

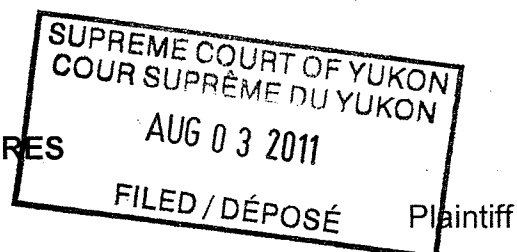
SUPREME COURT OF YUKON

Citation: *Dana Naye Ventures v. Canada*
(Attorney General), 2011 YKSC 59

Date: 20110803
S.C. No. 10-A0032
Registry: Whitehorse

Between:

DANA NAYE VENTURES



And

ATTORNEY GENERAL OF CANADA and
BUSINESS DEVELOPMENT BANK OF CANADA

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Peter Sandiford
Alex Benitah
Charles Willms

Counsel for Dana Naye Ventures
Counsel for the Attorney General of Canada
Counsel for Business Development Bank
of Canada

REASONS FOR JUDGMENT (Application for answers to interrogatories)

INTRODUCTION

[1] Dana Naye Ventures ("DNV") has brought a defamation action against the Attorney General of Canada ("AG") and the Business Development Bank of Canada ("BDC") arising out of comments about DNV's business practices. DNV issued interrogatories to an employee of Canada. DNV now applies for answers from the specific person to whom the interrogatories were served and an order for sources of

information and belief. DNV also seeks an order that certain interrogatories are relevant and should be answered.

BACKGROUND

[2] Dana Naye Ventures is a federally-incorporated not-for-profit financial institution that provides developmental financing, assistance and business services to small and medium-sized entrepreneurs in Yukon and northern British Columbia. It is based in Whitehorse. In 2009, DNV was one of two main sources of capital for local businesses and consultants; the other was BDC.

[3] On July 23, 2009, Eric Brown, a B.C.-based consultant, entered into a contract with BDC to provide a study about the business services available in Yukon. While the contract was with BDC, the work was understood to be for Indian and Northern Affairs Canada ("INAC"), a BDC "Client". As part of this work, Mr. Brown solicited information from local businesses and other stakeholders through anonymous surveys and interviews. He provided the results to BDC in a November 2009 report entitled "Study on the Business Service Environment in the Yukon Territory" (the "Study"). Prior to drawing conclusions in the Study, Mr. Brown recorded point-form comments that he received from individuals he interviewed. There are both positive and negative comments included about DNV. The individuals who made the comments are not identified.

[4] DNV alleges that the Study is defamatory and pleads the following at para. 4 of its Amended Amended Statement of Claim:

In or about November, 2009, the defendant Crown's servants and agents, including BDC, published a study entitled "Study on the Business Service Environment in the Yukon Territory" (the "Study"). By "published", the plaintiff means that the Study was communicated to at least one person other than the plaintiff, which communication

included but was not necessarily limited to the delivery of the Study by the defendant BDC to the defendant Crown as admitted in paragraph 3 of the defendant BDC's statement of defence filed July 15, 2010.

[5] DNV received a copy of the Study on April 27, 2010. Correspondence from Shari Borgford, the Regional Director of the Canadian Northern Economic Development Agency (CanNor), to DNV's counsel stated the following:

- As indicated in the April 27, 2010 email to your client, this draft Report is only an internal CanNor document.
- Further, as the Report makes clear, the comments in it do not reflect the views of CanNor or INAC; they are the statements of parties who were interviewed by the authors, BDC, in the process of conducting the study.
- The draft Report provided to DNV on April 27, 2010 is not a final version; it is what BDC submitted to CanNor following completion of their survey.
- DNV is the only party external to CanNor or BDC that has been provided any draft of the report.
- CanNor does not intend to publish or distribute this report.

[6] The plaintiff served interrogatories on Shari Borgford of CanNor and Guy Champagne of BDC on July 20, 2010. Responses were received in late August. The plaintiff seeks orders with respect to these responses by way of application filed December 3, 2010. In particular, it objects to Karen Dove answering interrogatories directed to CanNor in the place of Shari Borgford, and seeks orders relating to the sufficiency of certain responses in the affidavits of both Karen Dove and Guy Champagne. Some of DNV's objections relate to the refusal of Guy Champagne to respond to questions about the identities of the individuals who made seventeen negative comments that were included verbatim in the Study and form a large part of DNV's claim.

ISSUES

[7] Counsel for the parties had managed to resolve some of the issues raised in the applications prior to the hearing. As well, we resolved during the hearing that, on DNV's request for particulars, BDC would provide the answers to questions 8 and 9 in the interrogatories directed to Mr. Champagne. The issues that remain are:

1. Should Shari Borgford be ordered to answer the interrogatories served on her and answered by Karen Dove?
2. Should Ms. Dove be required to disclose the source of her information with respect to her answers to questions 3 (a), (b), (c), (d) and 3 (k) (i), (ii) and (iii), which were sworn on the basis of information and belief?
3. Should Ms. Dove be required to answer questions 3 (i) and (j), objected to on the basis of relevance?
4. Should Mr. Champagne be required to answer questions 4, 15, 16 (a) to (q), 17 (a) to (f), 18 and 19, objected to on the basis of relevance? Relatedly, if the answers to questions 16 and 17 are relevant, can Mr. Champagne rely on common law privilege as a basis for his refusal to respond?

[8] I attach the Interrogatories for and Answers of Karen Dove and Guy Champagne as Appendices "A" and "B" respectively.

