

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 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

**APPLICATION RESPONSE OF
THE ATTORNEY GENERAL OF CANADA**

Application response of: the defendant, the Attorney General of Canada (the
“application respondent” or “Canada”)

THIS IS A RESPONSE TO the Amended Notice of Application of the plaintiffs, 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 First Nation (“SSN”) filed September 19, 2018.

Part 1: ORDER CONSENTED TO

Canada consents in part to an order governing the taking of deposition evidence, on the terms set out below. The additional terms proposed by Canada are underlined below.

1. Periodically, a list of proposed deponents will be provided to each of the parties describing why consent is sought for the deposition for each witness in accordance with Rule 7-8(3).

2. The party responding to a request for a deposition shall have 14 business days to consent or object to the proposed witness sought to be deposed. An objection shall be made by letter setting out the precise nature of the objection and making submissions on the objection. The party requesting the deposition shall have 5 business days to reply to the objection. The requesting party upon serving the reply may bring a motion to the Court to resolve the objection.
3. Will-say statements will be exchanged by the parties 10 business days in advance of the deposition and records relevant to the deponent's expected evidence will be produced and exchanged by the parties 14 business days in advance of the deposition.
4. The parties acknowledge that the deponent's pre-trial evidence is being taken prior to completion of document discovery and examinations for discovery. The parties agree that further examination of the witness may occur on matters arising out of examination for discovery of the parties or documents not previously produced or previously examined upon.
5. Depositions shall be taken by video with a court reporter present and presented at trial as video with transcript in accordance with Rule 7-8(16). Plaintiffs' counsel shall maintain custody of the original video, transcript and exhibits for each of the deponents, with copies provided by the videographer and court reporter. The costs of the transcripts and video are to be shared equally by the Parties, or as otherwise ordered by the court.
6. Depositions will be held within 30 kilometers of the registry nearest to the place the witness resides under Rule 7-8(7), provided that the Plaintiff will try to arrange for depositions to occur in Kamloops where appropriate.
7. The video and transcript of the deposition evidence may be led as evidence at trial by any party, subject to any objections pursuant to Rule 12-5(56), and if such evidence is led, then the deposition evidence must be given in full, unless the parties otherwise agree or the court otherwise orders in accordance with Rule 12-5(45).
8. The parties agree not to object to the introduction of evidence by deposition of a witness, even where the witness is capable of giving viva voce evidence at trial.
9. Subject to the court's discretion further to Rule 12-5(40), the fact that a witness' evidence was obtained by deposition further to this Order does not foreclose a party, even the examining party, from calling the witness to give viva voce evidence at trial.
10. Deposition evidence sought to be introduced at trial shall be tendered by video, using electronic means and transcript.

11. Translators or word spellers are permitted to assist the deponent in giving evidence at the deposition. Translators or word spellers shall swear an oath or affirm to tell the truth and to translate verbatim to the best of their abilities. Translators are not permitted to provide their own interpretation of the meaning of the deponent's testimony. If the translator has to ask additional questions of the deponent for clarification of the meanings, they should first inform the parties that they propose to do so and may only do so with the consent of the parties, which consent shall not be unreasonably withheld. They shall provide a verbatim translation of their conversation with the deponent.
12. This Order will serve as a consent order for the deposition of each deponent in accordance with the Rules of Court unless otherwise objected to by the Defendants. In the event that the terms of this Order are not sufficient to cover the individual circumstances of a deponent, then the party proposing the deponent will seek a consent order or, failing consent, approval by the court in respect to that deponent.
13. The Plaintiffs reserve the right to apply to the court to seek a further order to depose witnesses in groups and tender their evidence collectively.
14. The above procedure may be modified by consent of the parties in writing and upon approval by the court.

Part 2: ORDERS OPPOSED

Canada opposes the granting of the orders set out in paragraphs 1, 2, and 4 of Part 1 of the Amended Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

Canada takes no position on the granting of the orders set out in paragraph 3 of Part 1 of the Amended Notice of Application.

