canada for a declaration that a surrender of the SNGR's interest in certain lands that had been negotiated between the elected council and Canada, and approved by community referenda, was null and void because, among other things, HCCC did not accept it. The court rejected this argument, finding that the community referenda were valid in accordance with the *Indian Act*.

[55] While HDI, in its motion materials, styled itself as a representative of the Haudenosaunee Confederacy, its website states that it represents "Citizens on Grand River Enrollment from each of the Six Nations". On cross-examination, HDI's witnesses testified that this means Six Nations peoples within the Grand River Community.

[56] On cross-examination, HDI's representative Brian Doolittle agreed that HDI wants to stop the litigation by the elected council so that HCCC can negotiate with the Crown. Mr. Doolittle also indicated that HCCC has no interest in advancing a claim in Canadian courts: "No, [HCCC] doesn't do claims. Claims is a part of Canada's world, law." Mr. Doolittle indicated that, in HCCC's view, litigation does not help achieve reconciliation. He confirmed that HCCC wants the elected council "out of that picture and out of [negotiations with the Crown]".

[57] In a Lands Rights Statement issued by HCCC, HCCC states that it seeks "to renew the existing relationship that we had with [the] Crown prior to 1924." As I have noted, prior to 1924, HCCC was the governing body of the Six Nations community. It was in 1924 that the Order-in-Council was passed ousting HCCC as the governing body, and the elected council came into being.

[58] In my view, HDI's interest in this proceeding was never to represent the Haudenosaunee Confederacy more broadly; that is seen by its concession at the hearing to limit its request for a representation order to HCCC only. Moreover, neither HDI nor HCCC has any record of ever seeking to intervene in any other Haudenosaunee band's litigation or claims on behalf of the Haudenosaunee Confederacy; rather, they focus their attention on the Six Nations of the Grand River community.

[59] I find as a fact that, as HCCC's delegate, HDI seeks to advance HCCC's interest in positioning itself as the legitimate governing body of the Six Nations people within the Grand River community. Its efforts to do so have been litigated and rejected three times.

[60] In its draft pleading and as affirmed on cross-examinations, HDI has stated what it seeks to do: it wants to derail SNGR's litigation and displace SNGR in favour of HCCC as the counterparty to negotiations with the defendants. In other words, HCCC seeks to use HDI to challenge the governance of SNGR through this proceeding.

[61] Understood in this way, HCCC's interest, which HDI seeks to represent, is not genuine to the litigation nor is it sufficient for purposes of r. 13.01(a). HDI does not seek to participate in the litigation as a good faith actor, to advance it to its adjudicated conclusion in an organized, efficient, and just manner. I am satisfied on the evidence before me that HCCC's true interest and goal in seeking to intervene as a party through its delegate HDI is to cause delay and disruption for its

ulterior purpose of challenging and undermining SNGR's right to lead the Six Nations community. Having reached this conclusion, I need not consider whether HCCC, through HDI, is attempting to collaterally attack SNGR's membership.

[62] But if HDI's real purpose is to collaterally attack SNGR's governance of the Six Nations Grand River community, what of the question HDI raises – who truly is the rights-holder?

[63] First, there is good reason to doubt whether HCCC through HDI in fact claims rights under the Haldimand Proclamation at all. In a 2018 newsletter issued by HCCC, HCCC explained that it does not recognize the Haldimand Proclamation as being a deed. Rather, in HCCC's view as expressed in the newsletter, the Haldimand Proclamation was from the King to British subjects directing them that they were not to settle in the area covered by the Haldimand Proclamation. HCCC denies that the British King had authority to grant or give the Haldimand Tract lands to anyone. Its position in this litigation that it is the true rights-holder under the Haldimand Proclamation is new, arising over two decades after this litigation commenced.

[64] If HDI or HCCC legitimately seek to have the question of the true rights-holder determined, it may well properly fall for determination in other *fora* pursuant to Haudenosaunee laws and legal orders. If it must be determined by this court, it can be determined in a separate proceeding, although, as I have noted, there is good reason to think HCCC does not and will not seek to determine that question in Canadian courts, given its previously expressed view on the effect of the Haldimand Proclamation, and the evidence of HDI's affiants, who have indicated that HCCC "doesn't do claims".

