



NO. 051952
KAMLOOPS REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CHIEF RON IGNACE and CHIEF SHANE GOTTFRIEDSON, on
their own behalf and on behalf of all other members of the
Stk'emlupsemc te Secwepemc of the SECWEPEMC NATION

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF
BRITISH COLUMBIA, KGHM AJAX MINING INC., and THE
ATTORNEY GENERAL OF CANADA

DEFENDANTS

REQUISITION - GENERAL

Filed by: The Plaintiffs

Required:

New date, place and
time for hearing: 25/OCT/2018
The Courthouse
800 Smithe Street, Vancouver, BC
10:00 a.m.

Nature of the relief sought: Rule 7-8, Protocol for taking Deposition Evidence

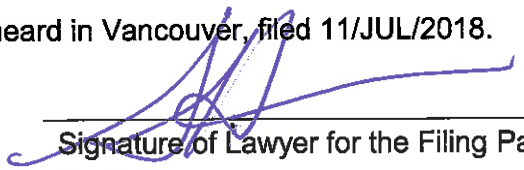
Time estimate of hearing: 1 day

This matter is not within the jurisdiction of a Master.

This requisition is supported by the following:

1. Notice of Application with leave to be heard in Vancouver, filed 11/JUL/2018.

Date: 18/SEP/2018



Signature of Lawyer for the Filing Parties
Sarah Hansen



Leave to have the application
filed and heard in
Vancouver
granted pursuant to Rule 8-2 (4).
[Signature]
Registrar

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their own behalf and on behalf of all other members of the
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BRITISH COLUMBIA, KGHM AJAX MINING INC., and THE
ATTORNEY GENERAL OF CANADA

DEFENDANTS

NOTICE OF APPLICATION

Name(s) of applicant(s): CHIEF RON IGNACE and CHIEF SHANE GOTTFRIEDSON, on their own
behalf and on behalf of all other members of the Stk'emlupsemc te
Secwepemc of the SECWEPEMC NATION ("SSN")

To: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH
COLUMBIA ("British Columbia"), KGHM AJAX MINING INC. ("KGHM"), and
THE ATTORNEY GENERAL OF CANADA ("Canada")

TAKE NOTICE that an application will be made by the applicant(s) to the presiding judge or
master at the Courthouse at Law Courts, 800 Smith Street, Vancouver, British Columbia,
V6Z 2E1, on 19/JUL/2018 at 9:45 a.m. for the order(s) set out in Part 1 below.

PART 1: ORDERS SOUGHT

1. An order in the form attached;
2. Alternatively, directions on the process for taking depositions in this proceeding;
3. Any other relief that this Honourable Court may deem just; and
4. The costs of this application.

PART 2: FACTUAL BASIS

Background

1. SSN claims Aboriginal title and rights over approximately 1.25 million hectares of land near the confluence of the North and South Thompson Rivers at Kamloops and Savona, BC.
2. The claim was filed in 2015. No trial date has been set, and the number of days of trial has not determined at this time.
3. SSN intends on introducing oral history evidence by way of deposition at the trial.
4. The Parties have been unable to reach an agreement on a protocol for the taking of deposition evidence in the form of the attached draft order (the "Deposition Protocol").
5. SSN seeks and order, alternatively, direction from this Court to establish a streamlined process for the taking of depositions, applicable to all deponents, for reasons of judicial efficiency.
6. The Deposition Protocol is not intended to limit potential objections of the parties at the trial with respect to the relevance and admissibility of deposition evidence.

Oral History Evidence Required

7. SSN will rely on oral history evidence at trial. In particular, SSN has pleaded that its Stsq'ey' (Indigenous law), which reflect Secwepmec spirituality and SSN's connection to its Territory, support its claim to Aboriginal title.
8. As pleaded by SSN:
 - (a) The Stsq'ey' comprise the experiences of Secwepmec ancestors on the land.
 - (b) The Stsq'ey' are written in physical markings on the land and told in Secwepmec stories.
 - (c) These Stsq'ey' are integral to SSN's claim to Aboriginal title.
9. As in the case of *William et al v. British Columbia et al.*, admissibility of oral history and traditions will be determined by the trial judge on a case by case basis.