ANALYSIS

1. Should Shari Borgford be ordered to answer the interrogatories served on CanNor and answered by Karen Dove?

[9] In requesting this order DNV primarily relies on Rule 29(2) of the Supreme Court of Yukon *Rules of Court* ("Rules of Court"), but I will set out 29(1) and (2):

RULE 29 – DISCOVERY BY INTERROGATORIES

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 on other parties a record. (emphasis added)

[10] According to DNV, the use of mandatory language in this Rule means that the party serving the interrogatories is entitled to a response from the person on whom they are served.

[11] In response, the AG says that the application of Rule 29 is trumped by provisions in the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (the “CLPA”) and the associated *Crown Liability and Proceedings (Provincial Court) Regulations*, SOR/91-604 (the “Regulations”).

[12] Section 27 of the CLPA is as follows:

27. Except as otherwise provided by this Act or the regulations, the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings.

[13] Section 7 of the *Regulations* is given the heading “Examination for Discovery” and reads:

7. Subject to sections 37 to 39 of the *Canada Evidence Act*, where, under the provincial rules, there is provision under which, if an action were an action between a corporation (other than an agency of the Crown) and another person, an officer or servant of the corporation could be examined for discovery, **such officer or servant of the Crown or an agency of the Crown, as the case may be, as may be designated for the purpose by the Deputy Attorney General or after such designation by order of the court**, may be examined for discovery during an action subject to the same conditions and with the same effect as would apply to the examination for discovery of the officer or servant of a corporation.
(emphasis added)

[14] According to the AG, these provisions give the Crown the right to designate someone to respond to interrogatories, irrespective of who they are addressed to. DNV does not so much take issue with the interpretation the AG gives the section, but submits that it is relevant to oral discovery only and not interrogatories, and therefore does not affect the application of Rule 29(2).

[15] I do not think that DNV makes a helpful distinction. As argued by DNV on the basis of *Hoyt v. Insurance Corp. of British Columbia*, 2001 BCCA 154, I accept that traditionally there has been a difference in the scope and purpose of interrogatories versus oral discovery, however I do not think that difference is relevant here. Further, unlike British Columbia, the Yukon *Rules of Court* include Rule 29(1), which specifically broadens the traditional scope of interrogatories to reduce or eliminate the need for examination for discovery. Rule 29(1) is a new provision, which became effective September 15, 2008, as part of the new *Rules of Court*. Rule 29(1) must be read in conjunction with Rule 1(6), which adds the principle of proportionality to the object of securing the “just, speedy and inexpensive determination of every proceeding on its

merits ...". Because of procedural wrangling, this case has strayed a long way from that objective.

[16] The *CLPA* is a short piece of legislation that does not explicitly consider interrogatories. Its purpose seems to be to allow the Crown to determine who is well-situated to give the answers requested during the discovery phase of a proceeding, and, in an entity the size of the federal government, it is likely in the best position to determine this. In this case, the interrogatories delivered to the Regional Director of CanNor were answered by the Manager of Community and Economic Development. Apart from the fact that Shari Borgford responded to a letter sent by DNV following its receipt of the report, there was no reason advanced by DNV for why they specifically preferred her evidence over that of another affiant.

[17] In *Hubrisca Enterprises Ltd. v. Canada (Attorney General)*, [1988] B.C.J. No. 122 (S.C.), the court suggested a two step procedure at para. 19 for challenging the Crown's deponent:

19 ... firstly, unless it can otherwise demonstrate that the Crown deponent is not informed or is incapable of being informed, the examining party must proceed to examine the designated deponent. Secondly, if after examination the Crown deponent proves uninformed or incapable of being informed the examining party may apply to the Court for redesignation.

[18] In this application, DNV has not demonstrated that Ms. Dove is not informed or is incapable of being informed.

[19] I conclude, at this point, that DNV is not entitled to have the interrogatories answered by Ms. Borgford.

2. Should Ms. Dove be required to disclose the source of her information with respect to her answers to questions 3 (a), (b), (c), (d) and 3 (k) (i), (ii) and (iii), which were sworn on the basis of information and belief?

[20] Questions 3(a) through (d) relate to the distribution of the Study between BDC and CanNor or INAC. Question 3(a) and its response reads:

[Q] In paragraph 3 of BDC's Statement of Defence, BDC pleads that it delivered the report to "INAC": was the Report¹ delivered by BDC to INAC?

[A] No. I have been informed and do believe that the Report was delivered to CanNor.

[21] Questions (b), (c) and (d) particularly ask who in INAC the report was delivered to, whether INAC delivered the Study to CanNor, and whether BDC delivered the Study to CanNor directly. The response to each question is a direction to the answer to 3(a).

[22] Question 3(k) and its sub-questions relate to the names of any CanNor, INAC or other Crown officials interviewed by Mr. Brown during his research for the Study. Ms.

Dove's response to these was:

I have no knowledge, and have been informed and believe that CanNor has no knowledge of the names of anyone interviewed by the consultant.

[23] Having given Canada some leeway in applying s. 7 of the Regulations to interrogatories as well as examinations for discovery, the sources of information must be disclosed. It is not satisfactory to say the source of the information is from a review of the file.

[24] As a preliminary objection, counsel for the AG submits that the traditional scope of interrogatories adopted in *Hoyt v. Insurance Corp. of British Columbia*, *supra*, should govern. In that case, the BCCA confirmed that, in British Columbia, there was a

¹ The Study is alternatively referred to as "the Report" in various documents filed with the Court.

difference between the scope of questions permitted for discovery versus interrogatories. Specifically, the names of potential witnesses can be compelled on examination for discovery, whereas in interrogatories the identity of witnesses must be a material fact in issue. In *Hoyt*, the court concluded that the fact of medical treatment was relevant but not the names of who provided the treatment (para. 33).

