# SUPREME COURT OF YUKON

*Citation:* *Ross River Dena Council v. The Attorney General of Canada,* 2011 YKSC 56

Date: 20110624
S.C. No. 05-A0043
06-A0092
Registry: Whitehorse

Between:

**Ross River Dena Council**

Plaintiff

And

**The Attorney General of Canada**

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Stephen L. Walsh — Counsel for the Plaintiff
Suzanne M. Duncan and Maegan Hough — Counsel for the Defendant

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] This is an application by the plaintiff, Ross River Dena Council ("RRDC"), for an order pursuant to Rule 29(7) of the *Rules of Court* requiring the defendant, the Attorney General of Canada ("Canada") to provide further answers to the plaintiff's interrogatories dated November 17, 2010. By my count, there are twenty-six interrogatories at issue.[1]

[1] Of the original list of contested questions in the outline of RRDC's counsel, a number have either been withdrawn, resolved or are otherwise not at issue. Those are questions: 4, 15, 16, 31, 32, 33, 34, 35, 36, 39(b), 39(c), 39(f), 39(g), 39(o), 39(w), 40 and 43. The remaining questions at issue are: 2(b), 6,7 12,13, 14,19(b), 19(d), 19(e), 19(f), 19(h), 19(i), 20(a), 20(b), 21(b), 21(c), 21(d), 21(e), 21(f), 21(g), 21(h), 38, 39(s), 39(v), 44 and 45.

These can be grouped into the following categories, which are all based on the submissions of Canada's counsel:

1. Questions which can not be answered until document discovery is completed;
2. Questions where the documents speak for themselves;
3. Questions which seek a legal conclusion;
4. Questions containing terms which require definition; and
5. Questions which have been adequately answered.

[2] In general, the test for whether interrogatories are proper is whether they are relevant to the issues raised in the pleadings: *Smith v. Global Plastics Ltd.*, 2001 BCCA 275.

**LAW**

[3] The relevant provisions of Rule 29 are as follows:

> "**Purpose**
>
> 1. The purpose of interrogatories is to obtain evidence in a timely and cost effective manner and reduce or eliminate the need of or time required for oral examination for discovery.
>
> **Service of and answer to interrogatories**
>
> 2. A party to an action may serve on any other party, who is or has been a director, officer, partner, agent, employee or external auditor of a party, interrogatories in Form 26 relating to a matter in question in the action, and the person to whom the interrogatories are directed shall, within 21 days, deliver an answer on affidavit to the interrogatories. The party serving the interrogatories shall serve all other parties of record.
>
> ...

**Insufficient answer to interrogatory**

7. Where a person to whom interrogatories have been directed answers any of them insufficiently, the court may require the person to make a further answer either by affidavit or on oral examination.

…

**Continuing obligation to answer**

11. Where a person who has given an answer to an interrogatory later learns that the answer is inaccurate or incomplete, the person is under a continuing obligation to deliver to the party who served the interrogatory an affidavit deposing to an accurate or complete answer." (my emphasis)

[4] One of the leading cases on the principles governing interrogatories is *Hou v. Wesbild Holdings Ltd.* (1994), 98 B.C.L.R. (2d) 92 (S.C.). There, Baker J., at para. 15, helpfully summarized the requirements for and limitations on interrogatories based upon the British Columbia authorities:

"1. Interrogatories must be relevant to a matter in issue in the action.
2. Interrogatories are not to be in the nature of cross-examination.
3. Interrogatories should not include a demand for discovery of documents.
4. Interrogatories should not duplicate particulars.
5. Interrogatories should not be used to obtain the names of witnesses.
6. Interrogatories are narrower in scope than examinations for discovery.
7. The purpose of interrogatories is to enable the party delivering them to obtain admissions of fact in order to establish his case and to provide a foundation upon which cross-examination can proceed when examinations for discovery are held.
8. Interrogatories are only one means of discovery. The court may permit the party interrogated to defer its response until other discovery processes have been completed, including examinations for discovery."

[5] In *Andersen v. St. Jude Medical Inc.*, [2007] O.J. No. 5383 (S.C.), Master MacLeod, at paras 17 and 18, further elaborated on the modern purposes and objectives of discovery:

> "17. The modern purposes of discovery may therefore be said to include disclosure, verification and admission. They may be summarized as follows:
>
> (a) Disclosure of the evidence and the legal theory of the opposing party;
> (b) Verification that all relevant documents have been produced; and
> (c) Admissions that will narrow the issues, dispense with formal proof, or reveal deficiencies in the opponent's case.
>
> 18. These of course are not ends in themselves. They accomplish at least the following objectives:
>
> (a) Allowing the examining party to understand the case to be met;
> (b) Narrowing the issues that will require adjudication;
> (c) Streamlining pre-trial and trial procedures;
> (d) Facilitating settlement;
> (e) Determining if a full trial or a summary procedure may be appropriate; and
> (f) Preparing for trial or other form of adjudication."

