

12-Oct-18

REGISTRY

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 SECWEPENMC 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

**THE RESPONDENT KAM'S APPLICATION RESPONSE TO
AMENDED NOTICE OF APPLICATION**

Application Response of: The Application Respondent KGHM Ajax Mining Inc, (KAM)

THIS IS A RESPONSE TO the Amended Notice of Application (Amended Application) of the
Plaintiffs Stk'emlupsemc te Secwepemc of the SECWEPENMC NATION (SSN), filed September
19, 2018.

Part 1: ORDERS CONSENTED TO

KAM does not consent to the granting of any of the orders set out in Part 1 of the Amended
Application.

Part 2: ORDERS OPPOSED

KAM opposes the granting of all of the orders set out in Part 1 of the Amended Application.

KAM does not oppose the granting of individual orders governing the deposition process for
individual deponents, namely Elder Christine Simon, Elder Loretta Seymour, and Elder Delores
Jules.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

N/A

Part 4: FACTUAL BASIS

1. SSN's claim for Aboriginal title and rights was started in 2015.
2. SSN raised the issue of depositions with the parties in May 2017. SSN advised that it had approximately 25 individuals (possibly more) that it intended on deposing prior to trial for reasons of age or ill health. SSN provided a draft consent order for consideration. No individuals were identified for depositions. The draft consent order was general in nature.

Affidavit of L. Schwartz, Exhibit A

3. The Defendants provided their feedback on each of the items in the draft consent order in June and July 2017. As there were no individuals identified for deposition, the feedback provided was in the abstract and general in nature.

Affidavit of L. Schwartz, Exhibits B, C & D

4. SSN circulated a revised draft consent order for review on July 11, 2017. Again, no parties for depositions were identified.

Affidavit of L. Schwartz, Exhibit E

5. The parties exchanged position on the revised draft consent order from July to the beginning of August 2017. As there were no individuals identified for deposition, the feedback provided was in the abstract and general in nature.

Affidavit of L. Schwartz, Exhibits F, G & H

6. In August 2017, SSN sought a case planning conference. SSN sought the appointment of a trial management judge to in part, make decisions on outstanding issues between the parties in respect of deposition. From August 2017 to November 2017, the parties provided submissions on SSN's application for a trial management judge. Ultimately, the Court declined to appoint one.

Affidavit of L. Schwartz, Exhibits I to S

7. Immediately following the Court's decision, the Defendant Canada, wrote SSN asking whether or not SSN would be proceeding with scheduling depositions.

Affidavit of L. Schwartz, Exhibit T

8. In May 2018, SSN identified four individuals in intended on deposing first. (Christine Simon, Delores Jules, Cecilia Peters and Martha Simpson). SSN sought the parties' availability for this first round of depositions.

Affidavit of L. Schwartz, Exhibit U

9. On July 11, 2018, SSN filed a Notice of Application seeking the Court's approval of a process for the taking of depositions.

Affidavit of L. Langhorn, Exhibit A

10. Following receipt of the Notice of Application up to September 18, 2018, the parties exchanged emails and letters on the Notice of Application. On September 19, 2018, SSN circulated its Amended Notice of Application (unfiled).

Affidavit of L. Langhorn, Exhibits B to F

11. The only identified individuals for whom SSN has provided the Defendants information for depositions are:

- the deposition of Elder Christine Simon; and
- the proposed "panel deposition" of Elder Loretta Seymour, Colleen Seymour, Elder Delores Jules and Councillor Jeanette Jules.

(collectively, the First Depositions)

Part 5: LEGAL BASIS

1. KAM opposes of the relief sought on the following basis:
 - (a) The Deposition Protocol is inconsistent with the individual, fact specific nature of depositions and convention trial practice.
 - (b) Any court order or direction should be limited to the First Depositions.
2. The Amended Application should be dismissed with costs.

The Deposition Protocol is inconsistent with the fact specific nature of depositions.