[25] However, in deference to those who submitted that there should be no difference, in principle, between the scope of interrogatories and examination for discovery, Finch J.A., as he then was, stated:

37 The question arose in the course of counsel's submissions as to why there should, in principle, be a difference between the scope of questions permissible on examination for discovery and in an interrogatory. The history of the rules, and their application, suggest that the two procedures were not intended to provide parallel means of obtaining the same information. Rather, they supplement one another. Interrogatories can be burdensome for the recipient and can add unnecessarily to the exchange of paper, duration of proceedings and expense. They were not intended to provide the equipment for a fishing expedition.

38 If the Court, or those responsible for suggesting revisions to the rules, should come to the conclusion that the scope of interrogatories should be broadened, it is within the power of the Court to seek appropriate amendments. Some of the cases referred to suggest that would be useful.

39 However, in the absence of such an amendment, this Court should not interfere with decisions of the trial court on matters of practice in that court, unless such practise is based on an error in principle. ...

[26] I conclude that Rule 29(1) broadens the scope of interrogatories to be similar to examinations for discovery requiring sources to be given. The usefulness and cost savings of interrogatories will be completely emasculated if the designated person to

answer the interrogatories has no personal knowledge and is not required to give the names of sources. This disclosure of the source of information is also supported by Rule 49(12), which reads:

RULE 49 – AFFIDAVITS

Contents of affidavit

(12) An affidavit may state only what a deponent would be permitted to state in evidence at a trial, except that, if the source of the information is given, an affidavit may contain statements as to the deponent's information and belief, if it is made

(a) in respect of an application for pre-trial order, or

(b) by leave of the court under Rule 42(53)(a) or 50(9)(e).

[27] I order that Ms. Dove amend her answers to questions 3(a), (b), (c), (d) and 3 (k)

(i), (ii) and (iii), so that they clearly identify the source(s) of her information.

3. Should Ms. Dove be required to answer questions 3 (i) and (j), objected to on the basis of relevance?

[28] Questions 3(i) and (j) relate to the distribution of the report within CanNor and INAC after it was received from BDC. In 3(i), DNV asks whether any individual at CanNor who first received the report provided it to another individual at CanNor, and for the names of all recipients. Question 3(j) asks the same question, but with respect to anyone at INAC who may have received the report from CanNor. Ms. Dove's response to both is an objection on the basis that the question does not relate to a matter in issue in this action.

[29] DNV submits that the test for relevance is very broad and the names sought will confirm both publication and provide information on the scope of publication. The AG and BDC object, taking the position that the pleadings allege publication from BDC to CanNor

or INAC only and not within CanNor or between CanNor and INAC, and therefore this question is outside the scope of the action. BDC as well says that to succeed, DNV would have had to have specifically pleaded re-publication. The AG further says that the pleadings lack the necessary specificity that would allow this line of inquiry to proceed.

[30] In its claim, DNV alleges that:

“...the Study was communicated to at least one person other than the plaintiff, which communication included but was not necessarily limited to the delivery of the Study by the defendant BDC to the defendant Crown ...”

[31] The AG likens this to the pleadings considered in *Craig v. Langley Citizens' Coalition*, 2003 BCSC 124, and *Wesson v. Campbell River (District)* (1985), 63 B.C.L.R. 327 (C.A.). The AG says that the pleadings in defamation actions must contain substantial detail, including particulars of when, in what circumstances, by whom and to whom the allegedly defamatory words were published.

[32] This case is distinguishable from both *Craig* and *Wesson*, where the plaintiffs were pleading against a large number of people in very broad terms. As discussed in my earlier ruling in this case (*Dana Naye Ventures v. Canada (Attorney General)*, 2011 YKSC 20), in *Wesson*, the Court of Appeal characterized the pleadings as raising ‘no more than a speculation of publication’ and a ‘fishing expedition’. In *Craig*, the allegations were that any or every one of seventeen named individuals either ‘printed’, ‘caused to be printed’ or ‘authorized’, ‘incited’ or ‘encouraged’ printing of allegedly defamatory material. In this case, the plaintiff specifically pleads that the Study was sent from BDC to the Crown. The specific nature of this pleading is as a result of an amendment to include an admission made by BDC in its initial statement of defence. In any event, the plaintiff is well aware that a report created by BDC was sent to CanNor, as they received a copy of

it from that agency. Only the Crown is in a position to know who may have received the report within CanNor or INAC and how it flowed within and between those agencies.

[33] In my view, it is implicit in the pleadings that DNV is concerned about further circulation of the BDC Study within CanNor and INAC. The AG is named as a defendant in DNV's action, which would not be the case if CanNor and/or INAC were merely alleged to have received the publication. As well, the scope of information DNV is seeking is narrow and limited to instances of Crown recipients of the Study forwarding it to other individuals within their organizations. The expectation that a document will be forwarded to persons with an interest is not speculative and often happens in a workplace; for example, a recipient manager often is expected to send something out to members of his or her team for their review or consideration. I agree with counsel for DNV that the response to this question is relevant. It goes to the scope of publication, which I find is relevant to the defence of qualified privilege and the issue of damages, should we reach that stage. I order that the AG provide responses to DNV's interrogatories 3(i) and (j).

4. Should Mr. Champagne be required to answer questions 4, 15, 16 (a) to (q), 17 (a) to (f), 18 and 19, objected to on the basis of relevance?

Question 4

[34] Guy Champagne is a Senior Partner of BDC and is listed as the Consulting Project Manager on the Study. Question 4 asks him who typed the Study. Mr. Champagne objects to the question on the ground that it does not relate to a matter in question in the action.

