

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE)
JUSTICE J. T. AKBARALI)
TUESDAY, THE 11th
DAY OF JUNE, 2024

B E T W E E N :

SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS Plaintiff
- and -

**THE ATTORNEY GENERAL OF CANADA and
HIS MAJESTY THE KING IN RIGHT OF ONTARIO** Defendants
- and -

MISSISSAUGAS OF THE CREDIT FIRST NATION Intervenor

ORDER

UPON MOTION brought by the Attorney General of Canada for leave to examine three of its expert witnesses before trial pursuant to Rule 36.01.

AND UPON the parties' resolution of the motion in almost all respects; said resolution forming part of this Order and appended as **Schedule "A"**; the only issues requiring adjudication were the quantum of interim costs payable by Canada to the plaintiff, and the costs of the motion, which were heard in writing.

ON READING the Motion Record of the Attorney General of Canada, dated April 9, 2024, the Responding Motion Record of the Plaintiff, dated April 15, 2024, the Supplementary Motion Record of the Attorney General of Canada, dated April

23, 2024, the Factum of the Attorney General of Canada, dated May 6, 2024, the Transcript of the Cross-Examination of Myra Sivaloganathan, dated May 2, 2024, the Factum of the Mississaugas of the Credit First Nation (MCFN), dated May 13, 2024, Factum of the Plaintiff Six Nations of the Grand River Band of Indians, dated May 14, 2024, Factum of the Defendant His Majesty the King in right of Ontario, dated May 14, 2024, Email from Tanya Muthusamipillai, counsel for Canada, to all parties and the Court dated May 23, 2024 inclusive of the terms agreed upon and attached as **Schedule "A"**, the Attorney General of Canada's Reply to the Plaintiff's Interim Cost Submissions, dated May 24, 2024, Sur-Reply of the Plaintiff Six Nations of the Grand River Band of Indians, dated May 29, 2024, Costs Outline, Plaintiff Six Nations of the Grand River Band of Indians, dated June 5, 2024, Costs Submissions of the MCFN, dated June 5, 2024, Reply Cost Submissions of the Attorney General of Canada, dated June 10, 2024, Reply Cost Submissions of His Majesty the King in right of Ontario dated, June 10, 2024, and for reasons in the Endorsement released this day:

1. **THIS COURT ORDERS** that Canada is granted leave under Rule 36.01 to examine three of its expert witnesses before trial pursuant to the terms set out in **Schedule "A"**.
2. **THIS COURT ORDERS THAT** the attached **Schedule "A"** regarding the taking of evidence before trial, as agreed to by the plaintiff, defendants and intervenor forms part of this order and shall be complied with.

3. **THIS COURT ORDERS THAT** Canada shall pay to MCFN its interim costs of \$50,000, as agreed to in the terms set out in **Schedule “A”**, within sixty days from the date of this order.
4. **THIS COURT ORDERS THAT** Canada shall pay to the plaintiff its interim costs of \$150,000, within sixty days from the date of this order.
5. **THIS COURT ORDERS THAT** if the trial judge orders that the examinations taken out of court be played at trial, any party may seek the duplication of costs arising therefrom, which costs are reserved to the trial judge to determine.
6. **THIS COURT ORDERS THAT** the remaining costs of the examinations are reserved to the trial judge.
7. **THIS COURT ORDERS THAT** no costs are ordered with respect to this motion.

THIS ORDER BEARS INTEREST at the rate of 7.0% per year commencing on June 11, 2024.

JUSTICE J. T. AKBARALI

SCHEDULE “A”

Regarding the taking of evidence before trial for Professors McCalla, Read, and Miller (each an “**Expert**” and together the “**Experts**”):

General

1. Subject to the terms herein and further direction from the Court, Canada is granted leave under Rule 36 to examine the Experts out-of-court before trial for the purpose of having the Experts’ testimony available to be tendered as evidence at trial.
2. The Experts shall deliver no additional expert reports beyond those already delivered.
3. The Experts will not be called by any party to give evidence at trial without leave of the trial judge.

Right to cross-examine, and sequencing

4. The Plaintiff may cross-examine the Experts.
5. Ontario and MCFN may cross-examine the Experts only to the extent and under the circumstances that they would be entitled to cross-examine the Experts at trial. Ontario and MCFN will conduct cross-examinations of each Expert, if any, before the Plaintiff’s cross-examinations of each Expert.

Notice of cross-examination topics by Ontario and MCFN

6. No later than 21 days before the scheduled commencement of the examinations of each respective Expert, Ontario and MCFN will provide notice to the other parties setting out topics on which they intend to cross-examine (the “**Notice**”). The parties acknowledge that the Notice is not intended to restrict cross-examinations to only topics set out in the Notice but rather to avoid the Plaintiff having to address in cross-examination unexpected expert opinion evidence for which it has not had an adequate opportunity to prepare in advance.
7. Any party may seek direction from the Case Management Judge regarding a Notice before the examinations.

Objections during examinations

8. The Court shall appoint a hybrid commissioner to preside over the examinations and decide any objections as they arise. The particulars and scope of the hybrid

commissioner's mandate are to be determined by the parties with the direction of the case management judge.

9. If an objection arises from a question on a topic that is not set out in the Notice, and where that question is allowed to be answered, the Plaintiff reserves the right to request to adjourn its cross-examination as necessary to consider that topic.

Costs and fees

10. Canada will, at its cost, arrange for appropriate court reporting and video recording services for the examinations. This will include real-time transcription reporting, as may be necessary to address objections. Canada will pay for all the fees associated with the examinations, including fees for copies of transcripts ordered by other examining parties and virtual access for counsel, client representatives, and community members if requested.

11. Pursuant to Rule 36.01(5), Canada will pay, in advance of the examinations, the costs that the Plaintiff and MCFN reasonably expect to arise from the examinations and any related cross-examination or re-examination, in the amount of:

- (a) \$150,000 to the Plaintiff; and
- (b) \$50,000 to MCFN.

Playback at trial

12. Canada expects to seek leave from the trial judge to play the video recorded testimony of the Experts at trial pursuant to Rule 36.04(4).

Examination timing and location

13. The Experts will be examined in person in Toronto. Professors McCalla and Read shall be examined by September 30, 2024, and Professor Miller shall be examined in the Fall of 2024.

SIX NATIONS OF THE GRAND RIVER
BAND OF INDIANS
Plaintiff

-and-
THE ATTORNEY GENERAL OF CANADA and
HIS MAJESTY THE KING IN RIGHT OF ONTARIO
Defendants

-and-
MISSISSAUGAS OF THE CREDIT
FIRST NATION
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**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at
TORONTO

ORDER

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