3. Depositions are fact specific both in need and in process. The Deposition Protocol seeks a court order generalizing the process for depositions absent a single fact about the identity or circumstances of the deponent to which it will apply.
4. A fundamental rule of the civil litigation process is that witnesses shall give their evidence in person at trial (the Fundamental Rule). Departures from this rule are only allowed

where the Court may be deprived of the opportunity of hearing a material witness which will necessarily result in a disadvantage to that party.

Williams v. Fraser (1925), 35 B.C.R. 481, [1925] B.C.J. No. 64 at pp. 482 and 483 (C.A.).
[Williams]; *Abermin Corp. v. Granges Exploration Ltd.*, [1990] B.C.J. No. 1830,
 (1990) CanLII 1827 (BC SC), at 9. **[Abermin]**

5. Rule 7-8(1) provides that depositions are to be consented to or ordered on a case by case basis. Further, Rule 7-8(3) requires the deposition to be justified on the specific facts of the particular person being deposed (the Justification Test). Orders granted under Rule 7-8(1) "depend upon the peculiar facts which give rise to the application itself." Once it is determined that a particular deposition is justified, Rules 7-8(2) to (17) provide a common process for all depositions.

Abermin, at 5.

6. KAM agrees that the Rule 7-8 does not specifically address all of the issues set out in the Deposition Protocol. The omission was intentional. Determinations on specific issues like timing for production of documents, location, and costs of a deposition should not be decided in a factual vacuum. The specific facts of the deposition matter. Decisions on these issues must be informed by the specific facts of the deponent and the circumstances of the deposition.

7. SSN intends on deposing at least 25 witnesses, possibly more,¹ prior to trial. While the SSN argues this provides support for the Deposition Protocol, what they have failed to recognize is that that is 25 or more different individuals, each with their own specific circumstances (residence, length of testimony, scope of testimony, documents for deposition, etc.). The criticalness of this factor should not be overlooked. Attempting to create a very specific process to govern 25 or more different deposition scenarios will not produce an efficient or effective result.

8. In addition, absent the necessary facts, the Court may be legally binding the parties to unanticipated consequences and unfair results. For instance, the Deposition Protocol would:

- permit the production of *unlimited documents* 14 days before a deposition;
- require the parties to attend depositions *outside BC and possibly even internationally*; and
- require the parties to share equally in an *unidentified amount of costs*.

9. The Deposition Protocol will not result in a more efficient process. Setting down a process absent the underlying facts and circumstances risks the need for more Court intervention,

¹ In its letter of May 26, 2017, the SSN advised that: "We are aware of approximately 25 individuals from the Plaintiffs' group". Based on this assertion, it is possible that there are more witnesses to be deposed.

not less. The Deposition Protocol recognizes this; several of its terms contemplate further judicial intervention.²

10. The SSN chose this forum to pursue their claim for Aboriginal title. In so doing, they submitted to the Supreme Court Civil Rules (the Civil Rules). Rule 7-8(1) to (17) provide a comprehensive process for depositions. This Court should not allow the Deposition Protocol to displace that process. Specific procedural uncertainties should be resolved as they arise to permit an informed resolution. Only in these circumstances can a fair and just outcome be reached.

The Deposition Protocol is inconsistent with conventional trial practices.

11. The Deposition Protocol is inconsistent with convention trial practices because it:

- (a) disregards the Fundamental Rule;
- (b) sets aside Rule 7-8(3); and
- (c) deprives the parties of judicial oversight.

12. Term 12 of the Deposition Protocol reserves the SSN "the right to apply to the court to seek a further order to depose witnesses in groups and tender their evidence collectively." Deposition by panel is not part of convention trial practices.

13. Moreover, SSN proposes using this right to depose witnesses that do not meet the Justification Test (hereafter referred to as Non-Qualifying Witnesses). The effect of such an approach is to set aside the Fundamental Rule and Rule 7-8(3).

