

Federal Court



Cour fédérale

Date: 20090811

Docket: T-195-92

Citation: 2009 FC 760

OTTAWA, Ontario, August 11, 2009

**PRESENT:** The Honourable Max M. Teitelbaum

**BETWEEN:**

**ALDERVILLE INDIAN BAND now known as Mississaugas of Alderville First Nation, and Gimaa Jim Bob Marsden, suing on his own behalf and on behalf of the members of the Mississaugas of Alderville First Nation**

**BEAUSOLEIL INDIAN BAND now known as Beausoleil First Nation, and Gimaaniniikwe Valerie Monague, suing on her own behalf and on behalf of the members of the Beausoleil First Nation**

**CHIPPEWAS OF GEORGINA ISLAND INDIAN BAND now known as Chippewas of Georgina Island First Nation, and Gimaa William McCue, suing on his own behalf and on behalf of the members of the Chippewas of Georgina Island First Nation**

**CHIPPEWAS OF RAMA INDIAN BAND now known as Mnjikaning First Nation, and Gimaaniniikwe Sharon Stinson-Henry, suing on her own behalf and on behalf of the members of the Mnjikaning First Nation**

**CURVE LAKE INDIAN BAND now known as Curve Lake First Nation, and Gimaa Keith Knott, suing on his own behalf and on behalf of the members of the Curve Lake First Nation**

**HIAWATHA INDIAN BAND now known as Hiawatha First Nation, and Gimaa Greg Cowie, suing on his own behalf and on behalf of the members of the Hiawatha First Nation**

**MISSISSAUGAS OF SCUGOG INDIAN BAND now known as Mississaugas of Scugog Island First Nation, and Gimaaniniikwe Tracy Gauthier, suing on her own behalf and on behalf of the members of the Mississaugas of Scugog Island First Nation**

**Plaintiffs**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

**Third Party**

**AMENDED REASONS FOR ORDER AND ORDER**

[1] This is a motion pursuant to Rule 51 of the *Federal Courts Rules* wherein the Third Party, Her Majesty the Queen in Right of Ontario (Ontario) is appealing a decision of Prothonotary Milczynski dated May 6, 2009.

[2] As stated by Ontario in its Motion Record, the motion is for:

- An Order setting aside, in part, the Order of Prothonotary Milczynski made May 6, 2009 on a motion by the third party.
- An Order requiring the plaintiffs to answer by way of written interrogatory questions 33, 34, 38, 39, 40, 49 and 54 in Ontario's Written Discovery Questions for the Plaintiffs dated March 13, 2009, which questions are particularized in the attached Appendix "A", and to answer any proper further questions reasonably arising from the answers so given.
- An Order for the costs of this motion.

- Such further and other relief as this Honourable Court may deem reasonable and just.

[3] The grounds for the motion as stated in the Motion Record, are:

- The prothonotary erred in failing to overrule the plaintiff's objections to these discovery questions and direct the plaintiffs to answer the questions by way of written interrogatory.
- The decision of the prothonotary was based upon wrong principles or a misapplication of the principles governing the scope of permissible discovery.
- Questions 33, 34, 49 and 54, as particularized in Appendix "A", are relevant on the fact of the pleadings in the main action and the prothonotary erred in upholding the objections to them on the basis that they were not relevant.
- Questions 38, 39 and 40, as particularized in Appendix "A", are questions of mixed fact and law in which the third party is seeking the plaintiffs' factual understanding and accordingly, the prothonotary erred in upholding the plaintiffs' objections to them on the basis that they are a legal question.
- In ruling that these questions were not relevant or a legal question the prothonotary erred in principle and impaired the right and ability of the third party to inform itself fully, through the discovery process, of the precise nature of the plaintiffs' positions so as to define fully the issues between.