[6] *Montana Band v. Canada*, [1999] 4 C.N.L.R. 65 (F.C.T.D.), is an aboriginal law case involving the use of interrogatories. There, Hugessen J. discussed the general purpose of examination for discovery at para. 5:

> "The general purpose of examination for discovery is to render the trial process fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them. It is in the interest of justice that each party should be as well informed as possible about the positions of the other parties and should not be put at a disadvantage by being taken by surprise at trial. It is sound policy for the Court to adopt a liberal approach to the scope

> of questioning on discovery since any error on the side of allowing questions may always be corrected by the trial judge who retains the ultimate mastery over all matters relating to admissibility of evidence; on the other hand any error which unduly restricts the scope of discovery may lead to serious problems or even injustice at trial." (my emphasis)

[7] At paras. 9 and 10, Hugessen J. noted the difficulties arising where interrogatories may be misunderstood by the party being questioned. He remarked that when that problem arises, a court "should attempt to view questions in the best possible light" and that where a question is susceptible of two interpretations, "the Court should prefer the interpretation which would make question legitimate and admissible". At para. 11, Hugessen J. remarked that "evasive, unresponsive and ambiguous answers are not to be tolerated". And, in the specific context of aboriginal litigation, he concluded that the Crown has a particular duty to be open and frank in its disclosures, given its continuing capacity as protector and fiduciary of First Nations. The entirety of his remarks at para. 12 are worth repeating, because the importance of the Crown's fiduciary relationship to the Indian bands in that case is also a central feature in the case at bar:

> "There is one final comment of a general nature which is related to the particular circumstances of this action. It is, as I have said, an action by three Indian Bands against the Crown. It alleges breaches of the Crown's fiduciary duty towards the plaintiffs and their predecessors over a period of time approximately 100 years ago. It is common knowledge that Indian Bands have few or no written records relating to their past and must, apart from tradition and oral history, rely to a large extent upon the records of the government itself. This casts upon the Crown, in its past and continuing capacity as protector and fiduciary of the Bands, a particular duty to be open and frank in its disclosures. Even within the adversarial relationship created by litigation between them, the Crown continues to owe an historic fiduciary duty to deal fairly and openly with first nations. This is not to say that there are special rules for aboriginal claims, but simply that the nature of any claim is part of the context in which any objection to interrogatories is to be decided and that where a claim is in respect of alleged historical

> injustice by the Crown, that context may be determining." (my emphasis)

**ANALYSIS**

***1. Questions which cannot be answered until document discovery is completed.***

[8] Here, Canada chiefly relies on the principle from the *Hou* decision, cited above, that the court may permit the party interrogated to defer its response until other discovery processes have been completed. Canada's counsel submitted that, if it is required to provide answers to the following questions before completing document discovery, the answers will necessarily be incomplete and will be subject to future qualification or amendment. Counsel also stated that this will likely delay the process of document review and production, because it will require Canada to take the time to provide interim answers, as well as one or more subsequent answers as document discovery progresses and new relevant information is revealed.

[9] Canada's counsel informed me that, as this case involves matters spanning a century and a half, with many documents pre-dating Confederation, several thousand documents have already been reviewed, and well over ten thousand further potentially relevant documents have been identified and are in the process of being reviewed. Counsel expects this document review to be completed in September or early October 2011. She implied, in her submissions above, that this timeline may be set back as a consequence of any requirement to provide interim answers.

[10] With respect, I do not find these arguments to be particularly compelling. Rule 29(11) specifically contemplates that interim answers to interrogatories may be provided, and that, where a person who provides such an answer later learns that the answer is

inaccurate or incomplete, that person is under a continuing obligation to provide an accurate or complete answer.

[11] This principle was also acknowledged by Vertes J. in *Fullowka v. Royal Oak Mines Inc*., 2001 NWTSC 76. That case involved Rule 251 of the Northwest Territories *Rules of Court*, which deals with the scope of examination for discovery, as opposed to interrogatories *per se*. However, the relevant wording of Rule 251(1) is very similar to the relevant wording in Rule 29. The former provides:

> " 251. (1) A person who is examined for discovery shall answer, to the best of his or her knowledge, information and belief, <u>any proper question relating to any matter in issue in the action</u> and no question may be objected to on the ground that
>
> (a) the information sought is evidence;
>
> (b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or
>
> (c) the question constitutes cross-examination on the statement as to documents of the party being examined." (my emphasis)

As I noted above, Yukon Rule 29(2) includes the words "… interrogatories…relating to a matter in question in the action…".

[12] In *Fullowka*, Vertes J. chose to follow the liberal approach to examinations for discovery from Ontario, based principally on the case of *Six Nations v. Canada* (2000), 48 O.R. (3d) 377 (Div. Ct.), rather than the more strict approach from the Alberta Court of Appeal in *Can-Air Services Ltd. v*. *British Aviation Insurance Co.*, [1989] 1 W.W.R. 750. I will return to the comments by Vertes J. in relation to those cases later. For present purposes, it is sufficient to note that, Vertes J. made the following remark at para. 11:

> "… Any answer can, and will of course, be limited to the witness' current knowledge, information and belief (to quote Rule 251) and

> subject to disclosure of any after-acquired facts and information (also as required by the rules)."

