

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

TROY CAHOON, AND THE ESTATE OF CARL PHILLIP SMITH  
by its Administrator, THE PUBLIC TRUSTEE  
OF THE NORTHWEST TERRITORIES

Plaintiffs

- and -

DALE PENNER, MULLEN TRUCKING INC,  
VERITAS MACKENZIE DELTA LTD,  
VERITAS DGC LAND LTD, COMPANY A, and  
VERRI-ILLUQ GEOPHYSICAL LTD

Defendants

- and -

E. GRUBEN'S TRANSPORT LTD

Third Party

MEMORANDUM OF JUDGMENT

[1] On April 9, 2009, counsel for the Plaintiffs and for certain of the Defendants (the "Veritas Defendants", sometimes also referred to as "Veri-Illuq") in this matter appeared before me to argue an application relating to objections to questions on examinations for discovery. In the course of their submissions, counsel advised that they expected to resolve issues arising from four such questions and the application was adjourned at their request in order to allow the opportunity for resolution. Counsel subsequently advised that they did not resolve the issues and that a ruling is necessary. The original deadline of 3 weeks for the filing of written submissions was extended to May 18, 2009. Written submissions

were received from counsel for the Plaintiffs. No written submissions were received from counsel for the Veritas Defendants.

[2] The case involves a motor vehicle accident that occurred in 2002. Since then, Mr. Scott, an officer of the Veritas Defendants, has been examined for discovery several times.

[3] The questions at issue were posed by counsel for the non-Veritas Defendants at one such examination of Mr. Scott. They were taken under advisement and are now objected to by counsel for the Veritas Defendants. Counsel for the Plaintiffs seeks to have them answered. They are as follows:

#### 1. Undertaking 111

[4] Question: “Paragraph 8 [of the statement of defence] says that the loss, injury or damage was caused solely or substantially contributed to by the negligence of Cahoon or Smith and then particulars follow. And my question is what information does the company have that you must properly inform yourself of those particulars of negligence?”

[5] There are ten separate paragraphs of particulars given in paragraph 8 of the statement of defence. These include: (a) repairing a vehicle on the roadway when they knew or ought to have known it was unsafe and hazardous; (b) failing to maintain any, or any proper, lookout and (f) physically blocking vehicle access to the roadway.

#### 2. Undertaking 115

[6] Question: “And, sir, just to expedite things, I am going to ask did Veri-Illuq warn Cahoon or Smith of each of these particulars [referring to paragraph 8], and if they didn’t why they didn’t.”

#### 3. Undertaking 116

[7] Question: “Sir, can you refer to paragraph 10 of Veri-Illuq’s Statement of Defence, and it says that Veri-Illuq states that the plaintiffs’ losses, injuries, and damages were caused by or contributed to by the negligence of E. Gruben’s Transport. And it says that they failed to ensure that appropriate warning signs or devices or reflective clothing were supplied to Mr. Cahoon and Mr. Smith.

[8] Can you inform yourself, sir, and advise me of what facts Veri-Illuq have of that particular negligence?”

#### 4. Undertaking 118

[9] “And if I can refer you to paragraph 9 of the Statement of Defence, and I am going to ask you what information Veri-Illuq has with respect to each of those allegations.”

[10] Paragraph 9 of the statement of defence alleges negligence on the part of defendants other than the Veritas Defendants and gives a list of particulars of that negligence.

[11] In submissions made at the hearing of this application, counsel for the Veritas Defendants objected to the foregoing questions on two grounds. The first is that the questions ask for the evidence on which Veri-Illuq intends to rely and that sort of question has been ruled improper in *Can-Air Services Ltd. v. British Aviation Insurance Co.*, [1989] 1 W.W.R. 750 (Alta. C.A.). The second ground is that in order to answer the questions, counsel or Mr. Scott would have to go through and summarize all of the evidence given by the individuals produced by the Veritas Defendants or others in the several sessions in which examinations for discovery took place and they should not be obliged to do that.

[12] In *Can-Air Services*, Côté J.A. for the Court said that questions which ask upon what facts a party relies on for a certain allegation in a pleading are always improper because they make the examinee select facts and demand in effect how the examinee’s lawyer will prove the plea. Only facts can be sought on an examination for discovery, not law, argument, evidence in support of facts or how the examinee proposes to prove a fact.

[13] Côté J.A. also said, however, that compendious fact questions may be permissible and gave an example of such a permissible question: “Paragraph 4(b) of your statement of claim alleges that the driver was impaired by alcohol at the time of the collision. Tell me all the facts about that impairment which you know or must properly inform yourself of”.

[14] The questions reflected in Undertakings 111, 115, 116 and 118 do not ask what facts or information the Veritas Defendants or Mr. Scott rely on and so are not objectionable on that basis. The questions are really compendious fact questions, so long as the word “information” used in 111 and 118 is understood to be restricted to facts.

[15] The second ground of objection is based on there having already been extensive examinations for discovery. To the extent that the questions seek to have Mr. Scott go over and summarize all the testimony given to date on discovery, in

my view the questions are over-broad and unnecessary. Therefore, the answers to the questions in Undertakings 111, 116 and 118 need only provide facts that have not already been testified to in the examinations for discovery that have taken place to date.

[16] In summary, I order that:

1. Mr. Scott will answer the questions in Undertakings 111, 116 and 118 with only those facts that have not already been testified to in the examinations for discovery that have taken place to date.
2. Mr. Scott will answer the question in Undertaking 115.

[17] Counsel asked to make written submissions on costs and they may do so within 45 days of the date this Memorandum of Judgment is filed.

V.A. Schuler  
J.S.C.

Dated at Yellowknife, this 4<sup>th</sup> day of June, 2009.

Counsel for the Plaintiffs: Adrian C. Wright.

Counsel for the Veritas Defendants: J. Robert Black, Q.C.

S-1-CV-2004000030

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THE HONOURABLE JUSTICE V.A. SCHULER

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