[35] DNV submits that this question is relevant to the issue of publication while BDC says that typing is not publishing. This point was not strenuously argued. I accept that, generally speaking, the preferred approach is to treat dictation-type communications as

privileged (see e.g. *Green v. Minneapolis Threshing Machine Co. & Christiansen*, [1929] 4 D.L.R. 501 (Alta. S.C.A.D.)). There is no indication here that the report was typed by anyone other than the authors or someone that took dictation from them. I decline to order that Mr. Champagne answer question 4.

Questions 15 and 19

[36] Question 15 asks whether there were any meetings between BDC and INAC or other Government of Canada representatives at which the Study was discussed, and, if so, further information about the date(s) and the identities of individuals who attended.

[37] Question 19 asks for the names of any individuals within INAC or other branch of the Government of Canada that discussed the Study with BDC.

[38] Mr. Champagne's response to both questions is an objection on the ground that the question does not relate to a matter in question in the action.

[39] For similar reasons to those discussed in my consideration of Ms. Dove's responses to questions 3(i) and (j), above, I find that Mr. Champagne should answer questions 15 and 19. Communication of the contents of the Study at a meeting could also amount to publication for the purposes of DNV's claim.

[40] As a final point, I note that BDC raised an additional concern about these questions being over-broad and without time boundary, and therefore potentially able to catch discussions about one or the other of these lawsuits insofar as those discussions would relate to the Study. Given the time at which the interrogatories were issued, it should be read and answered only as relating to discussions about the Study itself in the days or weeks following its publication, and not the legal action taken as a result of it.

Questions 16 and 17

[41] These questions seek information about the identity of the individuals and businesses that provided information incorporated into the Study. Question 16 sets out the seventeen negative comments and, with respect to each, asks:

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

[42] Question 17 asks about the business owners, business associations, business advisory service providers and financial institutions that participated in the Study and seeks the names of individuals interviewed. It also asks for the names of federal and territorial government representatives interviewed.

[43] Mr. Champagne objects to these questions on the basis of relevance, stating that they do not relate to a matter in question in the action. He also takes the position that the names of individuals interviewed is subject to common law privilege.

[44] With respect to the relevance issue, DNV submits that the identity of the individuals is relevant to the defamation suit, as whether or not their comments were made maliciously is important to the plaintiff's ability to refute a defence of qualified privilege. BDC says that this is not the case, as it relates to publication only by BDC and the Crown, and the malice would have to be on their part(s). Indeed, this is explicit in the pleadings, where DNV alleges that the "Crown's servants and agents" published the defamatory statements "for improper purposes and with indifference to, or reckless disregard for, the truth".

[45] I am inclined to agree with BDC on this issue. The motivation of the individuals that Mr. Brown approached for input into the Study is not at issue; rather I understand DNV to be criticizing BDC and the Crown for publishing the statements, either for an improper purpose or with the knowledge that they were untrue or reckless disregard for the truth of them. Although DNV says that the context of the statements would help it make the case that the defendants either knew the statements were untrue or were reckless in that regard, I am not satisfied that disclosing the identities of the individuals is necessary to establish this context. Reckless disregard for, or knowledge of, the falsity of a statement can be established through other evidence about the defendant's practices in obtaining, evaluating and communicating information provided.

[46] In the event that I am wrong about the relevance of these responses to DNV's claim, I find in any event that the identities of the individuals who participated in the interviews and surveys is protected by common law privilege. The leading case in this regard is *R. v. National Post*, 2010 SCC 16. In *National Post*, the issue was whether a journalist should be compelled to release documents and the name of an informant in the situation where there was a criminal investigation into potentially fraudulent conduct of the informant. Rather than recognizing a constitutional or class privilege for journalistic-secret source privilege, the Court found that the privilege should be protected on a case-by-case basis, with reference to the *Wigmore* criteria for establishing confidentiality at common law. The *Wigmore* criteria consist of four elements, set out by Binnie J. at para. 53:

First, the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the

relationship must be one which should be “sedulously fostered” in the public good. ... Finally, if all of these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth.

[47] The Court also indicated that the fourth *Wigmore* criterion “does most of the work”.

[48] I think the first two criteria are quite easily resolved. Although counsel for DNV suggested that there was some ambiguity in Mr. Brown’s affidavit about whether he did indeed create a confidence that the identities of his interviewees would not be disclosed, I agree with counsel for BDC that his evidence simply appears to be framed in cautious terms. Mr. Brown deposed:

5. ... To the best of my recollection, at the beginning of each of the interviews that I had that led to the statements...I promised the individual that I was interviewing that the statements made to me were made on a confidential basis and that I would not disclose their identities to any other person.

6. I believe that each of the statements made to me ... originated in the confidence that I would not disclose the name of the individual communicating with me. If I had not made that promise to the individuals that I interviewed, I am certain that the communication would never have been made to me and that I would have been unable to fulfil at least part of the mandate arising from the Contract.

7. In my 27 years of experience in conducting surveys and gathering information for business reports and studies, it is my experience that the promise of confidentiality of the names of the individuals providing information to me is essential in order to provide useful studies or reports for my various clients. ...

[49] I find that the first *Wigmore* criterion has been met, and that the communication of the comments originated in a confidence that the identity of the informant would not be disclosed.

[50] Likewise, I accept Mr. Brown's belief that this confidence is essential to the relationship in which the communication arose. Mr. Brown, as a contractor preparing a Study, was asking individuals to comment candidly on the provision of a very important local service. Some of the individuals were likely dependent on DNV for their livelihood, and others were likely required to have frequent professional dealings with DNV. If they believed that their identities would be made known to DNV or another party, they may well have felt fettered in their ability to speak freely for fear that their relationship with DNV would be adversely affected.