[13] It seems logical to me that both parties will benefit from the maximum possible disclosure being made as early as possible in the litigation. Of course, any answers provided by Canada at this stage to questions within this category are understood to be qualified, and subject to change, should further relevant information be revealed. However, that does not make the current information available to Canada less valuable to RRDC. If requiring Canada to provide these interim answers results in a delay of the completion of the defendant's document review, then that is the price of the benefit to RRDC from earlier, rather than later, disclosure. In *Montana Band*, Hugessen J. noted at para. 33:

> "…this is a large complicated case and the fact that the marshalling of facts and documents may require great deal of work is something with which the parties simply have to live….".

The same can be said of the case at bar.

[14] I will set out the specific questions at issue within this category and the responses on behalf of Canada to date[2]:

> "*6. With respect to the facts and matters pleaded at para 23 of the SFASOC in the '05 Action, and responded to at para 8 of the FASOD, has the defendant any record of the Kaska or their ancestors ever having surrendered the Territory, or any part of it, to the Crown at a meeting held for that purpose?*
>
> The defendant cannot answer this until document review is complete.
>
> …
>
> *19.(e) Regarding the facts and matters pleaded in subparagraph 43[d], has the defendant-after July 15th,1870-enjoyed the*

[2] RRDC's questions are in italics and Canada's initial answer is in regular font. "SFASOC" means the Second Further Amended Statement of Claim, filed April 29, 2009. "FASOD" means the Further Amended Statement of Defence, filed June 10, 2009.

*benefits of the lands comprising the Territory by exploiting those lands as a source of revenue?*

The defendant cannot answer this fully until document review is complete, however, the defendant states that any dispositions were made in accordance with the defendant's legal obligations applicable to it at the relevant times.

*"19.(f) Regarding the facts and matters pleaded in subparagraph 43[e], did the defendant's servants or agents-after July 15th, 1870-consult the plaintiff and its members [or other Kaska] in respect of the disposition of lands and resources within the Territory to third parties prior to making such dispositions?*

The defendant cannot answer this until document review is complete.

…

*19.(i) Regarding the facts and matters pleaded in subparagraph 43(h), did the Government of Canada, in or around April 2003, purport to devolve administration and control of, and the right to beneficially exploit, the Territory to the Government of Yukon over the objections of the Kaska, including the plaintiffs, without first considering and settling the claims of the plaintiff and other Kaska to the Territory?*

In reaching the Devolution Transfer Agreement and in enacting the *Yukon Act*, S.C. 2002, c. 7 the defendant acted in accordance with its legal authority over the claimed Territory. It is not possible to answer the aspect of the question relating to objections of the plaintiff until document review is complete. Nor is it possible to answer the aspect of the question dealing with considering and settling the claims until we know the meaning of "considered and settled", and are sure it does not require a legal conclusion.

…

*21.(e) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[e] of the SFASOC?*

The defendant cannot provide a full answer until document review is complete. However, the defendant states that any

> dispositions were made in accordance with the defendant's legal obligations applicable to it at the relevant times."
>
> …
>
> *21.(h) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[h] of the SFASOC?*
>
> In reaching the Devolution Transfer Agreement and in enacting the *Yukon Act*, S.C. 2002, c. 7, the defendant acted in accordance with its legal authority over the claimed Territory. It is not possible to answer the aspect of the question relating to objections of the plaintiff until document review is complete. Nor is it possible to answer the aspect of the question dealing with considering and settling the claims until we know the meaning of "considered and settled", and are sure it does not require a legal conclusion." (my emphasis)

[15] For all the above questions, I reject Canada's excuse that it is not possible to answer until document discovery is complete. I see no reason why interim answers should not be provided based on the current state of Canada's document review. Accordingly, in each case I direct Canada to provide its current position in response, which it may, of course, qualify and amend as new relevant documents are revealed.

[16] With some of these questions, Canada's answers were multi-faceted and fall within other of Canada's proposed categories. Therefore, it will be necessary to address them again below.

***2. Questions where the documents speak for themselves.***

[17] There are four questions in this category. I will set out each question, together with Canada's initial response, then the positions of the parties at the hearing, followed by my ruling on each.

> "*12. With respect to the facts and matters pleaded at paragraph 30 of the SFASOC in the '05 Action, and responded to at*

> *paragraph 19 of the FASOD, did the Cabinet agree at its meeting of July 19th, 1973, to accept all of the recommendations made by the Special Committee of Ministers in that Committee's Memorandum for the Cabinet regarding 'Indian and Inuit Title and Claims' dated July 28th, 1973?*
>
> The federal Cabinet addressed the topic of "Indian and Inuit Titles and Claims" at a meeting on July 19th, 1973. Minutes of the meeting of the federal Cabinet on July 19, 1973 show that the Cabinet agreed on 17 points related to Indian and Inuit Titles and Claims. These minutes are in the public domain at Library and Archives Canada and are in the plaintiff's documents as #10 and will be produced in the Crown's upcoming List of Documents."

RRDC's counsel submits that Canada's answer is evasive, unresponsive and ambiguous. He says the question asked is whether cabinet agreed "to accept all of the recommendations", and the fact that the documents referred to are publicly available and will be disclosed in an upcoming List of Documents is irrelevant.

[18] Canada replies that to require a further answer would be duplicative of document discovery and would not aid in the "just, speedy and inexpensive determination" of the proceeding, to quote the object of the *Rules of Court*, in Rule 1(6).