14. The Current Depositions include a proposed "panel deposition" of Elder Loretta Seymour, Colleen Seymour, Elder Delores Jules and Councillor Jeanette Jules. Colleen Seymour and Councillor Jeanette Jules are Non-Qualifying Witnesses. Neither is of advanced age and there is no evidence on the record of illness or ailment on which to conclude that they may not be able to attend trial. They do not meet the Justification Test.

15. SSN justifies deviation from the Civil Rules as being required by SSN's customs for truth telling and intergenerational transmission of oral history and knowledge.

16. The parties have spent 17 months exchanging dozens of letters and emails on depositions. A month ago was the first time SSN's customs was provided as the rationale behind the panel depositions and the deposing of Non-Qualifying Witnesses. When SSN first raised depositions (in May 2017), deponents were identified solely on the basis of advanced age or ill health. When SSN first raised and explained their intent to do panel depositions (in May and July 2017), the justification provided was that tribunals and commissions have a similar process.

² Terms 2, 4, 6, and 12 all contemplated the possibility of further judicial intervention once the specific facts of the particular deposition are known.

Further, the original Notice of Application filed July 11, 2018 was devoid of any reference to SSN's culture as requiring panel depositions of witnesses including Non-Qualifying Witnesses.

17. More importantly, there is no evidence on the record that the depositions of SSN witnesses meeting the criteria in Rule 7-8(3) can't proceed on an individual basis. The evidence is that such studies are traditionally told together, not that they cannot be told individually and informed by one another.

18. SSN relies on the *Federal Court Guidelines* for the proposition that deposition by panel is an acceptable trial practice.

Federal Court - Practice Guidelines for Aboriginal Law Proceedings,
Part D: Elder Testimony and Oral History (April 2016). [***Federal Court Guidelines***]

19. The *Federal Court Guidelines* do not support deposition by panel or the deposing of Non-Qualifying Witnesses. The references relied on by SSN (regarding Elders preferring to testify as a panel) speak to live oral testimony at trial. The section on Commission Evidence in the *Guidelines* enumerates factors to be considered in the out-of-court examination of an Elder before trial. There is no mention of deposition panels, nor is there any reference to allowing witnesses to provide deposition evidence on such a panel absent evidence that they may not be able to attend trial.

Federal Court Guidelines, at 36 and 32.

20. The need for flexibility in complex Aboriginal law cases is well established. However, that flexibility should not displace the fundamental principle of live evidence on which convention trial practice is based. Flexibility should be found *within* the existing rules of court, not *apart from* them.

21. Term 12 deprives the parties and the Court of live judicial oversight over evidence that should and can be delivered in person at trial. Trial judges play an essential judicial function in overseeing and managing the introduction of evidence. The Deposition Protocol would remove this essential function for some evidence absent a need to do so.

22. The intended deposed evidence includes, but is not limited to,³ what the SSN calls "Stsq'ey' (Indigenous law), which reflect Secwépemc spirituality and SSN's connection to its Territory". This evidence is central to the SSN's claim for Aboriginal title.

23. Trial judges play a critical role in controlling the introduction and receipt of evidence. Determinations on admissibility focus the evidence on the issues to be determined. The absence of such oversight is "unsatisfactory" because it:

(a) risks the production of non-admissible evidence,

³ In its letter of September 2018, the SSN advised wrote regarding the panel proposed as part of the First Depositions: "We expect the panel members will, in large part, contribute to the telling of the oral history stores [*sic*], however, we are not in a position to predict whether and to what extent the panel will address additional matters relevant to the claim being advanced."

- (b) removes the Court's assistance in ensuring questions are appropriately framed and evidence properly received; and
- (c) effect the weight evidence receives resulting in "substantive prejudice" to the parties.

Byer v. Mills (2001), 198 A.C.W.S. (3d) 1204,, 2011 BCSC 158,
at Appendix A, paras. (c) to (j) (*obiter dictum*) [*Byer*],
cited in *Seder v. Insurance Corp. of British Columbia* (2011), 10 C.P.C. (7th) 1,
2011 BCSC 823, at para. 8. [*Seder*]

24. Trial judges must also be allowed to control the trial process by making on the spot decisions about the testimony being introduced and questions being posed. As previously put by this Court:

Taking evidence by deposition necessarily deprives the trial judge of an essential judicial function. Doing so is fraught with risks to the trial process and risks substantive prejudice to the parties.

