

CITATION: Vale Canada Limited v. Royal & Sun Alliance Insurance Co. of Canada, 2025
ONSC 129

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SUPERIOR COURT OF JUSTICE – ONTARIO

Actions: Vale Canada Limited v. Royal & Sun Alliance Insurance Co. of Canada
Vale Canada Limited v. Travelers Casualty & Surety Company

ASSOCIATE JUSTICE McGRAW:

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Date: December 18, 2024

Reasons For Endorsement

Background

- [1] These are motions by the Defendants USF and Travelers (the "Insurers") to compel the Plaintiff Vale to answer refusals arising from oral and written examinations for discovery. Additional issues arose in the week prior to the hearing which required lengthy discussion at the attendance therefore, I released an Interim Endorsement on December 20, 2024 with these Reasons For Endorsement to follow.
- [2] These are significant, complex actions in which Vale seeks declarations of coverage for environmental claims related to occurrences from 1967-1985 at 26 mining sites located in Ontario, Manitoba, Wales, Japan, Indonesia and the United Kingdom. Vale provided notice of its claims in 2018 and commenced these actions in 2021 after an unsuccessful 3-year settlement negotiation period governed by a standstill agreement (the "Standstill Agreement"). Vale has settled its claims with the other defendant insurers. There are parallel proceedings in New York (the "New York Action") in which the Insurers have moved for summary judgment. Based on information disclosed in the New York Action, the Insurers estimate that Vale's claims in these proceedings may exceed \$2 billion. Vale disagrees with this estimate which is subject to settlements and quantification of Vale's claims in its forthcoming expert reports. The Insurers also submit that these are essentially 26 individual and discrete claims proceeding as one action.

- [3] These actions are being case managed by Myers J. By Endorsement dated June 10, 2024, Myers J. ordered a timetable (the “Timetable”) which, among things, requires the discovery process, including all examinations, re-examinations and refusals, to be completed by January 31, 2025 and Vale to deliver its expert reports by February 28, 2025. Myers J. also scheduled a 10-week trial to commence during the week of November 17, 2025.
- [4] Due to the size and complexity of these proceedings with voluminous productions and information related to 26 mining sites and insurance policies dating back 40-60 years, significant case management has been provided and the parties and their counsel have continued to exchange charts and deliver productions with respect to both this motion and Vale’s refusals motions which proceeded before me on November 1, 2024. Since September 1, 2022 there have been 16 case conferences before me to speak to productions, site visits, examinations for discovery, and undertakings and refusals, many of which involved a larger number of defendant insurers due to the timing of settlements. Six of these case conferences have taken place since the Timetable was ordered to speak to Vale’s and the Insurers’ motions and review their refusals charts. As a result of the ongoing efforts of counsel and case management, a significant number of refusals have been resolved, withdrawn and/or narrowed. As set out below, there is also overlap between the issues and productions on Vale’s and the Insurers’ motions and the New York Actions which has provided some efficiencies. The parties estimate that Vale has produced 300,000 documents amounting to over 3 million pages and that 1,000-2,000 refusals remain at issue (excluding the 8,000 additional questions discussed below). In light of the voluminous number of questions and documents and the timing, the parties and their counsel have worked diligently and cooperatively to advance the refusals on Vale’s and the Insurers’ motions.
- [5] The parties made full submissions today with respect to the remaining refusals set out in the operative refusals chart on the Insurers’ motions which counsel and the court have been reviewing and discussing. This operative chart is referred to by the Insurers as the “exemplar chart” which is largely comprised of questions which apply all 26 mining sites (the “Exemplar Chart”). Exchanges between counsel continued right up until the start of today’s motion and Vale’s counsel uploaded an updated Exemplar Chart as the hearing started. A summary of the status, agreements and where necessary, directions and orders, is set out below.
- [6] Substantially all of the questions/refusals in the Exemplar Chart apply to all 26 sites. However, there are a large number of refusals/questions on the Insurers’ motions which are not set out in the Exemplar Chart as they only apply one site or apply to some but not all of the 26 sites. As counsel previewed during the most recent case conference on December 9, 2024, the Insurers delivered a bridge chart to Vale on December 10, 2024 which identifies which questions/refusals apply to which sites or, as termed by the Insurers, which “flow through” to which sites (the “Bridge Chart”). There are individual refusals charts for all 26 sites.
- [7] After receiving the Bridge Chart, Vale raised concerns about the ongoing discovery process which led to a flurry of correspondence between counsel and to the court before

