

**Date: 20091001**

**Docket: T-195-92**

**Citation: 2009 FC 994**

**Toronto, October 1, 2009**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

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

**BEAUSOLIEL INDIAN BAND now know as Beausoliel 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 know 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 know 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 know 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] The Plaintiffs apply for this Court to hear the testimony of community profile witnesses of the seven Plaintiff First Nations in one or more of the Williams Treaties First Nations. The Plaintiffs also apply to have the Court view each of the Plaintiffs' communities prior to the testimony of the community profile witnesses.

[2] The Plaintiffs have seven community profile witnesses to represent each of the seven First Nations. Each witness is to provide evidence on the past and present economic and social structure of his or her respective First Nation.

[3] The Plaintiffs originally presented this in the form of a proposal which was subsequently set down for hearing as a Motion. Subsequent to the adjournment of the hearing, I ordered this Motion to proceed under Rule 369 of the *Federal Court Rules* SOR/98-106 (the "Rules"). I have now reviewed the submissions of the Plaintiff First Nations and the Defendant Canada (Her

Majesty in Right of Canada) on this subject. The Third Party Ontario (Her Majesty in Right of Ontario) has chosen not to make any submission.

### **Relevant Legislation**

[4] Section 15 of the *Federal Courts Act*, R.S., 1985, c. F-7 (“FCA”) concerns sittings of the Federal Court.

15. (1) Subject to the Rules, any judge of the Federal Court may sit and act at any time and at any place in Canada for the transaction of the business of the court or any part of it and, when a judge so sits or acts, the judge constitutes the court.

[5] Rule 28 of the *Rules* states:

The Court may sit at any time and at any place.

In addition, Rule 29 of the *Rules* states:

(1) Subject to subsection (2) and rule 30, hearings of the Court, other than pre-trial or dispute resolution conferences, shall be open and accessible to the public.

While the Court may sit *in camera* by application, this is not an issue here. The request is for public sittings in the respective First Nation communities.

### **Analysis**

[6] In *Canada (AG) v. Hennelly*, [1995] F.C.J. No. 320, Justice Muldoon expanded on s. 15 of the FCA.

“The Federal Court is a national, trans-provincial institution with registry offices established in certain populous centres across Canada and itinerant judges travelling across Canada in order to adjudicate cases instituted in those various registry offices... adjudication hearings may (not must) be held in any place where there are available basic court facilities.”

[7] Where the Court sits is a matter to be decided at the Court’s discretion.

[8] The Plaintiffs’ community witnesses wish to testify in the Williams Treaty First Nations communities. It will facilitate the testimony of the community witnesses who are testifying about communities they are either on or near. The sittings in the First Nation communities advance the openness and accessibility of this Court to the members of the First Nations who have an interest in this proceeding. This will also allow the members of those communities to observe and understand the court process.

[9] I have decided to grant the Plaintiffs’ application in part.

[10] The evidence of the Plaintiffs’ community profile witnesses for the Mississaugas of Alderville First Nation, Hiawatha First Nation and Curve Lake First Nation will be heard in the Curve Lake First Nation. The evidence of the community profile witnesses for Beausoleil First Nation, the Chippewas of Georgina Island First Nation, Mnjikaning First Nation and the Mississaugas of Scugog Island First Nation will be heard in the Mnjikaning First Nation.

[11] The Court sittings in the First Nations should observe the following:

- a. The court sitting will be in a room suitable for the hearing of the testimony of the community witnesses;
- b. No objects capable of being relevant demonstrative evidence shall be in the court room save what will be introduced in the course of the testimony of the community witnesses;
- c. The commencement of court may be preceded by a First Nations ceremony or protocol in keeping with the custom of the First Nation where the court is sitting and the role of the Court; and
- d. Translation facilities should be available as necessary.

[12] On the question of viewing, it seems to me the jurisprudence in Canada points to one function of viewings, and that is to gain a better understanding of evidence. Viewings meant to provide a judge with a way of collecting evidence is frowned upon. Justice Rothstein, while sitting on this Court, canvassed jurisprudence considering both streams in *Jaworski v. Canada (Attorney General)*, [1990] 2 F.C. 106 (F.C.T.D). He concluded, and I agree, that a viewing is not an evidence gathering exercise, so much as an opportunity for the trial judge to test what he hears against what he sees. And this is what I take to be a way a judge may gain a better understanding of all the evidence heard before or after a viewing.

[13] I adjourn the hearing of the Plaintiffs' application for a viewing of the First Nations community until after hearing all of the seven community witnesses. I am satisfied that the viewing should take place after there is evidence that provides a framework for the viewing. In

addition, the parties should have the opportunity to consider co-operatively what the arrangements for a viewing should be and agree on a process. If the parties are unable to agree, then they may make submissions to the Court after which the Court may set out the terms for the viewing if it decides viewings are appropriate.

[14] I direct the parties make their further submissions concerning viewings after the sittings in Curve Lake and Mnjikaning First Nations.

**ORDER**

**THIS COURT ORDERS that:**

1. The evidence of the Plaintiff's community profile witnesses for the Mississaugas of Alderville First Nation, Hiawatha First Nation and Curve Lake First Nation will be heard in the Curve Lake First Nation.
2. The evidence of the community profile witnesses for Beausoleil First Nation, the Chippewas of Georgina Island First Nation, Mnjikaning First Nation and the Mississaugas of Scugog Island First Nation will be heard in the Mnjikaning First Nation.
3. The parties are to attend to arrangements for the Court sittings in the Curve Lake First Nation and Mnjikaming First Nation communities keeping in mind the direction I have set out above.
4. The hearing of the Plaintiffs' application for a viewing of the seven Plaintiff First Nations will occur after hearing the seven community witnesses. That application therefore will be heard at the close of testimony on the Curve Lake First Nation and Mnjikaming First Nations.

"Leonard S. Mandamin"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-195-92

**STYLE OF CAUSE:** ALDERVILLE INDIAN BAND, et al. v. HER MAJESTY THE QUEEN, et al. v. HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** October 1, 2009

**REASONS FOR ORDER AND ORDER:** MANDAMIN J.

**DATED:** October 1, 2009

**APPEARANCES:**

Peter Hutchins  
David Kalmakoff FOR THE PLAINTIFFS

Owen Young  
Allan Maclure  
Anusha Aruliah FOR THE DEFENDANT

Ronald Carr  
Ria Tzimas  
Kristen Smith FOR THE THIRD PARTY

**SOLICITORS OF RECORD:**

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Toronto, Ontario FOR THE THIRD PARTY