[65] Because the evidence suggests that HCCC (through HDI) does not seek to advance its claim under the Haldimand Proclamation in this court in any event, excluding it from participation in this litigation does not cause it prejudice. Rather, it places HCCC in the same position in which it has always been, seeking redress outside of the Canadian legal system. I thus reject that HDI has established that it or HCCC may be adversely affected by a judgment in this proceeding.

[66] Moreover, I reject the argument that there exists, in a practical, realistic sense, one or more questions of law or fact in common between HDI or HCCC and the issues raised in this proceeding. For that to be the case, in my view, HDI must intend to litigate the question of law or fact through its participation in this proceeding, but, as I have explained, that is not its goal. It makes no sense to conclude that a proposed intervenor has established the requisite interest because it theoretically could have a question of law or fact in common with the issues raised in the litigation, and then grant leave to intervene to allow the proposed intervenor to derail, rather than assist, the litigation of that issue.

[67] Moreover, although HDI argues that it would make a useful contribution to this litigation by bringing forward the perspective of the Hereditary Chiefs, there is no real evidence of this on the record.

[68] The signatories to the Haldimand Proclamation are ancestors of both, SNGR and HCCC. The evidence in this case is historical; the witnesses will all be experts. No descendant of the original Haudenosaunee peoples involved in the Haldimand Proclamation will be able to give first-hand evidence of what occurred. There is no evidence before me to suggest that HCCC is able to

offer a different historical perspective than SNGR can. HCCC has not explained how its expert evidence might differ, or more importantly (given that it has not had access to SNGR's expert evidence) why it would. Thus, while I can understand that the HCCC could have something valuable to add to the litigation, it has not led any evidence to support that contention.

[69] The record also indicates that HCCC seeks to intervene through HDI as a way of insulating itself from attorning to the jurisdiction of this court, and that HCCC does not consider itself as being bound by the court's determinations. HDI argues that HCCC accepts the court has jurisdiction to determine questions of Canadian law, but HCCC reserves its rights, as a nation's representative, to seek redress politically or internationally should it disagree with the ultimate resolution of the court.

[70] I understand that HCCC's position is that, as a nation's representative, its issues with the defendants ought to be resolved by nation-to-nation negotiations, and moreover, that it has reason to reject Canada's courts as the forum in which its rights ought to be determined. However, HCCC's rejection of Canada's judicial system does not mean it can engage with that system through a delegate to frustrate the rights of another Indigenous group that chooses to access Canada's judicial system to make its own claims against the defendants.

[71] I thus conclude that HDI does not meet any of the criteria in r. 13.01(1) to be granted party intervenor status.

Is HDI's motion a collateral attack on previous decisions and/or an abuse of process?

[72] While my conclusion that HDI does not meet any of the criteria under r. 13.01(1) is sufficient to dispose of HDI's intervention motion, I briefly consider SNGR's arguments that HDI's intervention motion is a collateral attack on the earlier governance decisions of Canadian courts, and an abuse of this court's process.

[73] Abuse of process is a flexible doctrine that engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation, or in a way that would bring the administration of justice into disrepute: see *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, aff'd 2002 SCC 63, [2002] 3 S.C.R. 307.

[74] As Abella J. wrote in *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 35 and 43, "judges have an inherent and residual discretion to prevent an abuse of the court's process. … the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts." Abuse of process is unencumbered by the specific requirements of concepts such as issue estoppel, and can apply where a party, who need not be the plaintiff, seeks to relitigate a claim which has already been determined: see *C.U.P.E.*, at paras. 37, 47.

[75] Collateral attack is a related doctrine that prevents a party from undermining previous orders of the court, and applies where a party attempts to "challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it": *Garland v. Consumers' Gas Co*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 71. See also *C.U.P.E.*, at para. 33.