[19] In discussing this point at the hearing, I questioned RRDC's counsel about the relevance of any recommendations made by the Special Committee which were not accepted by Cabinet at its meeting of July 19, 1973. Counsel declined to answer that question directly, stating that it had to do with his trial strategy. Obviously, it would have been inappropriate for me to press RRDC's counsel on such potentially privileged matters, but his position leaves me without a rationale for compelling an answer to RRDC's question. Furthermore, having reviewed both the memorandum from the Special Committee and the minutes of the Cabinet meeting, it seems that RRDC should be able

to determine for itself whether all the recommendations were accepted or not. In other words, I agree with Canada that the documents speak for themselves and no further answer is required.

[20]

> "*13. With respect to the facts and matters pleaded at paragraph 30 of the SFASOC in the '05 Action, and responded to at paragraph 19 of the FASOD, if the Cabinet did not agree at its meeting of July 19th, 1973, to accept all of the recommendations made by the Special Committee of Ministers in that Committee's Memorandum for the Cabinet regarding 'Indian and Inuit Title and Claims' dated June 28th, 1973, which specific recommendations did the Cabinet not agree to accept?*
>
> Please see response to #12."

RRDC submitted that the Canada's answer is evasive and unresponsive. For the reasons I have just given, I disagree. No further answer is required.

[21]

> *"14. Also with respect to the facts and matters pleaded at paragraph 30 of the SFASOC in the '05 Action, and responded to at paragraph 19 of the FASOD, what, if anything did the Cabinet agree to at its meeting of July 19th, 1973, with respect to the government's policy towards the matter of 'Indian and Inuit Title and Claims'?*
>
> Please see response to #12." (emphasis already added)

Once again, RRDC says that Canada's answer is evasive and unresponsive. For the reasons just given above, I disagree. No further answer is required.

[22]

> *"38. With respect to the facts and matters pleaded at paragraph 29 of the Amended Statement of Claim in the '06 Action and responded to at paragraph 30 of the SFASOD, what specifically were the recommendations that were made by the Special Committee of Ministers on Indian Claims?*

> The Memorandum for the Cabinet, #671-73, dated June 28, 1973 and entitled Indian and Inuit Title Claims, speaks for itself. It will be produced in an upcoming Crown List of documents."

RRDC again submitted that Canada's answer is evasive and unresponsive. I agree with Canada that the Memorandum itself is the best evidence of what the recommendations the Special Committee made to Cabinet were. No further answer is required.

[23]

> "*39.(s) Do the defendant's records also show that the process for ratifying the UFA that was determined at a CYI Special General Assembly in January 1991 was conveyed in a letter from the CYI's Chairperson to Minister Siddon and Premier Penikett dated January 22nd, 1991?*
>
> A copy of the document referenced as a "…letter from the CYI's Chairperson to Minister Siddon and Premier Penikett dated January 22nd, 1991" has been produced in Canada's List of Documents dated July 30, 2009. The document speaks for itself."

RRDC says Canada's answer is evasive and unresponsive. I disagree. The letter which is the subject of the question was not authored by Canada or anyone on its behalf. Consequently, I agree with Canada's counsel that her client cannot logically offer any more insight into the meaning of the letter. No further answer is required.

### *3. Questions which seek a legal conclusion.*

[24] Canada's counsel relies on three cases in support of her arguments in this category. The first is *Loo v. Alderwoods Group Canada Inc.*, 2010 BCSC 1471. This is a case involving a plaintiff who sought damages for wrongful dismissal, conspiracy, fraudulent misrepresentation and interference with economic relations. At para. 21, Smith J. made reference to some of the imputed interrogatories and commented as follows:

> "Other questions do not seek admission of facts, but invite conclusions of law. These include questions about the legal definition of frustration, the steps an employer is required to take to accommodate an employee's medical condition and interpretation of the terms of an employment agreement."

*Loo* did not elaborate on the exact wording of the questions, which unfortunately limits its usefulness.

[25] The second case relied on by Canada's counsel is *Hayes Heli-Log Services Ltd. v. Acro Aerospace Inc.*, 2006 BCSC 80. This case arose from a helicopter accident where the plaintiff alleged that the manufacturer was negligent in failing to warn it about certain design points on the subject aircraft. The only passage in the case in support of Canada's position is para. 21, which commented that the impugned question "seeks a legal response and is improper." However, once again the wording of the question is not provided and therefore the case is of limited assistance. Furthermore, *Hayes* was a case decided under the former British Columbia Rule 29, which was identical to our Yukon Rule 29 with the notable absence of our sub-rule 29(1). The addition of that sub-rule to the Yukon Rules arguably expands the ambit of our Rule 29 significantly beyond that of British Columbia's.

[26] The third case which Canada relies upon is *Burchill v. Yukon Territory (Commissioner)*, [1998] Y.J. No. 96 (S.C.). This is also a case involving a claim of wrongful dismissal. Relying on three British Columbia authorities, at paras. 12 and 16, Hudson J. struck out certain interrogatories as calling for the interpretation of a document. Unfortunately, as in the *Hayes* case, the actual questions are not reproduced in the reasons, which were given orally. As with Canada's other authorities, this limits its usefulness. Further, like *Hayes*, *Burchill* was also based on the old British Columbia Rule

29. Finally, the case law relied upon by Hudson J. has been overtaken by other more recent authorities, which I have already referred to and will next revisit.