today's motions. Vale estimates that the Insurers asked approximately 18,000 questions on discovery (15,000 in writing and 3,000 during the examination of Vale's representative Lisa Lanteigne) and that there are approximately 2,000 questions/refusals in the Exemplar Chart or which otherwise apply to all 26 sites which it is addressing or prepared to address. Counsel recently advised Myers J. that approximately 1,000 refusals remain at issue on the Insurers' motions. Vale claims that the Bridge Chart would add approximately 8,000 questions to the Insurers' motions which it is not prepared to address. The Insurers do not agree with these numbers and point out that there is a large amount of overlap. However, it cannot be disputed that the number of "flow through" questions is significant and far exceeds how many the court was addressing with counsel in the Exemplar Chart. A summary of the submissions, discussions and status regarding the Bridge Chart and additional refusals is set out below.

The Law, Disputed Refusals in Exemplar Chart and Analysis

- [8] Rule 31.06 provides that a person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action. Rule 1.04(1) further provides that the Rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. Particularly relevant to these motions. Rule 1.04(1.1) requires the court to make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved in the proceeding and Rule 29.2.03 sets out the proportionality factors which apply to both oral and documentary discovery.
- [9] Relevance, the scope of discovery and proportionality were summarized by Perell J. in *Ontario v. Rothmans Inc.*, 2011 ONSC 2504 and *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2013 ONSC 917. Discovery questions must be relevant to the issues as defined by the pleadings such that they must have probative value and adequately contribute to the determination of the truth or falsity of a material fact. Overbroad and speculative discovery and "fishing expeditions" are not permitted (*Rothmans* at paras. 129 and 154-157).
- [10] Given the ongoing discussions and case management, the motions involved reviewing the remaining refusals with counsel, counsel providing clarification and updates and in some cases the parties agreeing to certain productions or inquiries. In my view, this approach to discovery and production, in some cases determining first what documentation and/or information may be available on an interim basis is cost-effective, efficient, proportionate and consistent with Rule 1.04(1).
- [11] The following is a summary by category of the parties' agreements, clarifications, resolutions and where appropriate, my directions and orders with respect to the remaining refusals in the Exemplar Chart. All of this is without prejudice, on both the Insurers' motions and Vale's motion (the steps arising from Vale's motion are ongoing) to the parties' rights to ask follow up questions on re-attendance or in writing. Given the informational and historical nature of the litigation and refusals and the time restrictions, I have encouraged the parties to continue to use written questions and answers where

possible. These steps are also without prejudice to the parties' rights to make submissions and take positions with respect to any disputed issues going forward. Finally, in light of the fluid nature of these motions, the ongoing exchange of answers and positions and the restrictions imposed by volume and timing, I have not imposed timelines in many cases. The parties must take all required steps as soon as reasonably possible in order to ensure that the this action remains on course for trial.

- [12] Deferred to Expert Reports (Refusals #1-14, 16-28) – These refusals are related to the particulars of Vale's claims for all 26 sites including the occurrences, the "sudden and accidental" exception in the insurance policies and the properties at issue. Many of these particulars were at issue on Vale's motion as the Insurers took the position that they could not answer some refusals without first receiving particulars from Vale. Vale submitted that most of the particulars would be delivered in its expert reports which are due on February 28, 2025. After further discussions and court assistance, the parties' agreed that the Insurers' answers/further positions on the refusals would be deferred until after the delivery of Vale's expert reports. Similarly, the parties have agreed that these refusals on the Insurers' motions will also be answered when Vale delivers its expert reports on February 28, 2025, without prejudice to the parties' rights set out above including follow-up questions. Notwithstanding these agreements, Vale has agreed to make best efforts to deliver some answers and information in the interim. I am satisfied that this is a reasonable, efficient and proportionate result particularly given the timing of these motions as they relate to the delivery of Vale's expert reports such that even if I ordered Vale to deliver the information requested by the Insurers the delivery deadline would be close to Vale's expert report deadline in any event.
- [13] Answers Re: "All" Documents (Refusals #29-32) – These refusals relate to questions where Vale advised that the answers were located in its productions generally or in large productions without specifying the location of the information requested. I have advised the parties on numerous occasions that given the voluminous productions and the requirement that they commit sufficient resources to get this case to trial, the parties are expected to assist in identifying the location of relevant information within their productions and larger documents. This includes the use of e-discovery personnel where necessary. Consistent with the need for cooperation, Vale previously offered to share its document coding list with Insurers' counsel so that counsel could locate documents on its own, an offer which the Insurers should avail themselves of. Refusals 29, 31 and 32 have been resolved as Vale has agreed to identify the documents and/or make best efforts and inquiries to do so. With respect to Refusal 30 (which is comprised of sub-questions (a)-(e)), Vale submits that it has produced all documents related to the permits, licenses and regulatory requirements relevant to the Copper Cliff central tailings claim and that most of the information sought by the Insurers is apparent on the document, for example, where it identifies the government entity. Based on the parties' submissions and agreements, to the extent to which the information sought is not apparent on the documents, Vale shall advise the Insurers at least 90 days before the pre-trial conference in these actions.
- [14] References To Document or Section (Refusals #33-37) – These refusals with respect to spills and related issues are similar to Refusals 29-32. Vale has agreed to provide