[76] For the reasons I articulated above in concluding that HDI's and, by extension, HCCC's interest in this proceeding is not sufficient and genuine, I also find that HDI's motion is a collateral attack on the three decisions which dismissed challenges to SNGR's governance of the Six Nations of the Grand River community, and that its attempt to use SNGR's litigation to challenge the governance of the Six Nations of the Grand River community is an abuse of this court's process. I would have dismissed the motion on either of these grounds, had I not dismissed it under r. 13.01(1).

HDI's intervention motion would cause undue delay

[77] Had I not dismissed the intervention motion under r. 13.01(1), I would have dismissed it under r. 13.01(2) because permitting HDI's intervention at this stage would cause undue delay.

[78] This litigation is very old. HDI and HCCC have known of its existence for years. They have been considering intervening since, at the latest, 2018.

[79] The delay in the intervention, which is unexplained, is consistent with my earlier conclusion that HDI seeks to disrupt the litigation rather than advance it in an effective manner. Intervening as the action nears trial is more disruptive than intervening earlier.

[80] Allowing HDI's proposed intervention would result in delays for additional productions, discoveries, and presumably delivery of additional expert evidence. HDI has proposed no plan for how it would manage these steps efficiently. Importantly, as became clear through the parties' submissions about the differences in their proposed orders if intervention were permitted, HDI, despite its assurances to the contrary, seeks an order giving it maximum flexibility to expand the issues in the litigation. I fully expect that is what it would seek to do if it were permitted to intervene, and the expansion of issues would lead to undue delay.

[81] No party has proposed any terms that I find would mitigate against the risk of undue delay, and I have not been able to identify any on my own.

Conclusions on HDI's motion to intervene as a party

[82] I deny HDI leave to intervene as a party. I need not consider the merits of its representation motion given my determination. Nor do I need to consider HDI's joinder motion. Given its withdrawal of its pleading, I understand the joinder motion has been abandoned.

[83] I note that, in its factum on HDI's motion, Ontario asks that my order arising out of this motion "stipulate that any person or entity having received the public notice provided in relation to the Action (whether or not they have responded to such notice) be deemed to be bound by any final judgment in the Action."

[84] I decline to make this order. The notice made no statement to alert people that they may be bound by the results of any final judgment in this litigation. In fact, the original notice, ordered pursuant to Sanfilippo J.'s September 21, 2022 case management endorsement, states something different. It states that if the order permitting HDI to represent all citizens of the Haudenosaunee Confederacy "is granted, all decisions and findings in the Litigation will be binding on the Haudenosaunee Confederacy, its Chiefs and Councils, and all its citizens, as will any agreements

amongst counsel for the parties in respect of the conduct of the litigation": *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada*, 2022 ONSC 5373, at Schedule "A". It would be inappropriate to bind people who received the notice by the findings in this litigation when the notice only told them they would be bound if the representation order was made, and the order was not made.

MCFN's Motion to Intervene as a Party in the Litigation

[85] I now turn to MCFN's motion to intervene as a party in the litigation.

Does MCFN meet any of the criteria under r. 13.01(1)?

[86] MCFN argues that it has a genuine and direct interest in this litigation, because its history lies at the centre of this action. MCFN seeks to participate in the fact-finding process to ensure its perspectives on its own history are before the court.

[87] MCFN identifies the following main issues in the existing litigation which relate to its history, the history of its territory, and the interpretation of its treaties with the Crown:

a. The historic use, occupation, and control of MCFN's territory by MCFN and Six Nations;

b. The nature, scope, and meaning of agreements between MCFN and Six Nations with respect to MCFN's territory;

c. The interpretation and effect of agreements between Six Nations and the Crown relating to MCFN's territory, and whether such agreements are treaties under s. 35 of the *Constitution Act, 1982*;

d. The interpretation of treaties and agreements between MCFN and the Crown.

[88] While SNGR argues that it does not seek relief with respect to any issues impacting MCFN, MCFN notes that SNGR does not say that it does not seek findings of fact or law with respect to these historical issues. MCFN describes its concern that SNGR is seeking "a judicially endorsed history of MCFN Territory that privileges the Six Nations' perspective while minimizing, or eliminating, that of MCFN."