[27] In the 1999 *Montana Band* decision, Hugessen J, at para. 5, stressed that the general purpose of discovery was to allow each party to inform itself of the precise nature of the opposing party's position. At para. 21, Hugessen J. was dealing specifically with a category of historical questions requiring interpretation of documents and an opinion. Here he stated:

> "Finally, it seems to me that many of the questions objected to under this rubric are essential for the purpose of understanding the Crown's position and tying it down to the facts as pleaded. That is an essential part of the defining the issues and while such definition is, in the first instance, done by the pleadings, discovery is often an essential second step in order to make clear what exactly it is that separates the parties…". (my emphasis)

[28] Hugessen J. then went on to refer to the category of questions requiring the deponent to state the "Crown's legal position" and remarked, at para. 23:

> "There is of course no question that examination on discovery is designed to deal with matters of fact. "Pure" questions of law are obviously an improper matter to put to a deponent. It is likewise with argumentative questions and questions which ask a party to state what evidence it proposes to lead at trial. But the line is rarely clear or easy to draw. Questions may mix fact and law or fact and argument; they may require the deponent to name a witness; they may still be proper. So too, questions relating to facts which may have legal consequences or which may themselves be the consequence of the adoption of a certain view of the law are nonetheless questions of fact and may be put on discovery." (my emphasis)

[29] In the 2007 decision in *Andersen*, Master MacLeod remarked, at paras. 16 and 17, that one of the purposes of discovery is "understanding the legal arguments that will be

advanced by the opposing party", which he alternatively referred to as "the legal theory of the opposing party". (my emphasis)

[30] In the 2001 decision in *Fullowka*, Vertes J. was dealing with a question in the nature of a "compendious reliance" question. The Alberta Court of Appeal expressly disapproved of such questions in *Can-Air Services*. However, as noted above, Vertes J. chose to follow the more liberal approach from Ontario, because Rule 251 of the Northwest Territories *Rules of Court* was modeled on the relevant Ontario rule. Both of these state that the witness must answer any proper question relating to any "matter" at issue. Vertes J. then stated, at para. 10:

> "As held in the *Six Nations* case, the word "matter" is wide enough to include both a question of fact and the actual position taken by a party on a legal issue." (my emphasis)

[31] In *Nunavut (Department of Community and Government Services) v. Northern Transportation Company Ltd.*, 2010 NUCJ 05, Johnson J. followed *Fullowka*, as the Nunavut *Rules of Court* are identical to those of the Northwest Territories. In considering a number of the questions arising from the examinations for discovery in that case, Johnson J. found that they sought "a legal interpretation" and were therefore improper, but his solution was to order the plaintiff to re-phrase the questions so that they instead asked the defendant to provide its "legal position" (see paras. 50-54, 63-66, 71, 72, 81 and 82).

[32] In the *Six Nations* case, at first instance, [1999] O.J. No. 2804 (S.C.), the Band sought to know the Crown's position on the *Royal Proclamation of 1763*, the *Québec Act* of 1774, and the *Haldimand Proclamation*. At para. 7, Kent J. acknowledged that it is

correct that legal argument of one's case is not required until trial, however he clarified at para. 8:

> "…But, practically speaking, each party needs to know the position of the opposite party. A distinction must, therefore, be drawn between final legal argument and the position being taken by a party on a particular point or issue. A question of law, which is more often than not really a question of mixed fact and law, cannot be held to be improper." (my emphasis)

Kent J. then went on to cite, as an example, that the Six Nations needed to know:

> "The position that Canada takes regarding the effect of:
>
> - the Royal Proclamation 1763
> - Québec Act of 1774
> - *Haldimand Proclamation* of 1784
> - the devolution of pre-Confederation obligations"

He concluded, at para. 9, that the above were among the "matters" that may be at issue:

> "... Six Nations needs to know Canada's position on those matters. Without the answers sought the litigation will remain unfocused. The issues need to be narrowed or at least joined or the trial could become unmanageable. Furthermore, no harm can come to Canada by being required to determine its position and state it."

[33] I suggest the same can be said in the case at bar, as will become evident in my discussion regarding the specific questions.

[34] *Six Nations* was appealed to the Divisional Court and this appeal decision is the one referred to above by Vertes J. in *Fullowka*. Campbell J. delivered the reasons for the Divisional Court, and at para. 9 he stated:

> "…Rule 31.06(1) requires the examined party to answer any proper question related to "any matter in issue in the action". On a plain reading of the Rule, the word "matter" is wide enough to include both a question of fact and the actual position taken by a party on a legal issue..." (my emphasis) (Rule 31.06 is the Rule upon which the Northwest Territories Rule 251 is based)

Later, at para. 14, Campbell J. continued that Canada's representative was:

> "… not required to swear to the truth of the law, but merely to state what the defendant's current legal position is. If that position changes, she is required to advise the plaintiff, as would be [the] case for any others on discovery." (my emphasis)

[35] I will now turn to the questions at issue in this category. In each case, I will state the question, indicate Canada's response, summarize the arguments of the parties, and then give my ruling.