Part 4: FACTUAL BASIS

Overview of Canada's Position

1. Canada supports taking deposition evidence for use at trial from individuals who are elderly or in ill-health, or otherwise meet the requirements for deposition evidence set out in Rule 7-8 of the *Supreme Court Civil Rules*.
2. Canada consents to the draft order proposed by the SSN, subject to the modifications of the draft order in relation to document disclosure, the use of a word speller and/or translator, and the need for individual consent orders.

3. Canada consents to an order that Delores Jules may provide deposition evidence in a traditional manner as a panel in the presence of and accompanied by Loretta Seymour, Jeannette Jules and Colleen Seymour, who shall be duly sworn and provided that the terms of the order limit the evidence to be provided by Loretta Seymour, Jeannette Jules and Colleen Seymour to assisting in telling oral traditions (*stsptekwill*, or stories set in ancient times) in accordance with their communities' traditions and providing translation and word spelling as needed and further that the order sets out the process for cross examination. The face of said individuals shall be visible at all times on the video and their words and speech recorded on the video and by the court reporter.

Background on the Negotiations

4. Between March 26, 2017 and August 2, 2017 the parties exchanged correspondence regarding scheduling depositions of SSN members and the terms of a protocol that the SSN proposed for the taking of deposition evidence and its use at trial (the "Deposition Protocol"). Although the parties reached agreement on many of the terms, some remained in dispute.

Affidavit #1 of L. Schwartz, Exhibits "A" to "H"

5. On May 31, 2018, SSN wrote to the parties proposing to adduce deposition evidence of Christine Simon, Delores Jules, Cecilia Peters, and Martha Simpson. Although the Defendants did not object to conducting deposition of the SSN's proposed witnesses, and responded by providing available dates, there remained some unresolved issues in respect to the Deposition Protocol proposed by the SSN.

Affidavit #1 of L. Schwartz, Exhibits "U", "V", "W", "X" and "Y"

6. On July 12, 2018, the SSN filed and served a Notice of Application to settle the terms of the Deposition Protocol. The Notice of Application did not include a proposal to conduct the deposition of Delores Jules in a group.

Affidavit #1 of M. Nusrat, Exhibit "C"

7. On September 18, 2018, the SSN wrote to the parties serving unfiled copies of an Amended Notice of Application and unsworn affidavits. The Amended Notice of Application included a proposal that Delores Jules be permitted to provide deposition evidence as part of a group.

Affidavit #1 of M. Nusrat, Exhibit "G"

8. On September 20, 2018, Canada responded to the SSN's letter, requesting clarification of the scope of evidence to be given by the proposed panel of witnesses, as well as clarification on the procedure for cross-examination.

Affidavit #1 of M. Nusrat, Exhibit “H”

9. On September 25, 2018, KGHM wrote to the SSN requesting clarification of the role of the SSN’s proposed translator and word speller, Mr. Darcy Deneault.

Affidavit #1 of M. Nusrat, Exhibit “T”

10. On September 27, 2018, the SSN wrote to the parties responding to the requests from Canada and KGHM for clarification on the proposal for Delores Jules deposition to be given in a panel and the role of the translator and/or word speller, respectively.

Affidavit #1 of M. Nusrat, Exhibit “L”

11. On October 11, 2018, the SSN wrote to the parties serving copies of the will-say statement of Christine Simon.

Affidavit #1 of M. Nusrat, Exhibit “M”

12. On October 12, 2018, Canada wrote to the SSN advising that in its view, the will-say statement of Christine Simon was inadequate, as it did not summarize her expected testimony.

Affidavit #1 of M. Nusrat, Exhibit “N”

Part 5: LEGAL BASIS

1. Canada relies upon Rules 1-3, 7-8, 8-1, 12-5, 12-5(56), 14-1, and the inherent jurisdiction of this Honourable Court.
2. The taking of evidence by deposition is governed by Rule 7-8, which provides that deposition evidence may be taken by consent of the parties or by order of the court.
3. When an order of the court is sought, as it is here, the applicable Rule is Rule 7-8(3).
4. In exercising the discretion under Rule 7-8, the *obiter dictum* comments of Mr. Justice Harris in *Byer v. Mills* (2011), 2011 BCSC 158, apply, namely that the basic rule is that witnesses should testify live before the court.