[89] MCFN was only recently provided a copy of certain expert reports filed by SNGR, given to it by Ontario. Although MCFN was aware of this litigation prior to that time, it was only upon reviewing the expert evidence that MCFN determined that the scope of the action was larger than that described in SNGR's factum, that is, "an action brought by a band about the loss of a tract of reserve land and the mismanagement of monies derived from that land by the Crowns" and in respect of which SNGR seeks equitable compensation for breaches of fiduciary duties and treaty rights.

[90] MCFN points to a number of findings of fact SGNR appears to be seeking, based on its pleading and the expert reports MCFN has seen, including that: (i) Six Nations has used and occupied MCFN territory since time immemorial; (ii) Six Nations gained sovereignty over MCFN

territory in the 1600s; (iii) in the Dish with One Spoon and Great Peace of Montreal, MCFN and Six Nations agreed to share sovereignty over MCFN territory; (iv) the Nanfan Deed is a treaty that guarantees Six Nations' rights within MCFN territory; (v) in the Between the Lakes Treaty and the Purchase No. 3 Treaty, MCFN extinguished its interests in the lands treated for (and lands not treated for at the headwaters of the Grand River), including Aboriginal title, and agreed to cease exercising rights on those lands; and (vi) the Haldimand Proclamation is a treaty within the meaning of s. 35 that guarantees Six Nations rights within MCFN territory. MCFN has indicated that it would oppose relief sought by SNGR with respect to a finding that the Haldimand Proclamation is a treaty. In its view, MCFN is the sole Indigenous group with treaties within and respecting their territory, with one exception that does not relate to the Six Nations.

[91] MCFN argues that the findings SGNR appears to be seeking are inconsistent with its understanding of its own history and rights within MCFN territory. Moreover, MCFN's history is the legal basis for MCFN's Aboriginal and treaty rights, including Aboriginal title, and determines the scope and content of the duties the Crown owes to MCFN, including the duty to consult, and the honour of the Crown. MCFN raises the concern that the Crown would be bound by findings on these issues in this litigation, impacting MCFN and the Crown's ongoing efforts to establish a renewed nation-to-nation relationship.

[92] In contrast, SNGR argues that MCFN's true interest in this litigation is not as it has described; it states that the litigation does not seek declarations with respect to anything that could impact MCFN's interests. Rather, according to SNGR, MCFN is seeking to bolster a separate claim it has against the Crowns, described as the "Water Claim". In the Water Claim, MCFN seeks a declaration that it has Aboriginal title to all of the water, beds of water, and floodplains in its territory, which includes the modern-day Six Nations Reserve.

[93] I do not accept this argument from SNGR. It does not make sense. The Water Claim was brought in 2014, and expert evidence was delivered in 2015. In 2020, the claim was put in abeyance. On SNGR's theory, MCFN, a sophisticated litigant with limited resources, worked on advancing its Water Claim for years, put it in abeyance, and then decided to collaterally litigate it in the context of another party's complex litigation at much greater cost. The SNGR theory is irrational.

[94] SNGR also suggests that MCFN has either colluded with Ontario to delay this action by seeking intervenor status or has been duped by Ontario into doing so. This theory relies on the fact that MCFN only decided to seek intervenor status when Ontario provided its counsel (who was not counsel on this motion) with copies of certain of the SNGR's expert reports.

[95] I find this theory extremely unlikely. It is based mostly on speculation, and the one shred of evidence – Ontario's provision of the expert reports to MCFN – has other explanations, including Ontario's efforts to develop responding evidence.

[96] Moreover, I am not prepared to find that, after centuries of colonialism, difficult dealings, and conflict between Indigenous peoples, including MCFN, and the Crown, that MCFN would collude with or be duped by Ontario. On the record before me, I see no reason to conclude anything other than that MCFN's leadership has made thoughtful decisions as to how to best protect its people and advance their interests.