[36]

> *"2.(b) What is the defendant's position as to what constitutes the equitable principles that are referred to in the phrase' … the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines'?*
>
> This is a question that calls for legal conclusion and is not appropriate to be answered in an interrogatory." (my emphasis)

RRDC argued that it has provided its position as to its understanding of what the "equitable principles" are in its response to Canada's demand for particulars.[3] Therefore, it submits that it is only fair that Canada provide its position on the point. I agree.

[37] Canada is not being asked to provide its final legal argument on the definition of "equitable principles", it is only being asked to provide its current legal position on the issue. In my view, there is a significant risk that this litigation will remain unfocused and that the trial could become unmanageable unless this question, and others similar to it, are answered now. Furthermore, there is no prejudice to Canada in being required to state its current legal position on the issue, if it is understood that this position could change as more information is obtained. I therefore direct that the question be answered.

[3] At para. 15(a) of RRDC's Response to Canada's Demand for Particulars, dated May 14, 2009.

[38]

> "*19.(d) Also regarding the facts and matters pleaded in subparagraph 43[c] [SFASOC], if the defendants servants or agents did-after July 15th, 1870-make grants of land and issue leases, licenses and permits for the development of lands within the Territory, did they first consider and settle the claims to those lands of the Kaska?*
>
> The defendant cannot fully answer this until "consider and settle" are defined by the plaintiff. This also calls for legal conclusion. The defendant did act in accordance with its legal authority over the claimed Territory." (my emphasis)

RRDC submits that Canada's answer is evasive and unresponsive, and denies that the question calls for a legal conclusion. I agree with that submission. If Canada finds it necessary to qualify its answer by stating its current legal position on the terms "consider and settle", then it may do so.

[39]

> "*19(h) Regarding the facts and matters pleaded in subparagraph 43[g], did the defendant and its servants or agents-after July 15th, 1870-put the rights and interests of the plaintiff and its members (or other Kaska) in and to the Territory ahead of its interests of others?*
>
> At all times the defendant's servants or agents acted in accordance with their legal authority in respect of the claimed Territory."

RRDC says Canada's answer is evasive, unresponsive and argumentative. Canada replies that the question presupposes a legal conclusion, is argumentative and seeks to box Canada into a logical corner on a question of law. I agree with RRDC that the initial answer provided by Canada is argumentative. I also acknowledge that RRDC provided further particulars to Canada as to what it means by "others". And, I disagree with Canada that the question presupposes a legal conclusion. However, in my view, the

language “put the rights and interests….ahead of” is vague, and because of that vagueness, I am not directing Canada to provide any further answer.

[40]

> “*21.(b) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[b] of the SFASOC?*
>
> The defendant cannot answer this until we have the plaintiff’s definition of “settlement” and of “consider and settle” and the requirements of the 1870 Order. This also calls for a legal conclusion.” (my emphasis)

RRDC submits that Canada is being obtuse, evasive and unresponsive and denies that the question calls for a legal conclusion. At the hearing, RRDC's counsel clarified that he is certainly not asking for an admission that Canada is in breach of its fiduciary duty by enacting legislation, as pled at para. 43(b) of the second further amended statement claim in the ’05 Action. He submitted that his question is focused on the facts upon which Canada relies for its denial. In other words, he is asking whether Canada is simply relying on its bare denial, and thereby putting RRDC to the proof of the allegation, or whether there is a factual basis for the denial. In this regard, counsel relies upon the comments of Hugesson J. in *Montana Band*, at para. 10, and says that Canada should view the question in the “best possible light”, which is that RRDC is simply seeking an admission of fact and not a conclusion of law. I agree and direct that a further and better answer be provided based upon the current state of Canada’s document review. Any such as answer is subject to change as further relevant documents are revealed.

[41]

> “*21.(c) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[c] of the SFASOC?*

> The defendant cannot answer this until we have the plaintiff's definition of considered, settled and the requirements of the 1870 Order. This also calls for a legal conclusion." (my emphasis)[4]

RRDC submits that Canada's answer is evasive and unresponsive and denies that the question calls for a legal conclusion. For my reasons at paras. 36 and 39 above, I agree and direct that Canada provide a further and better answer.

[42]

> "*21.(d) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[d] of the SFASOC?*
>
> The defendant cannot answer this until we have the plaintiff's definition of considered, settled and the requirements of the 1870 Order. This also calls for a legal conclusion." (my emphasis)

Once more, RRDC submits that Canada's answer is evasive, unresponsive and argumentative, and denies that the question calls for a legal conclusion. Canada replies that the question presupposes a legal conclusion and seeks to box it into a logical corner on a question of law. For my reasons above, I disagree and direct that Canada provide a further and better answer.

[43]

> "*21.(e) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[e] of the SFASOC?*
>
> The defendant cannot provide a full answer until document review is complete. However, the defendant states that any

[4] Subparas. 43(a) through (h) of the SFASOC allege various breaches of asserted constitutional and fiduciary duties.

> dispositions were made in accordance with the defendant's legal obligations applicable to it at the relevant times."

RRDC submits that Canada's answer is evasive, unresponsive and argumentative. Canada replies that the question also presupposes a legal conclusion, is argumentative and seeks to box Canada into a logical corner on a question of law. For my reasons above, I disagree and direct that Canada provide a further and better answer. I also addressed question 21(e) at para. 15 above.