[51] In terms of the third factor and whether the relationship is one that should be "sedulously fostered" in the public good, Binnie J. defined "sedulous[ly]" as "diligent[ly] ... deliberately and consciously" (para. 53). BDC submits that the Study was commissioned to improve INAC's understanding of the business services environment in the Yukon, with the ultimate goal being service improvement. BDC says that the government's ability to collect accurate information for the purpose of providing or improving services is in the public good. I agree.

[52] Counsel for BDC also pointed out that the contract between BDC and Mr. Brown is infused with language about confidentiality. However, as pointed out by DNV, this agreement is concerned with the confidentiality as between BDC and Mr. Brown, and not between Mr. Brown and his interview subjects. I accept, however, that the contract does

highlight the importance of confidentiality generally, for example in article 2.8.2 of the *Consultant Code of Contact*, it is noted that:

“Consultants protect confidential information obtained during the course of their duties. They do not disclose such information, for any reason, and in any circumstances, to third parties who are not employed by BDC or to other BDC employees who are not privy to such information”.

[53] This language clearly contemplates the confidential nature of some of the material collected by a contractor, and expressly limits its dissemination even within BDC.

Although not determinative, the fact that both parties to the contract turned their minds to the protection of confidential information at the outset bolsters counsel’s argument that guaranteed confidentiality is important to the relationship not only between Mr. Brown and BDC, but also between Mr. Brown and his informants.

[54] Being satisfied of the first three *Wigmore* criteria, I am left with the fourth, namely, whether the public interest served by protecting the identity of the informants outweighs the public interest in getting at the truth. As noted, this is the most contentious part of the analysis. The relevant considerations for this criterion in a civil suit were considered by the Supreme Court in *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41. They include: how central the issue is to the dispute; the stage of the proceedings; whether the journalist (here contractor) is a party to the proceedings; and, whether the information is available through other means.

[55] Applying these factors to the facts before me, I find that, although the identities of the individuals is relevant, it is not crucial to a determination of whether BDC, CanNor and INAC committed the tort of defamation in relation to the seventeen unsourced comments. As noted above, information about the conduct of the interviews and any

follow-up can be given by Mr. Brown and may well be able to provide all the background necessary for a determination of whether BDC communicated the comments maliciously or with indifference or reckless disregard for the truth.

[56] The second factor, the stage of the proceedings, can work in favour of both disclosure and non-disclosure (para. 58 of *Globe and Mail*). Here, it works in favour of non-disclosure. If, after all the interrogatories are answered, DNV feels that its ability to run its case is hampered by this missing information, they are at liberty to re-visit this issue, as discussed below.

[57] The third factor, whether Mr. Brown is a party to the litigation, militates in favour of disclosure. While not named as an individual defendant, Mr. Brown's inclusion of the comments in the Study form the basis of the claim for BDC's liability, and his actions are being defended by counsel for BDC. There is no third party disclosure issue.

[58] The final enumerated factor, whether the information is available by other means, must be answered in the negative. It is clear from the evidence and submissions that Mr. Brown is the only person with knowledge of who the individuals are, apart from the individuals themselves.

[59] Despite the fact that some factors favour disclosure, on balance, and at this early stage, I find that the public interest in protecting the identity of BDC's informants outweighs the public interest in getting at the truth. Should the information retrieved by DNV through interrogatories and discovery not allow it to make out the elements of their claim, another application for the disclosure of the names may be made and the issue re-assessed: see *Globe and Mail* at para. 58.

Question 18

[60] Question 18 asks about the fifteen businesses that responded to a written survey sent out by Mr. Brown. It asks for the identities of the businesses, whether the responses were disseminated to INAC, and whether BDC has retained the responses. Unlike 16 and 17, above, it was objected to only on the basis of relevance, and not common law privilege.

[61] Mr. Brown has deposed that the seventeen negative comments that are largely at issue came from his oral interviews with individuals, and not as part of the survey responses. However, DNV's pleadings are broader and, although they particularize the seventeen statements, they also refer to the Study as defamatory generally.

[62] I adopt my reasons above with respect to the relevance of the names of the individuals who were interviewed, and find that the identities of the businesses that completed the survey are similarly not relevant. The concern in this suit is about BDC and Crown conduct in the publication of the Study, and this will not be furthered by identifying individual survey respondents. As well, while I doubt anything turns on it, it is not clear whether this is information BDC would have, as the survey form does not ask that the respondent's identity. I also fail to see the relevance of whether BDC retained the responses.

[63] To the extent, however, that publication of the Study may have included publication of the source material, it is relevant whether the survey responses were disseminated to INAC and CanNor, and I order Mr. Champagne to respond to this part of Question 18.

CONCLUSION

[64] In summary, I have made the following orders:

1. Ms. Dove shall amend her answers to questions 3(a), (b), (c), (d) and 3 (k)(i), (ii) and (iii), so that they clearly identify the source(s) of her information.
2. Ms. Dove shall provide responses to questions 3(i) and (j).
3. Mr. Champagne shall provide responses to questions 15 and 19.
4. Mr. Champagne shall provide a response to the portion of question 18 that asks whether the response to the written surveys were disseminated to INAC.

[65] Costs may be spoken to, if necessary, at case management.



VEALE J.