[97] I find that MCFN has a genuine and direct interest in these proceedings. As a nation, it has a valid interest in the stewardship of its history, which is put into issue in this litigation. Moreover, the findings of fact that the trial judge may have to make may impact MCFN's rights, including its rights to Aboriginal title, and the obligations owed to it by the Crown, such as the duty to consult and the honour of the Crown. MCFN has a genuine and direct interest in the proceedings for that reason as well, and may be adversely affected by a judgment in this action as a result.

[98] I am also satisfied that MCFN can make a useful contribution to the litigation. Its history, treaties, and the events that took place on its traditional lands are at issue in SNGR's claim. It has a valid and important perspective on its own history, and it would benefit the court to have MCFN's evidence before it if the court is to be tasked with making historical findings of fact.

[99] I have no difficulty in concluding that the requirements under rr. 13.01(1)(a) and (b) are met. I need not consider whether the criterion articulated in r. 13.01(1)(c) is met in these circumstances.

[100] I thus turn to the second branch of the intervention test.

Will MCFN's intervention cause undue delay or undue prejudice?

[101] SNGR raises the spectre of prejudice in that at least some of the experts whose evidence will be adduced are professors *emeritus*, and delays in litigation risk the possibility that some will be unavailable to testify at trial. That may be so, but there is no specific evidence elevating this to a concrete risk rather than a speculative one, and unfortunately, no expert comes with a guarantee of availability at a future date. There is no specific evidence of prejudice that arises from MCFN's addition as an intervening party.

[102] SNGR argues that it will be unduly prejudiced if MCFN's addition expands the scope of the evidence and issues. I am satisfied that MCFN does not seek to do so. Rather, it seeks to adduce evidence on the issues already raised in the proceeding, and make argument on those issues, including resisting relief claimed by SNGR based on its contention that the Haldimand Proclamation is a treaty. MCFN's participation will expand the evidentiary record, but in a way that will be useful to the court.

[103] SNGR opposes MCFN's motion on the basis that allowing MCFN to intervene will cause undue delay. Any delay is unfortunate, and particularly so in an action of this age. SNGR rightly wants to proceed to trial as quickly as possible.

[104] The reality in this case is that the defendants continue to work on their expert evidence (albeit in breach of the current timeline), and there is a pleadings motion upcoming at which the defendants may be expected to argue that they need additional time to complete their expert reports in view of the plaintiff's proposed pleading amendments. It remains to be seen whether they will be able to establish that they require a timetable amendment if leave to amend is granted.

[105] Thus, the addition of MCFN may cause delay, but it is also possible that the timetable will be amended to provide for additional time for delivery of expert evidence, in which case MCFN may be able to work within a revised timetable.

[106] I note that Ontario seeks additional time to respond to MCFN's expert evidence if it is added as a party to the litigation. If such additional time is necessary, it can be expected to add delay.

[107] However, even if adding MCFN causes additional delay, I am satisfied that the delay will not be undue, having regard to the importance of the evidence MCFN can adduce, MCFN's commitment to work diligently towards advancing the action, and the fact that MCFN does not seek to expand the issues in this litigation.

[108] The parties made submissions about the terms that would appropriately guide MCFN's intervention were it permitted to intervene, to ensure that MCFN's intervention would be efficient, and to mitigate against any delay that the intervention would cause.

[109] I have considered SNGR's submission that MCFN should be restricted with respect to the issues on which it may engage. In my view, it is not practical at this stage to limit MCFN's involvement to certain issues, when the scope of the issues raised in this action are still evolving, and indeed, may continue to evolve even at trial, due to the nature of the litigation. MCFN has described its interest in this litigation. It is my expectation that it will focus its efforts as a party in this litigation on the issues and evidence that engage its interests as it has described them in this motion.

[110] SNGR and Ontario have submitted that it is appropriate to place a condition requiring MCFN to be bound by findings of law and fact in the action, including any appeals. I see no reason to do so. The effect of findings of law and fact in a proceeding operates by law, not by order.