[44]

> "*21.(h) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[h] of the SFASOC?*
>
> In reaching the Devolution Transfer Agreement and in enacting the *Yukon Act*, S.C. 2002, c. 7, the defendant acted in accordance with its legal authority over the claimed Territory. It is not possible to answer the aspect of the question relating to objections of the plaintiff until document review is complete. Nor is it possible to answer the aspect of the question dealing with considering and settling the claims until we know the meaning of "considered and settled", and are sure it does not require a legal conclusion."(my emphasis)

RRDC submits that Canada's answer is evasive, unresponsive and argumentative. Canada replies that the question presupposes a legal conclusion and seeks to box it into a logical corner on a question of law. For my reasons relating to this category of questions generally, I disagree. Accordingly, I direct that the question be answered, subject to whatever qualifications Canada feels are appropriate. I also addressed question 21(h) at para. 15 above.

[45]

> "*20.(a) What steps, if any, did the defendant [take] prior to April 2003 to protect the aboriginal title, rights and interests claimed by the plaintiff and its members [and other Kaska] in and to the lands comprising the Territory?*
>
> Please see response to question 19(a). The plaintiff has the burden of proof of the existence of its alleged aboriginal title, rights and interests to the land. Assuming the Territory is the claimed Territory, at all times the defendant acted in accordance with its legal authority in respect of the claimed Territory."

RRDC submits that Canada's answer is evasive, unresponsive and argumentative, and says that it clearly defined "Territory" in the preamble to the interrogatories as meaning "the portion of the Kaska's claimed traditional territory in the Yukon". Canada replies that the question presupposes a legal conclusion, is argumentative and seeks to box it into a logical question on a corner of law. I disagree. It is possible for Canada to answer the question with appropriate qualifications to avoid being seen as accepting any presupposed legal conclusions as to aboriginal title or the Territory. Beyond that, the answer to the question is essentially factual and has largely been answered already in response to question 19(a). Accordingly, I direct that the question be answered.

[46]

> "*20.(b) What steps, if any, did the defendant [take] after April 2003 to protect the aboriginal title, rights and interests claimed by the plaintiff and its members [and other Kaska] in and to the lands comprising the Territory.*
>
> The plaintiff has the burden of proof of the existence of its alleged aboriginal title, rights and interests to the lands comprising its claimed Territory. Assuming the Territory is the claimed Territory, at all times the defendant acted in accordance with its legal authority in respect of the claimed Territory."

The positions of the parties on this question are the same as for question 20(a) above, and, for the reasons I just gave on that question, I direct this question to be answered.

[47]

> "*21.(g) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[g] of the SFASOC?*
>
> At all times the defendant acted in accordance with its legal authority over the claimed Territory and in accordance with its legal obligations."

RRDC submits that Canada's answer is evasive and unresponsive. Canada replies that the question presupposes a legal conclusion, is argumentative and seeks to box Canada into a logical corner on a question of law. I find that Canada's initial answer is argumentative. I further find that the question should be viewed in the best possible light, i.e. it is essentially a factual inquiry and not one seeking a conclusion of law. Accordingly, I direct Canada to provide a further and better answer.

### ***4. Questions containing terms which require definition.***

[48]

> "*19.(b) Regarding the facts and matters pleaded in subparagraph 43[b], did the Government of Canada-after July 15th, 1870-enact legislation to open the Territory for purposes of settlement by others?*
>
> The defendant cannot answer this until the plaintiff provides the meaning of 'settlement'." (my emphasis)

RRDC submits this answer is obtuse, evasive and unresponsive. It is important to note here that, in its supplemental response to Canada's demand for particulars[5], RRDC provided some representative examples of the legislation enacted to open the Territory for the purposes of settlement. It is also significant that it was Canada that drafted the relevant passage referring to "settlement" in the*1870 Order*, which reads as follows:

> "… and furthermore that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."

It therefore seems evasive of Canada to argue that it cannot provide its legal position on the meaning of "settlement" in the above paragraph, until RRDC first provides its interpretation of the word.

[49] Also, in its further amended statement of defence in the '05 Action[6], Canada has pled, at para. 15, that it "admits that the claims of the plaintiff or other Kaska, or their ancestors, to the Territory have not been settled" (my emphasis). Further, at para. 25 of Canada's second further amended statement of defence in the '06 Action[7], it has pled:

> "In specific reply to paragraph 24 of the amended statement of claim:
>
> (a) He denies that the plaintiff, in its own right, has or can bring any claims for compensation for lands required for the purposes of settlement; and
>
> (b) In the alternative, if the plaintiff has the ability in its own right to bring claims for compensation for lands required for settlement, which is not admitted but denied, he admits for the purposes of this action that the claims of plaintiffs have not been settled." (my emphasis)

[5] Dated June 10, 2010.
[6] Filed June 10, 2009.
[7] Filed June 10, 2009.

Logic would dictate that, in order to make these pleadings, Canada must have some understanding the meaning of the words “settlement” and “settled”. Therefore, it should disclose that understanding to RRDC as its current legal position. Accordingly, I direct that Canada answer the question.