additional specifics regarding the closure plans (voluminous documents for each site), including identifying the site and version, and advised that any questions not answered by the closure plans will be answered by its expert reports. To the extent to which there are any remaining or additional relevant documents regarding spills, Vale shall advise the Insurers no later than 90 days prior to the pre-trial.

- [15] “Document Speaks for Itself” (Refusals #38-40) – These refusals relate to various issues including Vale’s knowledge of contamination where Vale states that “the document speaks for itself”. This issue also arose on Vale’s motion. I have advised the parties numerous times that, excepting more basic questions such as those discussed above where the identity of a governmental agency is apparent on the face of a document, advising that a document “speaks for itself” is not a sufficient answer. This is particularly true where a party has been asked for their knowledge or position. Vale has advised that these questions will be answered in its expert reports. As with others, these refusals can be revisited after the delivery of Vale’s expert reports, if necessary.
- [16] Storage and/or Disposal of Waste and Manitoba Sites (Refusals #41-42) – In Refusal #41, the Insurers request a detailed explanation of the factors which influenced Vale’s waste storage and disposal plans including choice of location and reliance on research and investigations. Vale has confirmed that the factors it has identified to date are the only ones it is currently aware of and it will advise the Insurers going forward if there are any additional factors. This is sufficient.
- [17] In Refusal 42 the Insurers ask whether Vale closed or abandoned any Manitoba sites before 1999 when there was no statutory requirement for a closure plan, and if so, to provide the information set out in sub questions (a)-(j). Vale has confirmed that its is advancing claims with respect to 3 of its sites in Manitoba: Thompson, Birchtree and Pipe. The parties had multiple exchanges in which, among other things, the Insurers took the position that the questions are relevant to Vale’s closure practices before closure plans were required and that sites in Manitoba are relevant for comparison purposes even if they are not part of Vale’s claims. Vale did not answer the questions as they relate to the 3 sites which are part of its claims and the parties veered off into exchanges about whether the closure costs for the non-sites are “accidental” and “fortuitous”. In my view, the parties’ efforts are incomplete. The parties must first address what information from the list in (a)-(j) is relevant and necessary with respect to the 3 Manitoba sites which are included in Vale’s claim. The Insurers have suggested that subsections (a), (c) and (f) are the priority (names/locations, closure dates and details re: steps). This should be completed before any discussion or consideration of Manitoba sites which are not part of Vale’s claims. Further, as this refusal is specific to 3 of the 26 sites, the parties should consider whether it may be more appropriately addressed in the Bridge Chart and, additional questions. Counsel shall have further discussions with a view to resolving Refusal 42 which may be brought back before me if necessary.
- [18] Legal Positions (Refusals #43-45) –. Refusals 43-44 relate to Vale’s legal positions regarding amendments to environmental legislation, regulations and policies. Vale has advised that its answers are in the closure plans and to a larger degree, its forthcoming expert reports. This is sufficient and can be revisited if necessary. The parties have

resolved Refusal 45 by agreeing on a process to exchange their respective positions and related evidence and information regarding “all sums” as pleaded by Vale and in the relevant policies.