Seder v. Insurance Corp. of British Columbia, 2011 BCSC 823

Canada’s position on points set out in the SSN’s draft order

5. Canada is in general agreement with the terms of the draft order, but seeks to clarify the terms in relation to document disclosure, the use of a word speller and/or

translator, the need for individual consent orders, and the giving of deposition evidence by panel.

6. Canada sets out below each of the terms of the SSN's draft order with which it disagrees or wishes to substantially modify, and provides an explanation for each.

Canada's position on document disclosure

The parties should provide relevant and material records relevant to the deponent's expected evidence, at least 14 business days in advance of the depositions.

7. Canada agrees with this term, but states that since document production is in early stages and will be ongoing throughout the depositions, it is reasonably possible that a document relevant to the deponent's evidence will only be located and produced after the deposition is completed.
8. To address this possibility, Canada suggests that the following term be included in the proposed order:

The parties acknowledge that the deponent's pre-trial evidence is being taken prior to completion of document discovery and examinations for discovery. The parties agree that further examination of the witness may occur on matters arising out of examination for discovery of the parties or documents not previously produced or previously examined upon.

Canada's position on the role of the translators and/or word spellers

Translators or word spellers are permitted to assist the deponent in giving evidence at the deposition.

9. Canada agrees that translators and/or word spellers can assist at the depositions.
10. Canada submits that the order ought to provide that the translators and/or word spellers swear an oath or affirm to tell the truth and to translate verbatim to the best of their abilities.
11. The SSN have advised that they intend to have Mr. Darcy Deneault consistently attend at all depositions to serve the function of translator/word speller, unless he is otherwise unavailable or inappropriate given the particular deponent.

Affidavit #1 of M. Nusrat, Exhibit "G"

12. Further, Mr. Deneault states that he will not only translate but also provide interpretations so the listener understands the meaning of what the witness is saying, rather than just the words.

Affidavit #1 of Darcy Deneault at para. 26

13. Canada agrees with Mr. Deneault attending at depositions to serve the function of translator/word speller, but it is Canada's position that Mr. Deneault, or any translator, should not be permitted to provide their own interpretations of the meanings of an oral history story, as this would constitute him giving evidence when he is not a witness and would taint the evidence of the person being deposed.
14. Canada respectfully submits that there is no evidence before this court to indicate that Mr. Deneault satisfies the criteria for deposition evidence set out in Rule 7-8. There is no evidence to suggest that Mr. Deneault will be unable or unavailable to testify at trial should he have relevant evidence to give.
15. Further, in response to a request for clarification of Mr. Deneault's role at the deposition of Christine Simon, counsel for SSN confirmed that his role, at the request of Ms. Simon, would be limited to translating and word spelling.

Affidavit #1 of M. Nusrat, Exhibit "L"

16. Canada respectfully submits that the order ought to limit the role of the word speller and/or translator, whether that person is Mr. Deneault or someone else, to translating and word spelling.
17. Canada does not object to a translator seeking clarification from the deponents. In this regard, Canada proposes that if the translator has to ask additional questions of the elder for clarification of the meanings, he should first inform the parties that he proposes to do so and may only do so with the consent of the parties, which consent shall not be unreasonably withheld. He shall provide a verbatim translation of his conversation with the elder.
18. Canada proposes that the following be added to the SSN's proposed order:

Translators or word spellers shall swear an oath or affirm to tell the truth and translate to the best of their abilities. Translators are not permitted to provide their own interpretation of the meaning of the deponent's testimony. If the translator has to ask additional questions of the deponent for clarification of the meanings, they should first inform the parties that they propose to do so and may only do so with the consent of the parties, which consent shall not be unreasonably withheld. They shall provide a verbatim translation of their conversation with the deponent.

Canada's position on the need for individual consent orders

This Order will serve as a consent order for the deposition of each deponent in accordance with the Rules of Court unless otherwise objected to by the Defendants

19. Canada agrees with this term, but submits that this term as written allows only for an individual consent order when the defendants object.
20. Canada submits that there may be circumstances in relation to individual witnesses that would warrant different terms, to which the defendants would consent, than are set out in this order.
21. To address this situation, Canada submits that the following be added to the SSN's order:

In the event that the terms of this Order are not sufficient to cover the individual circumstances of a deponent, then the party proposing the deponent will seek a consent order or, failing consent, approval by the court in respect to that deponent.