[111] However, other guard rails are appropriate and will assist in moving this litigation assiduously towards trial. I grant leave to MCFN to intervene as a party under r. 13.01 under the following terms:

a. SNGR, Canada, and Ontario shall deliver to MCFN: all productions; discovery transcripts; answers to written examination for discovery; answers to undertakings, under advisements, and refusals; expert reports and documents referred to therein; orders and endorsements of this court; the most recent draft of the issues list; and any other documents necessary for a party to this action to have within 15 days of the date of this endorsement.

b. MCFN shall not make any counterclaims, crossclaims, or third-party claims, and shall seek no relief in this action. MCFN may oppose relief that is sought by the other parties.

c. MCFN shall not be examined for discovery nor examine for discovery any other party without leave of the court or consent of the parties.

d. MCFN shall have the right to adduce evidence at trial, and cross-examine at trial; however, MCFN shall not duplicate the evidence led or the arguments made by other parties.

e. MCFN shall comply with all timetables set in this proceeding. The parties may expect the timetables that will be set to be aggressive.

[112] I will deal with the timing of the delivery of MCFN's statement of defence in my reasons on SNGR's motion to amend its pleadings, scheduled for June 30, 2023.

Costs

Costs of Men's Fire's Motion

[113] Men's Fire does not seek costs of its intervention motion. None are ordered.

Costs of HDI's Motion

[114] I encourage the parties to resolve the issue of costs of the HDI motion. If they are unable to do so such that determination of the costs of the HDI motion requires written submissions, I set out the following schedule:

a. Any party seeking costs of the motion shall deliver a costs outline together with written submissions not to exceed three pages, and any relevant offers to settle by July 7, 2023.

b. Any responding party shall deliver a costs outline together with written submissions not to exceed three pages, and any relevant offers to settle by July 19, 2023.

c. Reply submissions, not to exceed one page, may be delivered by July 26, 2023.

d. Submissions shall be sent to me by way of email to my assistant.

Costs of MCFN's Motion

[115] The parties have delivered costs submissions with respect to MCFN's motion.

[116] MCFN seeks its costs, on a partial indemnity scale, of $84,176.98 if successful. It has discounted the amount of its costs from those actually incurred. It argues that the motion for leave to intervene was moderately complex, and required analysis of voluminous materials. It also argues that the issues raised in the litigation directly engage its history, rights and treaties, making the issues on the motion, and the litigation, very important to it.

[117] SNGR seeks its costs, on a partial indemnity scale, of $32,173.88, an amount that does not reflect the actual costs incurred, but discounts the costs to reflect what, in SNGR's view, is fair and reasonable. SNGR argues that if MCFN's motion is granted, as it has been, MCFN or the defendants should pay SNGR's partial indemnity costs, or alternatively, the parties should bear their own costs.

[118] In support of its claim for costs, SNGR argues that: (i) MCFN brought its motion to intervene late; (ii) the motion was of moderate complexity; and (iii) the issues were very important. With respect to Ontario, SNGR argues that its conduct merits a costs sanction since, without

Ontario having provided certain of SNGR's expert reports to MCFN, MCFN would not have moved to intervene. It alleges Ontario misstated the nature of SNGR's claim to MCFN, and wrongly shared unfiled expert reports without first raising the issue with SNGR or in the case management process.

[119] Canada seeks no costs and asks that no costs be awarded against it. It notes that it consented to MCFN's motion after understanding the limits to the intervention that MCFN proposed, that it did not add to the record, or cause any delay in the proceedings. Moreover, Canada, together with Ontario, jointly assumed the costs associated with making the hearing of the intervention motion more accessible to the public via livestreaming administered by a third-party contractor.

[120] Ontario does not seek costs of the motion and asks that no costs be awarded against it. It disputes that it is responsible for the MCFN motion and denies it has acted improperly or in bad faith. It notes that MCFN has also taken the position that there was no collusion between Ontario and MCFN on this motion – a position I have already accepted.

[121] Ontario argues that it did nothing improper by sharing the expert reports with MCFN. It puts forth that (i) the deemed undertaking rule does not extend to expert reports; (ii) Ontario shared the expert reports to obtain responsive evidence for the litigation; (iii) once served, expert reports are no longer subject to litigation privilege; and (iv) SNGR had not sought a protective order.

[122] The three main purposes of modern costs rules are to indemnify successful litigants for the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants: see *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.), at para. 22.