- [19] Privilege Claims (Refusals #46-58)-. The parties have resolved Refusals 46-47 regarding Vale’s assertion of settlement privilege over the settlement amounts with other insurers by the parties agreeing to address them on further examinations or before or at trial. Refusals 48-49 relate to “Project Marlin” which is Vale’s internal codename for this litigation and the pre-litigation settlement discussions subject to the Standstill Agreement. Vale has advised that Project Marlin is still ongoing and submits that any further information regarding Project Marlin is subject to solicitor-client, litigation and/or settlement privilege. The Insurers argue that these questions are relevant to Vale’s claims for relief from forfeiture from late notice. Based on the submissions and discussions, the first step is for Vale to confirm when it claims privilege arises. This is more pronounced because Vale takes the position that the “zone of privacy” related to litigation privilege applies to communications before May 22, 2018, the date of the Standstill Agreement (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paras. 4 and 27-28). However, Vale has not advised or provided its position as to when this period began so as to permit the Insurers and, if necessary, the court, to consider its privilege claims. As Vale has advised that the commencement of Project Marlin is necessarily within this period, I am satisfied that Vale should advise when Project Marlin commenced within 30 days. Answering this question does not require Vale to disclose any privileged information or communications and in fact it is the same kind of information which Vale is required to disclose in its Schedule B to its Affidavit of Documents, namely, the date of a document or communication over which privileged is claimed. There is also some overlap and similarities with the clarifications the parties are working through with respect to Vale’s privilege log including the involvement of its legal counsel. Disclosure of this information may lead to the resolution of some of the refusals as it will allow the Insurers to more fully consider Vale’s privilege claims.
- [20] With respect to Refusal 50 the Insurers request why Vale decided to provide notice of its claims when it did as opposed to an earlier date. Vale states that the reasons for providing notice are set out in the notice letters (though the reasons for the timing are not) and submits that why it provided notice at that time is subject to solicitor-client and litigation privilege. Vale further submits that the individual who decided “why” was likely legal counsel. In my view, the preliminary issue is that Vale cannot currently confirm who made this decision or when they made it. I disagree with Vale that this preliminary information is privileged. Similar to my conclusions above, more information is required including who made the decision, if it was legal counsel or if legal counsel advised on the decision, and the timing, in order to consider Vale’s assertion of privilege and again is the kind of Schedule “B” information it is required to provide. As above, Vale has not provided me with any authority to support its assertion that this limited information is privileged. Given that notice is at issue in this litigation including Vale’s pleading of relief from forfeiture, the information is relevant. Vale shall advise who made the decision including if legal counsel was involved and when it was made within 30 days. Again, this information may resolve this refusal.

- [21] With respect to Refusal 51, the Insurers request more information about a privileged memorandum dated February 11, 2002 listed as privileged by Vale regarding environmental insurance. Vale asserts solicitor-client privilege and has advised that one of its legal counsel was the recipient of the memo. Vale shall provide sufficient information including clarifying the involvement of counsel and the basis for asserting privilege so that the Insurers can assess the privilege claim.
- [22] Refusals 52-58 relate to questions and issues raised by the Insurers with respect to Vale's privilege logs. The parties have agreed that the Insurers can seek clarifications and information as the actions continue and the Insurers reserve their rights in this regard.
- [23] Employee Details/Pre-1997 Documents (Refusals #59-60) – These refusals relate to information regarding Vale employees at the 26 sites during the relevant periods and related documents. It is likely that none of these employees are still employed by Vale, some are deceased and many of the documents pre-date Vale's document management system and therefore only exist in hard copy. The parties have agreed that the Insurers will address these questions by delivering Requests To Admit.
- [24] Reporting Lines (Refusal #61) – Vale has agreed to make reasonable inquiries and advise, subject to Rule 34.12, if Inco Europe reported to Mr. Finnerty in New York.
- [25] Refused As Disproportionate (Refusals #62-63) – With respect to Refusal 62 regarding the summary of Sudbury contamination costs, Vale has advised that the specific information requested by the Insurers will be included in its expert reports. In Refusal 63, the Insurers request that Vale search “long-standing concerns” regarding acid rock drainage referenced in a report produced by Vale. After significant exchanges and discussions, the Insurers have confirmed that they are seeking the documents which the report author relied on or had in mind in the specific section of the report referenced. Accordingly, I am satisfied that an appropriate interim step is for Vale to make best efforts to contact the author of the report and inquire into what documents she relied on for the referenced section including “long-standing concerns” and if they are unable to contact her to provide the contact information to Insurers' counsel.
- [26] Corporate Knowledge Re: Pollution and Contamination (Refusals #64-65) – These refusals relate to who was responsible for risk management and the existence of any reports to the board and officers for the period 1967-1985. These have been resolved as the Insurers have advised that they will deliver Requests To Admit.
- [27] Vale's Operations (Refusals #66-68) – In these refusals, the Insurers request any reports and memos regarding pollution control provided to Vale's board up to 2005 and to advise if the board had any subcommittees to address pollution from 1966 to 2005, and 2006 to the present, and any documents from meetings regarding any potential contaminants. Vale submits that these questions are not relevant and are disproportionate given that any organizational knowledge of contamination would be reflected in documents from other levels of the organization already produced and the documents requested date back almost 60 years. In my view, the board's knowledge of pollution and contamination is relevant particularly given the notice issues in these proceedings and is distinct and

