

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 2863

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

DATE: 20230512

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, Max Shapiro, and Laura Dougan*, for the plaintiff

Tania Mitchell, Maria Vujnovic, Tanya Muthusamipillai, and Elizabeth Chan for the defendant The Attorney General of Canada

Manizeh Fancy, Christine Perruzza, David Tortell, and Jennifer Lepan, for the defendant His Majesty the King in Right of Ontario

HEARD: April 6, 2023 and May 11, 2023

CASE MANAGEMENT CONFERENCE ENDORSEMENT

[1] I held case management conferences in this action on April 6 and May 11, 2023, principally to deal with the issue of the timing for delivery of the defendants' expert reports, but also to address scheduling issues with respect to the plaintiff's upcoming motion to amend its pleading. This endorsement addresses both of these issues.

Delivery of Defendants' Expert Reports

[2] To summarize the parties' positions briefly, the defendants argue that the proposed amendments to the plaintiff's statement of claim, which are the subject of the upcoming motion, add new claims and expand existing claims. As a result, they argue, they need to retain new experts, and some of the experts already retained will have to change the scope of their reports. Thus, they seek an order vacating the dates for delivery of their expert reports. They suggest that some of the experts they will retain will be unable to even begin work on their reports until sometime in 2024, perhaps as late as the fall of 2024 in the case of one proposed expert.

[3] The plaintiff argues that there is no need to amend the existing timetable at this stage. The defendants have given no reason why they cannot deliver their expert reports that respond to the current pleading in accordance with the timetable set by Sanfilippo J., which required those reports be delivered by April 30, 2023. The pleading has not yet been amended, and the defendants are resisting some or all of the amendments in any event. To the extent that any amendments granted

require further expert reports, or supplementary expert reports, the plaintiff argues I can deal with that in case management or on the motion to amend, where I understand evidence has been filed on the issue of procurement of expert reports, presumably to support the defendants' position that additional time will be required to complete their expert evidence.

[4] The defendants have focused on the proposed pleadings amendments. I have heard no compelling reason from the defendants as to why, if the amendments are not granted, the timetable for the expert reports needs to be adjusted. The plaintiff delivered their expert reports in 2022. Justice Sanfilippo set the schedule for the exchange of expert reports having regard to many of the factors the defendants now raise, including how long they have had the plaintiff's reports, and certain challenges that arose for the experts in trying to do their work during the COVID-19 pandemic when, for examples, certain resources and libraries were unavailable or only available in a limited way.

[5] There is one exception: I understand one defence expert is seriously ill. The plaintiff has indicated it is willing to have reasonable discussions with the defendants as to an adjusted timetable for that expert's report (or a report from a new expert to replace the original expert). I agree that illness of an expert is a circumstance that will likely justify an extension of time for delivery of that expert's report. The parties should discuss this particular report and at an appropriate time, the timing for it can be addressed in case management. This could be on delivery of the report, by way of a request to late-file it due to the unfortunate circumstances that have befallen the original expert.

[6] Because this case conference was originally supposed to take place in mid-April 2023 but had to be cancelled due to a family emergency, I appreciate that the defendants might have been counting on an extension of time to deliver their expert reports. For that reason only, I grant a brief indulgence. Defence expert reports responding to the current pleading shall be delivered by June 9, 2023 (although I do not expect any report from the expert who is ill at that time). Any reports not delivered by that time will require leave from me or from the trial judge to be introduced into the record.

[7] If the proposed pleading amendments affect the defendants' expert evidence (a matter on which I heard conflicting submissions, and which will be more fully argued on a proper record at the pleadings motion), and assuming leave to amend is granted in whole or in part, I will address any timetables for delivery of further expert evidence on the pleadings motion, when I will be able to have regard to the evidence filed with respect to the defendants' processes for obtaining expert evidence. I note that this evidence, although served, was not available to me at the case conferences.

The Pleadings Motion

[8] The defendants have filed a Notice of Cross-motion seeking to strike portions of the plaintiff's pleading, including portions that are not the subject of the proposed amendments, to remove any pleading by way of example. They have brought the motion without seeking leave in the case management process, although they have sought leave in the notice of motion. They advise that they wish to ensure that I have the jurisdiction to deal with the entirety of the pleadings issues at the same time.

[9] I agree that the question of the propriety of the pleading ought to be settled. Accordingly, I grant leave to the defendants to bring their motion to strike, which shall be heard together with the plaintiff's motion for leave to amend.

[10] The motion to amend pleadings is currently scheduled for May 23, 2023. The date will have to be vacated to allow for the motions to be fully briefed, including responding material from the plaintiff to the cross-motion, reply from the defendants (if required), cross-examinations, if necessary, the exchange of factums, and finally, the hearing of the motion.

[11] I am prepared to hear the pleadings motions on June 30, 2023, for one day. The parties should consult with each other on a timetable to ready the motions for hearing on that day, and report to me by May 16, 2023, with respect to whether they have been able to set a consent timetable. If they cannot agree on a timetable, I will hear the parties for a case conference on May 23, 2023, at 10 a.m. for 90 minutes, to set a timetable. As that date is a week and a half from the release of this endorsement, I suggest the parties not wait until May 23, 2023 to kick preparation for the pleadings motions into high gear. Their efforts to prepare the motions should be in high gear immediately, with a view to completing as many steps as possible by May 23, 2023. I will expect a report at the case conference, if a case conference is necessary, on the efforts the parties have made to ready the pleadings motions for hearing. The motions should be heard before the summer, when scheduling will grow infinitely more difficult. I see no reason to delay the hearing of these motions until the fall, which is a real possibility if they are not heard by the end of June.

J.T. Akbarali J.

Date: May 12, 2023