Williams et al v. British Columbia et al., 2004 BCSC
148, at para. 16

Oral History Witnesses

10. SSN members can credibly and reliably relate the necessary and relevant oral history evidence in this Claim. Some of those witnesses are now elderly or infirm (the "Elders").
11. SSN will adduce the Stsq'ey' and the Stories as oral history evidence through the Elders by way of deposition as many Elders are in poor health and cannot reasonably travel to attend a future trial. It is uncertain if many of the Elders will survive long enough to attend a future trial.

12. On May 31, 2018, SSN proposed to adduce the Stsq'ey' and other relevant oral history evidence of the first round of Elders, through Christine Simon, Dolores Jules, Cecilia Peters, and Martha Simpson.

Affidavit #1 of Leslie Schwartz, para. 22, Exhibit U

13. The Elders will require interpreters and "word spellers" for the testimony of the deponents, many of whom only speak Secwépemctsin (the language of the Secwépemc). There are no certified translators for the Secwépemc language in British Columbia. As such, SSN would seek to have interpreters and word spellers attend the depositions as translators.

Affidavit #1 of Leslie Schwartz, para. 29

Attempts to Reach Consensus on a Deposition Protocol

14. Counsel for SSN has attempted to reach an agreement with the Respondents on the procedure for admitting and using the oral history deposition evidence from the Elders.
15. On May 26, 2017, SSN proposed a protocol for conducting depositions of the Elders. In response, the Defendants stated their concerns and suggestions for amendments.
16. On July 11, 2017, SSN circulated a revised protocol to address the Defendants' concerns and suggestions in relation to the May 26, 2017 proposal. Thereafter, the Defendants raised a number of concerns, some of which are common to the Defendants and some of which are not.
17. The points of agreement and disagreement are outlined in the table attached to this motion, for ease of reference. Despite best efforts from all sides, the Parties have been unable to reach a consensus on the procedure surrounding deposition evidence in this case.

Procedural History

18. On August 2, 2017, SSN filed a Notice of Case Planning Conference, which was heard on September 15, 2017, to seek the appointment of a case management judge and resolve the outstanding issues relating to the Deposition Protocol.
19. The Defendants British Columbia and KGHM opposed the appointment of a trial judge. Canada took no position on the matter.
20. On September 27, 2017, Mr. Justice Affleck directed the Parties to write to the registry in Vancouver to the attention of the CJSCBC and make submissions on whether the appointment of a trial judge was necessary at the stage of the proceeding.

Affidavit #1 of Leslie Schwartz, para. 15, Exhibit N

21. On November 6, 2017, The Honourable Chief Justice Hinkson stated: "Given the present vacancies on the Court, and the other demands we face, I have decided that I will not appoint a trial judge at the present time".

Affidavit #1 of Leslie Schwartz, para. 20, Exhibit S

22. There is a risk that this proceeding will become unduly complicated and prolonged by preliminary objections and interlocutory matters for each deponent if there is no procedure or protocol to be followed.
23. There is a further risk that deposition be taken from Elders and then objections raised by the Defendants after the depositions are taken would prejudice the Plaintiffs from relying on the deposition evidence at trial.
24. SSN seeks to avoid applying for a retroactive court order on depositions, instead seeking the Court's directions before proceeding with such depositions.

Carter v. Canada (Attorney General), 2011 BCSC
1371 at para. 55

25. SSN thus seeks the guidance of this Court to establish a deposition protocol process.

PART 3: LEGAL BASIS

1. Rules 1-3, 7-8, 8-1, 12-5, and the inherent jurisdiction of this Honourable Court.

Deposition Evidence

2. Rules 7-8(1) to (3) provide when depositions may take place:

Examination of person

(1) By consent of the parties of record or by order of the court, a person may be examined on oath before or during trial in order that the record of the examination may be available to be tendered as evidence at the trial.

Examination of person

(2) An examination under subrule (1) may be conducted before an official reporter or any other person as the court may direct.