S.C. No. 10-A0032

SUPREME COURT OF YUKON

BETWEEN:

DANA NAYE VENTURES

Plaintiff

AND:

**ATTORNEY GENERAL OF CANADA and
BUSINESS DEVELOPMENT BANK OF CANADA**

Defendants

**AFFIDAVIT OF KAREN DOVE IN
RESPONSE TO PLAINTIFF'S INTERROGATORIES**

I, Karen Dove, of the City of Whitehorse, in the Yukon Territory, MAKE
OATH AND SAY THAT:

1. I am the Manager, Community and Economic Development, Canadian Northern Economic Development Agency (CanNor), and as such have direct knowledge of the information deposed to in this affidavit, except where stated to be on information and belief, which information I believe to be true. The answers are set out in the following chart, and refer back to the question numbers in the Plaintiff's Interrogatories served on July 20, 2010:

No.	Question	Answer
1.	Does the general denial pleaded by Canada in paragraph 3 of its Statement of Defence apply to the facts pleaded by the plaintiff in paragraph 5 of its Statement of Claim? If so, on what specific facts does Canada rely as the basis for its denial of the facts pleaded by the plaintiff in paragraph 5 of its Statement of Claim?	I refer you to paragraphs 4 and 5 of the Statement of Defence.
2.	With respect to the denial pleaded in paragraph 4 of Canada's Statement of Defence, on what specific facts does Canada rely as the basis for its allegation that it did not defame the plaintiff?	I refer you to paragraphs 5 and 10 of the Statement of Defence.
3.	<p>With respect to paragraph 5 of Canada's Statement of Defence, please answer the following questions regarding the November 2009 report entitled "Study on the Business Services Environment in the Yukon Territory" (the "Report") that was delivered by the Business Development Bank of Canada ("BDC"):</p> <p>(a) In paragraph 3 of BDC's Statement of Defence, BDC pleads that it delivered the Report to "INAC": was the Report delivered by BDC to INAC?</p> <p>(b) If the Report was delivered by BDC to INAC, what is the name of the individual or individuals in INAC to whom it was delivered? On what date did this delivery occur?</p>	<p>(a) No. I have been informed and believe that the Report was delivered to CanNor.</p> <p>(b) Not applicable, see Answer 3(a).</p>

Appendix A

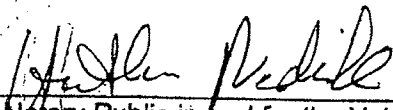
<p>(c) Was the Report delivered to CanNor by INAC?</p> <p>(d) Was the Report delivered directly to CanNor by BDC?</p> <p>(e) By what means was the Report delivered to CanNor?</p> <p>(f) On what date was the Report received by CanNor?</p> <p>(g) What is the name of each individual within CanNor that first received the Report?</p> <p>(h) Did any correspondence from BDC accompany the delivery of the Report and, if so, what is the name of the individual who signed that correspondence and to whom was it addressed?</p> <p>(i) Did any individual at CanNor who first received the Report provide a copy of the Report to any other individual at CanNor prior to the commencement of this action and, if so, what is the name of each individual to whom a copy of the Report was provided?</p> <p>(j) Did any individual at CanNor who received the Report provide a copy of the Report to any individual within INAC and, if so, what is the name of each individual within INAC to whom a copy of the Report was provided?</p>	<p>(c) Not applicable, see Answer 3(a).</p> <p>(d) Yes, see Answer 3 (a).</p> <p>(e) The Report was delivered by email. This correspondence will be disclosed in the List of Documents.</p> <p>(f) This correspondence will be disclosed in the List of Documents.</p> <p>(g) Objection. This question does not relate to a matter in issue in this action.</p> <p>(h) This correspondence will be disclosed in the List of Documents.</p> <p>(i) Objection. This question does not relate to a matter in issue in this action.</p> <p>(j) Objection. This question does not relate to a matter in issue in this action.</p>
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Appendix A

	<p>(k) The last paragraph of page 5 of the Report states, among other things, that the consultant interviewed federal government representatives:</p> <p>(i) Were any CanNor officials among the federal government representatives that were interviewed by the consultant and, if so, what are the names of those officials?</p> <p>(ii) Were any INAC officials among the federal government representatives that were interviewed by the consultant and, if so, what are the names of those officials?</p> <p>(iii) Were any officials of the Crown, other than CanNor and INAC officials, interviewed by the consultant and, if so, what are the names of those officials?</p>	<p>(k)</p> <p>(i) I have no knowledge, and have been informed and believe that CanNor has no knowledge of the names of anyone interviewed by the consultant.</p> <p>(ii) See Answer 3(k)(i) above</p> <p>(iii) See Answer 3(k)(i) above</p>
4.	With respect to paragraph 5 of Canada's Statement of Defence, on what specific facts does Canada rely in respect of its allegation that the Report is a "draft"?	I have been informed and do believe that this Report was never finalized, and that it is a draft.
5.	Did representatives of the Crown enter into any contract with BDC which provided for the preparation of the Report and, if so, is any such contract evidenced in writing, and if so, what are the names of the parties to such a contract and what individuals executed the contract on behalf of each party thereto?	This contract will be disclosed in the List of Documents

6.	With respect to paragraph 8 of Canada's Statement of Defence, on what specific facts does Canada rely on as a basis for its defence of qualified privilege?	I refer you to paragraphs 5 and 10 of the Statement of Defence. In addition, as noted in the Report itself, the document is a confidential one.
7.	<p>With respect to paragraph 8 of Canada's Statement of Defence, please answer the following questions:</p> <p>(a) What specifically is the "matter of public interest" referred to in paragraph 8 of Canada's Statement of Defence?</p> <p>(b) When did the "matter" referred to in paragraph 8 of Canada's Statement of Defence become a "matter of public interest"?</p> <p>(c) By what means did the "matter" referred to in paragraph 8 of Canada's Statement of Defence become a "matter of public interest"?</p>	<p>(a) An Amended Statement of Defence will be filed that will address this issue.</p> <p>(b) An Amended Statement of Defence will be filed that will address this issue.</p> <p>(c) An Amended Statement of Defence will be filed that will address this issue.</p>
8.	With respect to paragraph 13 of Canada's Statement of Defence, what are the specific provisions of the <i>Crown Liability and Proceedings Act</i> (Canada) and the <i>Defamation Act</i> (Yukon) that Canada is relying on?	This question is not a proper interrogatory.