[123] Subject to the provisions of an act or the rules of this court, costs are in the discretion of the court pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The court exercises its discretion considering the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 24. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

[124] MCFN is the successful party on this motion, and has been granted permission to intervene as a party. It is presumptively entitled to its costs.

[125] SNGR was the only party which resisted MCFN's motion to intervene. However, neither Crown consented until after MCFN incurred the bulk of its costs by preparing its record. I do not suggest that SNGR or the defendants took unreasonable positions in the motion, but the reality is that MCFN was required to incur the costs it did to obtain the result it did. While the defendants have a legitimate basis to deny responsibility for MCFN's costs of preparing for the hearing and arguing the motion, they do not have a legitimate basis to deny their responsibility for costs for the preparation of the motion record, which would likely have been less involved to prepare if the motion had been consented to by all parties in advance.

[126] MCFN's motion was moderately complex, and required significant preparation. The materials MCFN produced were of high quality. Counsel's hourly rates are reasonable.

[127] However, I find that the quantum of costs sought is outside the reasonable expectations of SNGR and the Crowns.

[128] In my view, it is fair and reasonable for MCFN to have its costs in the amount of $35,000, all-inclusive, to be paid severally as follows: (i) $11,000 by Ontario; (ii) $11,000 by Canada, and (iii) $13,000 by SGNR. All amounts shall be paid within 30 days.

[129] I deny SGNR's request for costs, or indemnity for MCFN's costs, from Ontario. SNGR is a sophisticated litigant. It made its decisions as to how to respond to MCFN's motion. Ontario did not force SNGR to oppose the motion or prepare responding materials.

[130] Moreover, the argument that MCFN's motion was precipitated because Ontario shared several of SNGR's expert reports with MCFN ignores the fact that MCFN had good reason to seek to intervene, and it is better for everyone that it did so when it did, and not in the middle of trial as expert evidence on its history and treaties was led. Moreover, while I agree that, given the case management process, it would have been appropriate for Ontario to raise its intention to share the expert reports with MCFN, it did not act in breach of the *Rules of Civil Procedure* or unethically in doing so.

Conclusion

[131] In summary, I make the following orders:

a. With respect to Men's Fire:

   i. The motion for leave to intervene as a party in HDI's motion is granted.

   ii. The motion for leave to intervene as a party in the action is dismissed.

   iii. No costs are ordered.

b. With respect to HDI:

   i. The motion for leave to intervene as a party in the action is dismissed.

   ii. If costs cannot be agreed upon, the parties shall deliver written submissions in accordance with the schedule set out at para. 114 herein.

c. With respect to MCFN:

   i. The motion for leave to intervene as a party in the litigation is granted, subject to the following terms:

      1. SNGR, Canada and Ontario shall deliver to MCFN: all productions; discovery transcripts; answers to written examination for discovery; answers to undertakings, under advisements, and refusals; expert

reports and documents referred to therein; orders and endorsements of this court; the most recent draft of the issues list; and any other documents necessary for a party to this action to have within 15 days of the date of this endorsement.

2. MCFN shall not make any counterclaims, crossclaims, or third-party claims, and shall seek no relief in this action. MCFN may oppose relief that is sought by the other parties.

3. MCFN shall not be examined for discovery, nor examine for discovery any other party, without leave of the court or consent of the parties.

4. MCFN shall have the right to adduce evidence at trial, and cross-examine at trial; however, MCFN shall not duplicate the evidence led, or arguments made, by other parties.

5. MCFN shall comply with all timetables set in this proceeding. The parties may expect the timetables that will be set to be aggressive.

6. The timing for delivery of MCFN's statement of defence shall be determined after the plaintiff's motion to amend its statement of claim is heard on June 30, 2023.

7. Canada and Ontario shall severally pay MCFN its costs in the amount of $11,000 each within 30 days. SGNR shall severally pay MCFN its costs of $13,000 within 30 days.

[132] I thank all counsel for the high quality of materials prepared and arguments made.

J.T. Akbarali J.

Date: June 14, 2023