

SUPREME COURT OF YUKON

Citation: *Kaska Dena Council v. Yukon (Attorney General)*
2018 YKSC 3

Date: 20180118
S.C. No. 16-A0161
Registry: Whitehorse

BETWEEN

KASKA DENA COUNCIL

PLAINTIFF

AND

GOVERNMENT OF YUKON
CHIEF GEORGE MORGAN on his own behalf
And on behalf of all the members of the Liard First Nation,
And the LIARD FIRST NATION

DEFENDANTS

AND

ACHO DENE KOE FIRST NATION

Before Mr. Justice R.S. Veale

Appearances:

Claire Anderson

Marlaine Anderson-Lindsay and

Elaine Cairns

Gavin Gardiner

Counsel for Kaska Dena Council

Counsel for Government of Yukon

Counsel for Chief George Morgan and
Liard First Nation

REASONS FOR JUDGMENT (Application for Particulars)

INTRODUCTION

[1] VEALE J. (Oral): The plaintiff, Kaska Dena Council (“KDC”) has filed a claim against the Government of Yukon seeking a declaration that the Government of Yukon has a duty to consult KDC prior to issuing hunting licences and tags, in the southern part of the Kaska Territory in the Yukon, and that it has failed to do so and should be

ordered to consult. The KDC is a British Columbia society that claims to be part of the Kaska Nation which includes Ross River Dena Council and Liard First Nation' traditional territory in the Yukon. It appears that there are overlapping First Nation claims at issue.

[2] KDC asserts what is known as a transboundary claim in the southern Yukon as its members are in northern British Columbia and not the Yukon. KDC and the Government of Yukon have signed a Memorandum of Agreement in January 1997 purporting to commence negotiations towards a Transboundary Agreement. It does not appear that any agreement has been reached.

[3] There are two hearings pending. The first is an application to strike the claim of KDC by Liard First Nation to be heard on April 9, 12 and 13, 2018. The second hearing, should KDC's claim not be struck, is to be heard July 11, 12 and 13, 2018.

[4] The Government of Yukon in its Statement of Defence denies the duty to consult is triggered by issuance of hunting licences and that it has met any duty that may exist.

[5] The Liard First Nation has been added as a defendant and claims that the area of the Yukon referred to by KDC is part of the Kaska Nation but that only Liard First Nation and Ross River Dena Council are entitled to the claimed duty of consult with the Government of Yukon.

[6] Liard First Nation challenges the standing of KDC to bring such a claim on behalf of some members of the Kaska Nation.

[7] This is the general context of this court action and none of the above are findings of fact but simply to provide background to the application.

The Application for Particulars

[8] KDC brings this application following a demand for particulars arising out of the pleadings. The specific *Rules of Court* relied on are Rules 20(18) to (23), as follows:

Order for particulars

(18) The court may order a party to deliver further and better particulars of a matter stated in a pleading.

Demand for particulars

(19) Before applying to the court for particulars, a party shall demand them in writing from the other party.

Demand for particulars not a stay of proceedings

(20) A demand for particulars does not operate as a stay of proceedings or give an extension of time, but a party may apply for an extension of time for delivering a pleading on the ground that the party cannot answer that pleading until particulars are provided.

Denial required if fact not admitted

(21) An allegation of fact in a pleading, if not denied or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant or mentally incompetent person.

General denial sufficient except where proving different facts

(22) It is not necessary in a pleading to deny specifically each allegation made in a preceding pleading and a general denial is sufficient of allegations which are not admitted, but where a party intends to prove material facts that differ from those pleaded by an opposite party, a denial of the facts so pleaded is not sufficient, but the party shall plead his or her own statement of facts if those facts have not been previously pleaded.

Substance to be answered

(23) If a party in a pleading denies an allegation of fact in the previous pleading of the opposite party, the party shall not do so evasively but shall answer the point of substance.

[9] The Notice of Application seeks the following particulars:

1. The defendants Chief Morgan and Liard First Nation ("Morgan/LFN") deliver further and better particulars in response to the Plaintiff's plea in paragraph 4 of the Amended Statement of Claim (the "Claim") that "[t]he Kaska Dena Council and its members are part of an aboriginal people of Canada known to the defendant Government of Yukon as "the Kaska" or "the Kaska Nation".
2. Morgan/LFN deliver further and better particulars in response to the Plaintiff's plea in paragraph 5 of the Claim that "[t]he Kaska are one of the "aboriginal peoples of Canada" referred to ins. 35(1) of the Constitution Act, 1982."
3. Morgan/LFN deliver further and better particulars in response to the Plaintiff's plea in paragraph 13 that "[t]he Government of Yukon has acknowledged in agreements entered into with the Kaska Dena Council and other representatives of the Kaska that the Kaska have aboriginal rights, titles and interests in and to the portion of the Kaska traditional territory in the Yukon."
4. Morgan/LFN deliver further and better particulars in response to the Plaintiff's plea in paragraph 14 that "[t]he Government of Yukon has also specifically acknowledged in agreements entered into with the Kaska

Dena Council, and other representatives of the Kaska, that the Kaska represented by the Kaska Dena Council have aboriginal rights, titles and interests in and to the portion of the Kaska traditional territory in the Yukon."