Canada's position on the deposition of Delores Jules by panel

22. At paragraph 7 of Part 3 of the Amended Notice of Application, the SSN requests that the Court allow the hearing of deposition evidence of Delores Jules and Loretta Seymour to be provided as a panel, along with their respective daughters, Jeanette Jules and Colleen Seymour.
23. In the letter enclosing the unfiled Amended Notice of Application, the SSN advised that, "with respect to the process of conducting a deposition by a group, this relief applies to the deposition of Elder Delores Jules." The SSN explained the deposition by panel was required because in accordance with family custom, specific members of the family were taught to tell oral history stories and those stories are told as a group, collaboratively.

Affidavit #1 of M. Nusrat, Exhibit "G"

24. In the letter, Loretta Seymour is said to be an elder, while Jeanette Jules and Colleen Seymour were stated not to be elders.

Affidavit #1 of M. Nusrat, Exhibit "G"

25. The SSN's letter serving the filed Amended Notice of Application, enclosed a draft consent order in relation to the deposition of Delores Jules. The consent order provides that Delores Jules "will give her testimony in a traditional manner as a panel in the presence of and accompanied by other elders and family members in accordance with the custom for truth telling and oral history evidence." It further provides that members of the panel may word spell or translate for Delores Jules. A draft consent order in relation to deposing Loretta Seymour was not enclosed with the letter.

Affidavit #1 of M. Nusrat, Exhibits "J" and "K"

26. In response to Canada's request for clarification on the scope of the evidence to be provided by the panel, the SSN advised that the testimony of Delores Jules will not be confined to oral history stories and will include additional matters relevant to the claim being advanced. Further, with respect to the testimony of the panel members, the SSN advised that they would contribute to the telling of oral history stories but they were "not in a position to predict whether and to what extent the panel will address additional matters relevant to the claim being advanced."

Affidavit #1 of M. Nusrat, Exhibit "L"

27. Though it is exceptional for more than one witness to testify at the same time in a trial before the British Columbia Supreme Court, Canada appreciates that evidence from Aboriginal elders should be approached with sensitivity, and that testifying in a group may accord with their communities' customs for truth-telling and oral history evidence.
28. At the same time, the procedure must ensure fairness, and allow the parties an adequate opportunity to test the evidence.
29. To balance these considerations, and in the circumstances of this case, Canada proposes the following terms for an order allowing the deposition of Delores Jules:
- a. Delores Jules may provide deposition evidence in a traditional manner as a panel in the presence of and accompanied by Loretta Seymour, Jeannette Jules and Colleen Seymour.
 - b. All members of the panel shall swear an oath to tell the truth, and if applicable, swear to provide translation and word spelling to the best of their abilities.
 - c. Deposition evidence from Loretta Seymour, Jeanette Jules and Colleen Seymour should be limited to assisting in telling oral traditions (*stsptekwill*, or stories set in ancient times) in accordance with their communities' traditions, and providing translation and word spelling as needed.
 - d. In respect to the evidence provided on telling oral traditions (*stsptekwill*, or stories set in ancient times) the parties may direct cross-examination questions to a particular member of the panel, and the question shall be answered only by the person or persons to whom the question is directed.
 - e. In respect to any evidence Delores Jules may give in relation to additional matters relevant to the claim being advanced, the parties will direct their questions only to Delores Jules and only Delores Jules may answer those questions.

- f. Nothing in these terms precludes Loretta Seymour, Jeannette Jules or Colleen Seymour from testifying at trial.
- g. Nothing in these terms limit the parties' right to object at trial under Rule 12-5(56).

PART 6: MATERIAL TO BE RELIED ON

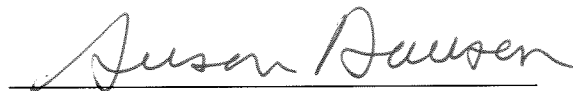
- 1. The pleadings and other material filed herein;
- 2. Affidavit #1 of Mahvish Nusrat made October 12, 2018.
- 3. Such further and other material as counsel may advise and this Honourable Court shall permit.

Canada estimates that the application will take 1 day.

Canada has filed in this proceeding a document that contains Canada's address for service.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 12, 2018



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