Byer, at Appendix A, para. (h) (*obiter dictum*),
cited in *Seder*, at para. 8.

25. In sum, depositions provide a narrow exception to the Fundamental Rule. Their need is fact driven and any resulting process should reflect the specific circumstances of the deponent. The Deposition Protocol would impose a process common to all depositions absent underlying facts for context. This will not result in more procedural efficiency. Instead, further Court interventions will be required to clarify how the process applies to a specific deponent's circumstances. Moreover, Term 12 would enable deposition to proceed in a panel format including evidence from Non-Qualifying Witnesses. Such an approach is contrary to the purpose of depositions and conventional trial practices. It risks detriment effects on the trial process and the trial judge's role. The Court should not approve the Deposition Protocol.

Any court order or direction should be limited to the First Depositions.

26. It is trite law that judicial decisions should not be made in a factual vacuum. The only depositions for which information has been provided are the First Depositions. As such, the Court should limit any order or direction provided to those depositions.

27. KAM has been provided with the names, basic biographical information and specific circumstances justifying the depositions of Elder Christine Simon, Elder Loretta Seymour and Elder Delores Jules. KAM does not oppose these Elders being deposed, nor does it take issue with the depositions taking place in Kamloops.

28. KAM opposes SSN's panel process for the depositions of Elder Loretta Seymour and Elder Delores Jules for the reasons outlined above.

29. KAM further opposes the deposition of Colleen Seymour and Councillor Jeanette Jules at this stage of the proceedings for the reasons outlined above.

30. As to the remaining issues in respect of the First Depositions, KAM's position is as follows:

- (a) *Document Disclosure*: The proposed 14 days in advance of depositions is insufficient. More time is needed.
- (b) *Translators*: KAM does not oppose the use of translators and/or word spellers provided that the order limits their role to translating words verbatim. KAM opposes having translators provide their own interpretations of the evidence. Their role is to translate; not to provide evidence. Should SSN wish to have its translators provide evidence, it can call them as a witness at trial to lead such evidence.
- (c) *Costs*: The costs of the transcript and videotape of depositions are part of the SSN's costs of the action under Rule 12-5(55). KAM should not have to bear these costs. SSN is contemplated 25 or more depositions, each spanning approximately 1 week. These costs will be significant; they rest with the SSN.
- (d) *Acknowledgment of Further Depositions*: Trial dates have not been set. It is likely that the trial will not proceed for a number of years. A provision should be built into the order to allow parties flexibility for further examination on documents not previously produced.
- (e) *Ability to Return to Court*: The order should contain a provision allowing the parties to return to Court to seek direction on (1) how a provision of the order applies to the deposition in question or (2) on any issue not addressed by the order.

Disposition of the Amended Notice of Application

31. KAM requests that the Court:

- (a) decline to grant the Deposition Protocol; and
- (b) restrict any order or direction to the process governing the First Depositions.

32. KAM requests its costs in the matter.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit of Lorleen Langhorn sworn October 11, 2018;
2. The pleadings and proceedings herein; and
3. Such further and other materials as counsel may advise and this Honourable Court shall permit.

The Application Respondent estimates that the application will take 1 Day.

- ☒ The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.
- ☐ The Application Respondent has not filed in this proceeding a document that contains an address for service. The Application Respondent's ADDRESS FOR SERVICE is:

Dated at the City of Vancouver, in the Province of British Columbia, this 12th day of October, 2018.



Lawson Lundell LLP
Solicitors for the Application
Respondent, KGHM Ajax Mining Inc.

This Application Response is filed by Keith B. Bergner, of the law firm of Lawson Lundell LLP, whose place of business and address for delivery is 1600 – 925 West Georgia Street, Vancouver, British Columbia, V6C 3L2.