SWORN before me at the City of
Whitehorse in the Yukon on August 25,
2010



Notary Public in and for the Yukon



Karen Dove

08/25/2010 10:43 FAX 804 631 3232

FMD VANCOUVER OFFICE

004/013

S.C. No. 10-A0032

SUPREME COURT OF YUKON

BETWEEN:

DANA NAYE VENTURES

PLAINTIFF

AND:

ATTORNEY GENERAL OF CANADA and BUSINESS
DEVELOPMENT BANK OF CANADA

DEFENDANTS

AFFIDAVIT OF GUY CHAMPAGNE IN ANSWER
TO PLAINTIFF'S INTERROGATORIES
DATED JULY 20, 2010

I, Guy Champagne, Senior Partner, of 990 Fort Street, Victoria, B.C., in answer to Interrogatories on behalf of the Plaintiff, Dana Naye Ventures, delivered to me and dated July 20, 2010, MAKE OATH AND SAY AS FOLLOWS:

- Q1. Who was the principal author--or who were the principal authors--of the November 2009 report entitled "Study on the Business Services Environment in the Yukon Territory" (the "Report") that is referred to in paragraph 3 of BDC's Statement of Defence?
- A1. The authors of the Report were Crown servants, agents and a consultant, Eric Brown.
- Q2. Was Eric M Brown, who is named on the cover and in Appendix B (at page 20) of the Report, the principal author of the Report?
- A2. See answer to question 1.
- Q3. Who, if anyone, within the entity referred to in Appendix A and Appendix B of the Report as "E M Brown Consulting Corporation" was involved in the preparation of, or had an opportunity to review, the Report?
- A3. See answer to question 1.
- Q4. Who typed the Report?
- A4. I object to this question on the ground that it does not relate to a matter in question in the action.

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- Q5. Is Eric M Brown or "E M Brown Consulting Corporation" the "consultant" that is referred to in the last paragraph of page 5 of the Report?
- A5. See answer to question 1.
- Q6. The cover of the Report identifies Guy Champagne as "BDC Consulting Project Manager". Was a copy of the Report delivered to Guy Champagne prior to the commencement of this action?
- A6. See answer to question 1.
- Q7. Prior to the commencement of this action, what other individual employees, agents or servants of BDC received, or had an opportunity to review, a copy of the Report?
- A7. I object to this question on the ground that it does not relate to a matter in question in the action.
- Q8. Does the general denial pleaded by the defendant BDC in paragraph 1 of its Statement of Defence apply to the facts pleaded in the first sentence of paragraph 3 of the plaintiffs Statement of Claim?
- A8. I object to this question on the ground that it does not relate to a matter in question in the action.
- Q9. If the general denial pleaded by BDC in paragraph 1 of its Statement of Defence applies to the facts pleaded in the first sentence of paragraph 3 of the Statement of Claim, on what specific facts does BDC rely on as the basis for that denial?
- A9. I object to this question on the ground that it does not relate to a matter in question in the action.
- Q10. With respect to the denial pleaded in paragraph 2 of BDC's Statement of Defence, on what specific facts does BDC rely as the basis for its allegation that it did not defame the plaintiff?
- A10. The facts are set out in the Statement of Defence.
- Q11. With respect to the facts pleaded in paragraph 3 of BDC's Statement of Defence, which individual or individuals from BDC delivered the Report or any copies thereof to INAC? By what means was the Report delivered by BDC to INAC?
- A11. I object to this question on the ground that it does not relate to a matter in question in the action.
- Q12. Did any correspondence accompany the delivery of the Report or any copies thereof from BDC to INAC and, if so, to whom was the correspondence addressed?
- A12. The correspondence will be disclosed in the affidavit of documents.

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Q13. With respect to the facts pleaded in paragraph 3 of BDC's Statement of Defence, what is the name of each individual within INAC to whom the Report was delivered?

A13. I object to this question on the ground that it does not relate to a matter in question in the action.

Q14. With respect to the paragraph 6 of BDC's Statement of Defence, on what specific facts does BDC rely as a basis for its claim of qualified privilege?

A14. In addition to the facts set out in the Statement of Defence, see answer to question 1. In addition the Study was confidential and was never intended to be disclosed to third parties.

Q15. Following the delivery of the Report by BDC to INAC, as pleaded by BDC, did representatives of BDC meet with representatives of INAC, or any other representative of the Government of Canada at which the Report was discussed? If any such meeting occurred, on what dates did each meeting occur and what is the name of each individual who attended or participated in those meetings?

A15. I object to this question on the ground that it does not relate to a matter in question in the action.

Q16. At bottom of page 6 and the top of page 7 of the Report (under the heading "Negative comments:") a number of statements regarding DNV are set out.

