

Federal Court



Cour fédérale

Date: 20090727

Docket: T-195-92

Citation: 2009 FC 761

OTTAWA, Ontario, July 27, 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

REASONS FOR ORDER AND ORDER

[1] This is a motion pursuant to Rule 51 of the *Federal Courts Rules* for:

- An Order setting aside, in part, the Order of Prothonotary Milczynski made June 1 and June 18, 2009 on a motion by the defendant.
- An Order requiring the plaintiffs to answer the following seven written discovery questions posed by Canada on January 15, 2009:
Q12(b), Q12(c), Q13(b), Q13(c), Q14, Q19, Q39,
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 revising or amending the orders made June 1 and June 18 to accord in other respects with a written consent and draft order submitted by the parties to the prothonotary on June 17, 2009 on a supplementary motion brought before her under Rules 397 and 394.
- An Order for the costs of this motion.

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

[2] The grounds for the present motion, as stated by the defendant Canada, are:

- The prothonotary erred in failing to direct the plaintiffs to answer these discovery questions posed by way of written interrogatory.
- The decision of the prothonotary was based upon incorrect or wrong principles or a misapplication of the principles governing the scope of permissible discovery.
- The questions listed in Appendix “A” are relevant on the facts of the pleadings and the prothonotary erred in upholding objections to answering them on the basis that they are not relevant.
- The prothonotary failed to apply to the discovery questions of the defendant the purposive approach and liberal interpretation appropriate to discoveries conducted in writing.
- In ruling that these discovery questions were not relevant, the prothonotary erred in principle and effectively impaired the right and ability of the defendant to develop, through the discovery process, the theory of its case.
- Such further grounds as counsel may advise and this Honourable Court may permit.

[3] At the commencement of the hearing, counsel for Canada informed the Court that he is no longer requesting the Court for an Order revising or amending the orders made June 1 and June 18 to accord in other respects with a written consent and draft order submitted by the parties to the

prothonotary on June 17, 2009 on a supplementary motion brought before her under Rules 297 and 394.

[4] The questions and rulings on Canada's motion are:

Q N	DISCOVERY QUESTION	PLAINTIFFS' OBJECTION	PROTHONOTARY'S RULING
12	Please answer each of these questions separately with respect to each of the plaintiff First Nations. At the time of contact, which Canada fixes at about 1640, -		
12(b)	Where was the plaintiff's village?	Objection on the basis of relevance	Objection upheld
12(c)	If the plaintiff was not yet in existence, who and where was the plaintiff's predecessor First Nation?	Objection on the basis of relevance	Objection upheld
13	Please answer each of these questions separately with respect to each of the plaintiff First Nations. At the time of sovereignty, which Canada fixes at 1763, -		
13(b)	Where was the plaintiff's village?	Objection on the basis of relevance	Objection upheld
13(c)	If the plaintiff was not yet in existence, who and where was the plaintiff's predecessor First Nation?	Objection on the basis of relevance	Objection upheld
14	What village sites has the plaintiff band occupied from the time of first contact, to 1923 and intervals between?	Objection on the basis of relevance	Objection upheld
19	What access and use of lands other than lands covered by the Williams Treaties did each of the plaintiff bands enjoy at the time of first contact, time of sovereignty, in 1923, and intervals between?	Objection on basis of relevance as well as being a legal question	Objection upheld on the basis that not relevant
39	What is the position of each of the plaintiffs of the nature and effect of "the baske clause" (3 rd clause) of the williams Treaty, and what is the position of each of the plaintiffs with	Objection, legal question	Objection upheld

	respect to the meaning and intent of the clause and its impact on the First Nations?		
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[5] Let me start by saying that these reasons will be very brief because of the urgency of issuing these reasons.

[6] The urgency is that this case is scheduled for hearing in September 2009 and is to be heard over a period of eight months.

[7] After considering the pleading of the parties and after considering the oral submissions and the case of *Merck & Co. Inc. v. Apotex Inc.*, 2003 FCA 488 at paragraph 19, in which Justice Décary concluded, relying on the standard enunciated by the Federal Court of Appeal in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (FCA) that the discretionary orders of prothonotaries ought not 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.

[8] For the reasons given by the Prothonotary, her decision relating to questions 12, 12(b) and (c), 13, 13(b) and (c), 14 and 39 is maintained.

[9] With regard to question 19, I am satisfied that the answer would, at this time, be relevant to the hearing judge who can determine in his final decision the weight to be given to this evidence.

ORDER

THIS COURT ORDERS that the plaintiffs answer question 19. Costs in the cause.

"Max M. Teitelbaum"

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: July 27, 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. Deputy Attorney General of Canada	FOR THE DEFENDANT
Ministry of the Attorney General Crown Law Office - Civil	FOR THE THIRD PARTY