Grounds for order

(3) In determining whether to exercise its discretion to order an examination under subrule (1), the court must take into account

(a) the convenience of the person sought to be examined,

(b) the possibility that the person may be unavailable to testify at the trial by reason of death, infirmity, sickness or absence,

(c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial,

(d) the possibility and desirability of having the person testify at trial by video conferencing or other electronic means, and

(e) the expense of bringing the person to the trial.

3. Further, Rules 12-5(40) to (45) provide for the use of deposition evidence at trial:

Use of deposition evidence

(40) A transcript or video recording of a deposition under Rule 7-8 may be given in evidence at the trial by any party and, even though the deposition of a witness has or may be given in evidence, the witness may be called to testify orally at the trial.

Use of videotape or film:

(41) If a video recording of a deposition is given in evidence under subrule (40) of this rule, a transcript of the deposition may also be given.

Certified transcript

(42) If a transcript of a deposition is certified as an accurate transcription by the person taking the deposition, the transcript may be tendered in evidence without proof of the signature of that person.

Video recording of deposition evidence

(43) A video recording of a deposition may be tendered in evidence without proof of its accuracy or completeness, but the court may order an investigation to verify the accuracy or completeness of the video recording.

Video recording of evidence becomes exhibit

(44) A video recording of a deposition tendered in evidence becomes an exhibit at the trial.

Deposition to be given in full

(45) If a transcript or video recording of a deposition is given in evidence,

(a) subrule (56) applies, and

(b) the deposition must be presented in full, unless otherwise agreed by the parties or ordered by the court.

4. Rules 7-8 and 12-5, the rules applicable to depositions, do not provide guidance on the points of disagreement amongst the Parties with respect to the Deposition Protocol. The remainder of the Rules provide no direction either. However, the Rules do not preclude this Court from providing directions on the points of disagreement amongst the Parties.
5. Further, Rules 7-8 do not provide guidance on how the parties may agree on the use of translators where deponents speak languages for which there are no certified translators.
6. The establishment of a procedural protocol for all deponents will not unduly prejudice the Defendants. The Defendants will still be able to review any proposals by SSN for deponents and object to an individual proposed as a deponent in accordance with the Deposition Protocol.

Inherent Jurisdiction

7. This Court has inherent jurisdiction and discretion to fulfill its judicial function, subject to the requirement that the Court exercise them without contravening any statutory provision.

*Conseil scolaire francophone de la Colombie
Britannique v. British Columbia*, 2013 SCC 42 at
para. 63, citing *R. v. Caron*, 2011 SCC 5 at para.
32

8. In this case, the Court can and should exercise its inherent jurisdiction and discretion to order a procedure for the parties to follow in admitting, using, and determining objections to SSN's oral history deposition evidence. In doing so, the Court would not be contravening any statutory provision including the *Supreme Court Civil Rules*.
9. By exercising its inherent jurisdiction to set a protocol for the admission and use of deposition evidence, this Court will facilitate the just, speedy, and inexpensive determination of the issues in this case, consistent with the objective of Rule 1-3.

PART 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Leslie Schwartz made 25/JUN/2016;
2. Draft Order (attached);
3. The Table for reference (attached);
4. The pleadings and proceedings herein; and
5. Such further and other materials as counsel may advise and this Honourable Court may allow.

The applicant estimate that the application will take less than 2 hours.

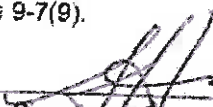
- ☐ This matter is within the jurisdiction of a master.
- ☒ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within five business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within eight business days after service of this Notice of Application:

- (a) file an Application Response in Form 33;
- (b) file the original of every affidavit, and of every other document, that:
 - (i) you intend to refer to at the hearing of this application; and
 - (ii) has not already been filed in the proceeding; and
- (c) serve on the applicant two copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed Application Response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) If this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: 4 JULY
25 JUN 2018


Signature of Lawyer for the applicants

Sarah Hansen

To be completed by the court only:

Order made

- ☐ in the terms requested in paragraphs _____ of Part 1 of this Notice of Application.
- ☐ with the following variations and additional terms:

.....
.....
.....

Date:

.....
Signature of ☒ Judge ☐ Master