[50]

> “*21.(b) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[b] of the SFASOC?*
>
> The defendant cannot answer this until we have the plaintiff’s definition of “settlement” and of “consider and settle” and the requirements of the 1870 Order. This also calls for a legal conclusion.”
>
> *21.(c) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[c] of the SFASOC?*
>
> The defendant cannot answer this until we have the plaintiff’s definition of considered, settled and the requirements of the 1870 Order. This also calls for a legal conclusion.”
>
> *21.(d) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[d] of the SFASOC?*
>
> The defendant cannot answer this until we have the plaintiff’s definition of considered, settled and the requirements of the 1870 Order. This also calls for a legal conclusion.”
>
> …
>
> *21.(h) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[h] of the SFASOC?*
>
> In reaching the Devolution Transfer Agreement and in enacting the *Yukon Act*, S.C. 2002, c. 7, the defendant acted

> in accordance with its legal authority over the claimed Territory. It is not possible to answer the aspect of the question relating to objections of the plaintiff until document review is complete. Nor is it possible to answer the aspect of the question dealing with considering and settling the claims until we know the meaning of "considered and settled", and are sure it does not require a legal conclusion."(my emphasis)

Once again, in order to answer these questions, Canada may want to state its current legal position on the meaning of the terms "settlement" and "consider and settle", as well as the requirements of the *1870 Order*. It does not first require RRDC's definition of those terms in order to do so. Canada may also add further qualification to avoid being seen as adopting any conclusive legal position. Subject to those types of qualifications, the answers to the above questions are essentially factual. Accordingly, for my reasons given above in this category, I direct that the questions be answered. I note that I considered all of these questions at paras. 15, 39-43 and 43 above, and reached the same conclusion with respect to Canada's obligation to answer.

***5. Questions which have been adequately answered.***

[51]

> *"15. With respect to the facts and matters pleaded at paragraph 31 of the SFASOC in the '05 Action, and responded to at paragraph 20 of the FASOD, did Canada intend that the Indian and Inuit people would be able to rely on Canada's new policy on the claims of Indian and Inuit people? If not, why not?*
>
> Yes, please see paragraph 60 of the defendant's Reply to Notice of Admit dated May 31, 2006."

RRDC's objection here is that the reference to paragraph 60 of Canada's Reply to Notice to Admit makes the answer evasive and ambiguous. However, I understood this was resolved at the hearing by Canada's agreement to simply limit the answer to the word "Yes".

[52]

> "*21.(f) On what specific facts, if any, does the defendant rely as the basis for its denial of the alleged breach pleaded in subparagraph 43[f] of the SFASOC?*
>
> Among other things, nothing in the Rupert's Land and Northwestern Territory Order requires compensation to be paid."

RRDC submits that Canada's answer is evasive and unresponsive and points out that there is no reference in paragraph 43(f) of the second further amended statement of claim to the *1870 Order*. Further, it wants to know what Canada is referring to by "other things". Canada replies that the question is adequately answered as written.

[53] I agree with RRDC that the answer is evasive and unresponsive. It is also argumentative. In addition, the use of the words "Among other things" makes the answer vague and ambiguous. The question is essentially a factual inquiry, as opposed to one asking for a legal conclusion. Accordingly, I direct that a further and better answer be provided.

[54]

> "*39.(v) Prior to the end of land claims negotiations in the Yukon, did the defendant's servants or agents agree with the Territorial Government and Council for Yukon Indians to make major amendments to the principal chapter of the UFA dealing with transboundary claims without first consulting and obtaining consent of the plaintiff to such amendments?*

> It was not the responsibility of the defendant to consult and obtain consent of the plaintiff. It was the admitted responsibility of the CYI to advise the plaintiff of these amendments."

RRDC submits that Canada's answer is evasive and unresponsive. Canada replies that the question is adequately answered as written. At the hearing, RRDC's counsel agreed to delete the modifier "major" in the question. With that change, I conclude that the question is essentially one of fact, which is capable of being answered by a yes or no. If Canada wishes to qualify such an answer along the lines of its original answer, then it may do so. On this basis, I direct Canada to provide a further and better answer.

[55]

> "*44. Also with respect to the admission made in paragraph 47 of the Crown's SFASOD, is the honour of the Crown engaged in Canada's dealings with the plaintiff in relation to the plaintiff's unsettled comprehensive land claims to the Territory?*
>
> The honour of the Crown was engaged in the comprehensive land claims negotiation process with the plaintiff."

RRDC submits that Canada is evasive and unresponsive. Canada replies that the question is adequately answered as written. I conclude that the answer is unresponsive for two reasons: first, because the question is framed in the present tense, whereas the answer is framed in an historic context; and second, the question does not refer to the "negotiation process". Accordingly, I direct that a further and better answer be provided.

[56]

> "*45. If the defendant denies that the honour of the Crown engaged in Canada's dealings with the plaintiff in relation to*

> *the plaintiff's unsettled comprehensive land claims to the Territory, on what specific facts, if any, does the defendant rely as the basis for that denial?*
>
> Please see response to #44."

The positions of the parties on this question are the same as for question 44 and for the reasons just given, I direct that a further and better answer be provided.

**COSTS**

[57] The parties may address me on costs if need be. However, as success was divided, I would expect each side would be prepared to bear its own costs.

Gower J.