(a) At page 6 of the Report the following statement regarding DNV is set out:

"financial resources are currently constraining service expansion activity"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(b) At page 6 of the Report the following statement regarding DNV is set out:

"organization lacks sufficient staff resources to provide mentoring to clients post-lending"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

- 4 -

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege

(c) At page 6 of the Report the following statement regarding DNV is set out:

"high staff turnover would indicate management problems (manager's frequent absence from the office and a dysfunctional Board of Directors were cited as issues)"

- (i) What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?
- (ii) What are the names of the individuals who "cited as issues" the "manager's frequent absence from the office and a dysfunctional Board of Directors"?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(d) At page 6 of the Report the following statement regarding DNV is set out:

"staff lacks experience, which often leads to wrong advice being given to clients"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(e) At page 6 of the Report the following statement regarding DNV is set out:

"DNV-produced business plans are technically sound (i.e. address all required matters of interest) but lack substance"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

- 5 -

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(f) At page 6 of the Report the following statement regarding DNV is set out:

"management and staff are not very sophisticated"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(g) At page 7 of the Report the following statement regarding DNV is set out:

"there are rumours that YTG is pulling its business advisory contract with DNV for areas north of Whitehorse due to poor delivery"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(h) At page 7 of the Report the following statement regarding DNV is set out:

"approximately 25% of its clients are in arrears and DNV does not have the staff to follow up adequately"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(i) At page 7 of the Report the following statement regarding DNV is set out:

- 6 -

"DNV's primary interests are Aboriginal businesses and graduates of its self-employment program"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(j) At page 7 of the Report the following statement regarding DNV is set out:

"lack of equity funding constrains DNV's ability to lend to many businesses"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(k) At page 7 of the Report the following statement regarding DNV is set out:

"business advisory services are only provided to borrowing clients"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(l) At page 7 of the Report the following statement regarding DNV is set out:

"loan process is too cumbersome"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

- 7 -

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(m) At page 7 of the Report the following statement regarding DNV is set out:

"one consultant indicated his clients get nowhere when he refers them to DNV"

- (i) What is the name of the consultant who indicated that "his clients get nowhere when he refers them to DNV"?
- (ii) What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(n) At page 7 of the Report the following statement regarding DNV is set out:

"much of DNV's funding is short- to medium-term, precluding long-term commitments and planning"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(o) At page 7 of the Report the following statement regarding DNV is set out:

"DNV is a 'security' lender and consequently, is not in the lending game in a meaningful way"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

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(p) At page 7 of the Report the following statement regarding DNV is set out:

"DNV charges too high an interest rate and its reporting requirements are too demanding"

What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

(q) At page 7 of the Report the following statement regarding DNV is set out:

"several knowledgeable economic development professionals indicated that DNV's primary focus is Aboriginal clients."

- (i) What are the names of each of the "several knowledgeable economic development professionals" who "indicated that DNV's primary focus is Aboriginal clients"?
- (ii) What is the name of the individual who made the determination that the economic development professionals referred to are "knowledgeable"?
- (iii) What individual or individuals are the source of the information upon which the foregoing statement is based? When was that information obtained? By what means was that information obtained? Was that information recorded and, if so, how and by whom?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action.. In addition the name of the individual or individuals who made the statement is subject to common law privilege.

Q17. In the last paragraph at the bottom of page 5 of the Report the following is stated: "The consultant spent 8 days in the Yukon interviewing business owners, business associations, federal and territorial government representatives, business advisory service providers and local financial institutions." With respect to that statement, please answer the following questions:

- (a) What are the names of each of the business owners that were interviewed by the consultant?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action. . In addition the name of the business owners is subject to common law privilege .

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- (b) What are the business associations that the consultant interviewed and what are the names of the specific individuals that were interviewed on behalf of each of those business associations?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action. In addition the name of the specific individuals is subject to common law privilege

- (c) What are the names of each of the federal government representatives that were interviewed by the consultant?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action. In addition the name of the representatives that were interviewed is subject to common law privilege

- (d) What are the names of the territorial government representatives that were interviewed by the consultant?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action. In addition the name of the representatives that were interviewed is subject to common law privilege.

- (e) What are the names of the business advisory service providers that were interviewed by the consultant and what are the names of the individuals that were interviewed on behalf of each of those business advisory service providers?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action. In addition the name of the individuals that were interviewed is subject to common law privilege

- (f) What local financial institutions were interviewed by the consultant and what are the names of the individuals that were interviewed on behalf of each of those local financial institutions?

Answer: I object to this question on the ground that it does not relate to a matter in question in the action. In addition the name of the individuals who were interviewed is subject to common law privilege

Q18. In the last paragraph at the bottom of page 5 of the Report the following statement is set out: "As of the date of this Report, responses have been received from 15 businesses (or an 18% response rate)." What are the names of each of the 15 businesses who provided the 15 responses to which the Report refers? Were those responses or any of them delivered to INAC as originals or as copies? Has BDC retained those responses or copies of them?

A18. I object to this question on the ground that it does not relate to a matter in question in the action.

08/25/2010 10:44 FAX 604 631 3232

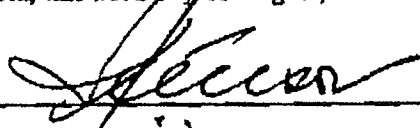
Appendix B
FMD VANCOUVER OFFICE

013/013

- 10 -

- Q19. What are the names of the individuals within INAC or any other branch of the Government of Canada with whom representatives of BDC have discussed the Report?
- A19. I object to this question on the ground that it does not relate to a matter in question in the action.

SWORN BEFORE ME at the City of)
Victoria, in the Province of British)
Columbia, this 23rd day of August, 2010.)


ALAN J. PETERSON
Barrister & Solicitor
McCONNAN, BURN, O'CONNOR & PETERSON
420 - 600 DOUGLAS ST., VICTORIA, B.C. V8W 2B7


GUY CHAMPAGNE