5. Government of Yukon provide further and better particulars of paragraph 14 of the Defence that its acknowledgement that the Kaska have Aboriginal rights, titles and interests in and to the portion of Kaska traditional territory in Yukon ... was of an assertion and neither established the asserted Kaska claims in Yukon, nor determined the extent, location and nature of the Aboriginal title, rights or interests of the Kaska, nor identified or defined the Aboriginal title, rights and interest of the Kaska in and to lands within Yukon.
6. Government of Yukon provide further and better particulars of the facts, if any upon which the defendant bases its allegation in paragraph 15 of the Defence that its "acknowledgement that the Kaska as represented by the Plaintiff have Aboriginal rights, titles and interests in and to the portion of Kaska traditional territory in Yukon ... was of an assertion and neither established the asserted Kaska claims in Yukon, nor determined the extent, location and nature of the Aboriginal title, rights or interests of the Kaska, nor identified or defined the Aboriginal title, rights and interest of the Kaska in and to lands within Yukon."
7. Government of Yukon further and better particulars of the facts, if any, upon which the defendant bases its denial in paragraph 20 of the Defence

"that the persons to whom it issues hunting licenses and seals are "sport hunters".

8. Government of Yukon provide further and better particulars of the facts and/or legal grounds, if any, upon which the defendant bases its allegation in paragraph 22 of the Defence "that while a right to exclusive use and occupation may be an incident of established Aboriginal title, it does not arise out of a mere assertion of title."

[10] The case has complexity to the extent that each of the parties makes a number of statements about their views of who represents the Kaska Nation and their views on the law of the duty to consult.

[11] The law on the discretion of courts to order particulars is well set out in *Ross River Dena Council v. Attorney General of Canada*, 2009 YKSC 57, at para. 2 as follows:

2 One of the leading cases in this area is *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369 (B.C.C.A.), where Lambert J.A., at para. 15, listed six points for courts to consider in exercising their discretion to order particulars:

"(1)to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;

(2)to prevent the other side from being taken by surprise at the trial;

(3)to enable the other side to know what evidence they ought to be prepared with and to prepare for trial;

(4)to limit the generality of the pleadings;

(5)to limit and decide the issues to be tried, and as to which discovery is required; and

(6)to tie the hands of the party so that he cannot without leave go into any matters not included."

[12] The parties had some disagreement about whether a party can be compelled to confirm or clarify its legal position. In *Six Nations of the Grand River Band v. Canada (Attorney General)*, [2000] O.J. No. 1431, the court stated the following in a complex legal action, at para. 11:

Canada has pleaded many issues of law or issues of mixed fact and law. This is perfectly appropriate in a case of this nature. Some of these issues are stated vaguely. Canada takes the position that there is no mechanism under the Rules by which the plaintiff can compel Canada to confirm or clarify its legal position in respect of any issue of law prior to trial. [T]hat position is not consistent with the policy underlying the Rules which is to encourage full and frank disclosure prior to trial so as to minimize costs and expedite the just resolution of claims. Further, it is not an interpretation of the Rules which is in accordance with their plain and ordinary meaning.

[13] I am in general agreement with that view. Rule 20 does not say that a party cannot be ordered to clarify a legal position, particularly where it is pleaded in a general or vague fashion.

[14] In the case at bar, counsel for KDC has helpfully provided two tables. One for the specific pleading of Liard First Nation and one for the Government of Yukon pleadings. I do not propose to set out the tables except to indicate that they are helpful should the matter be appealed.

[15] The first group of particulars sought in paras. 1 through 3 of the application relates to KDC's claims in para. 4 of its Statement of Claim that its members are part of the Kaska Nation.

[16] The specific pleadings of the Plaintiff are as follows:

4. The Kaska Dena Council and its members are part of an aboriginal people of Canada known to the defendant Government of Yukon as "the Kaska" or "the Kaska Nation".
5. The Kaska are one of the "aboriginal peoples of Canada" referred to in s. 35(1) of the Constitution Act, 1982. (KDC's Amended Statement of Claim)

[17] The pleading of Liard First Nation is as follows:

7. In answer to paragraphs 4 and 5, the Defendants say that the Kaska tribe of Indians, also known as the "Kaska" or the "Kaska Nation" (the "Kaska Nation") was a distinct aboriginal group before, at, and after the time of contact with Europeans (the "Date of Contact"), and before, at, and after the time of the Crown's assertion of sovereignty over the lands material to this proceeding (the "Date of Sovereignty"). (Morgan/LFN's Statement of Defence)

[18] While it is clear that Liard First Nation claims, in para. 8, that there are four subgroups of the Kaska Nation, i.e. Liard First Nation, Ross River Dena Council (both in Yukon) and Dease River First Nation and Kwadacha First Nation (both located in British Columbia), its pleading does not specifically address why the KDC, or those who it purports to represent, are not a part of the Kaska Nation that can bring forward a transboundary claim particularly when it has already entered a Memorandum of Agreement in January 1997 with the Government of Yukon to commence negotiation on a Transboundary Agreement.

[19] Counsel for KDC wishes to be informed of the case they have to meet, to not be taken by surprise and know what evidence they have to be prepared with. I am of the view that it is appropriate in the context of this legal dispute to order Liard First Nation to provide particulars in para. 7 of its Statement of Defence as to why KDC and its purported members have no standing to bring this action.

[20] I therefore order the Liard First Nation to provide particulars in para. 7, before the examination for discovery of George Morgan and in any event no later than January 31, 2018, as to why the KDC and its members are not part of the Kaska Nation and why it has no authority to bring this action.

[21] I dismiss the remaining requests for particulars demanded from Liard First Nation.

[22] The remaining application for particulars from the Government of Yukon, paras. 5 – 8 of the Notice of Application, refers to pleadings with respect to the interpretation of various agreements and pleadings of law which I find to be sufficient requiring no further particulars to be ordered.

[23] I will defer any application for costs until after the application to strike the claim of KDC is determined.

VEALE J.