[4] The motion relates to the following questions and rulings:

Q N	QUESTION	OBJECTION	RULING MAY 6
33	In the years since 1923, have any of the plaintiffs either attempted to or actually purchased lands to add to their reserves with funds from their trust accounts or otherwise? If yes, identify the facts concerning such purchases. If there were no such transactions, what are the reasons for which such transactions were not undertaken?	Objection on the basis of relevance	Objection upheld
34	Please list all the claims since 1923 that have been asserted against either the Federal or Provincial Crown, or both in relation to each plaintiff's traditional territory, its treaties, or any surrender of reserve lands. When answering this question, kindly describe what was sought by each asserted claim, when it was advanced, and what remedies were being sought if the claim remains outstanding. If any claims have been settled when were they settled and what were the key settlement terms?	Objection on the basis of relevance	Objection upheld
38	In 1923, what did each plaintiff believe or understand clause 1 of the Williams Treaties to mean? Does each plaintiff have the same belief or understanding today? If not, what is the basis for the change in belief or understanding?	Objection – Legal question	Objection upheld
39	In 1923, what did each plaintiff believe or understand clause 2 of the Williams Treaties to mean? Does each plaintiff have the same belief or understanding today? If not, what is the basis for the change in belief or understanding?	Objection – Legal question	
40	<p>In 1923, what did each plaintiff believe or understand clause 3 of the Williams Treaties to mean? Does each plaintiff have the same belief or understanding today? If not, what is the basis for the change in belief or understanding?</p> <p>Claude 3 reads as follows:</p> <p>AND ALSO all the right, title, interest,</p>	Objection – Legal question	Objection upheld

	claim, demand and privileges whatsoever of the said Indians, in, to, upon or in respect of all other lands situate in the Province of Ontario to which they ever had, now have, or now claim to have any right, title, interest, claim, demand or privileges, except such reserves as have therefore been set apart for them by His Majesty the King.		
49	In the ten years leading up to the signing of the Williams Treaties, did any members of the plaintiff seek licences under the relevant provincial game and fishing legislation?	Objection on the basis of relevance	Objection upheld
54	For each plaintiff, did its members apply for licences under the provincial game and fish legislation after 1923?	Objection on the basis of relevance	Objection upheld

[5] As I have said in the decision between the Plaintiffs v. Canada, these reasons will be very brief due to the urgency in issuing this decision, that is, the case is scheduled for hearing on the merits in September 2009 for a period of eight months.

[6] After considering the pleadings and the oral submissions of the parties, and taking into account the case of *Merck & Co. Inc. v. Apotex Inc.*, 2003 FCA 488, wherein it was clearly stated that discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

- a) The questions raised in the motion are vital to the final issue of the case, or
- b) The orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[7] This standard was recently confirmed and adopted by the Federal Court of Appeal in *Novopharm Ltd. v. Eli Lilly Canada Inc.*, 2008 FCA 287 at paragraph 52.

[8] For the reasons given in her decision of May 6, 2009, the Prothonotary's decision relating to questions 33, 34, 49 and 54 are maintained.

[9] Questions 38, 39 and 40 are set aside, it being clearly understood that the answer is not to be a "legal question" but simply what is it that the plaintiffs believed or understood the Treaties meant.

[10] It will be for the judge hearing the case on the merits to decide what was understood by the plaintiffs.

**ORDER**

**THIS COURT ORDERS** that the plaintiffs shall have a delay of 15 days from the date of this Order to answer the questions. Costs in the cause.

"Max M. Teitelbaum"

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Deputy Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-195-92

**STYLE OF CAUSE:** Alderville Indian Band et al v. Her Majesty the Queen  
and Her Majesty the Queen in Right of Ontario

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** July 6, 2009

**REASONS FOR ORDER:** TEITELBAUM D.J.

**DATED:** August 11, 2009

**APPEARANCES:**

Mr. Peter Hutchins FOR THE PLAINTIFFS  
Ms. Julie Corrie

Mr. Owen Young FOR THE DEFENDANT

Mr. Ronald Carr FOR THE THIRD PARTY

**SOLICITORS OF RECORD:**

Hutchins, Caron & Associates FOR THE PLAINTIFFS

John H. Sims, Q.C. FOR THE DEFENDANT  
Deputy Attorney General of Canada

Ministry of the Attorney General FOR THE THIRD PARTY  
Crown Law Office - Civil