fundamentally different from knowledge at other levels. Vale’s counsel advised that they do not know what documents may exist or be available given the age of the records which pre-date Vale’s document management system in 1997. In my view, given the relevance of the records and the potential quantum of the claims, proportionality, while important, does not mean that any efforts regarding the documents requested can simply be dispensed with. A reasonable, practical and proportionate first step is for Vale to make reasonable inquiries using best efforts and advise what information and/or documents exist and/or are available which are responsive to these questions, and if they continue to take the position that production would be disproportionate given that the documents are only in hard copy, in many boxes in multiple locations, to set out the efforts required to produce them. Once this is known, counsel can have further discussions about a potential reasonable and proportionate production of available documents.

- [28] Late Notice (Refusals #69-71) - These refusals regarding evidence in support of Vale’s claim for relief from forfeiture and its environmental procedure policy have been resolved.
- [29] Choice of Law (Refusals #72-74) – Vale has answered Refusal 72 regarding where the policies were delivered. Refusals 73-74 are similar to Refusal 61 regarding reporting lines to Mr. Finnerty (with the additional request of who worked with him) and as with Refusal 61 Vale has agreed to make reasonable inquiries and advise.
- [30] Surface Water (Refusal #75) – Vale has advised that this refusal with respect to surface water contamination will be answered in its expert reports.

The Bridge Chart and Additional Refusals

- [31] Vale submits that it should not have to answer or address the additional 8,000 questions identified in the Bridge Chart. Vale argues that these “flow through” questions are disproportionate and would require significant time and expense and were delivered too late which would result in a significant disruption to the Timetable threatening the 10-week trial scheduled for November 2025. Vale submits that it should only have to address questions that apply to all 26 sites in the Exemplar Chart except to the extent that it has already agreed to site specific questions. Vale further submits that if it is compelled to address these questions or the parties cannot otherwise agree then counsel must first appear before Myers J. to seek directions.
- [32] The Insurers submit that the questions in the Bridge Chart have always been part of their motions and it was always known and understood that the Exemplar Chart represented refusals to be dealt with by category which applied to all 26 sites and that the Bridge Chart remained at issue. As to timing, they note that they only received Vale’s answers in September 2024 and have been working through them on an ongoing basis while addressing Vale’s motion. The Insurers request that I order that any rulings, agreements and/or directions with respect to the Exemplar Chart also bind Vale with respect to the questions identified in the Bridge Chart. The Insurers rely on Myers J’s decision in *Green v. Canadian Imperial Bank of Commerce*, 2020 ONSC 5342. In that case, Myers J. held that decisions with respect to sample refusals in a category applied to all refusals in the

category and that the plaintiffs should not be surprised by such an approach. The Insurers advise that they will not agree to relinquish their clients' discovery rights with respect to the Bridge Chart questions which are necessary for full and proper discovery of Vale's claims regarding all 26 sites.

- [33] In my view, given the potential material impact on the Timetable particularly the fixed 10-week trial, I do not have jurisdiction to order that my directions and the parties' agreements with respect to in the Exemplar Chart bind Vale on "flow through" refusals in the Bridge Chart. An Associate Judge does not have jurisdiction to make orders which would or may have the effect of amending a Judge's order without direction or approval from a Judge to do so. This is no different than the regular back and forth between Civil Practice Court Judges and Associate Judges in Toronto.
- [34] Even if I had the jurisdiction, I cannot conclude that any orders or directions would be appropriate at this time. The Bridge Chart was only delivered 8 days ago. Neither Vale nor the court have had an opportunity to review it with any substance. Perhaps most importantly, the additional questions identified in the Bridge Chart have not been subject to case management and the ongoing exchange and review of answers and positions like the questions in the Exemplar Chart and on Vale's motion. This process has resolved a significant number of refusals and allowed the parties to stay on track towards their trial date.
- [35] The use of categories is a common and helpful approach in large refusals motions and its use is not the issue. The issue here is how the categories are used given the Timetable and the timing of delivery of the Bridge Chart where there are thousands of questions at issue. This is distinguishable from the parties' agreement to defer dealing with many refusals until after the delivery of Vale's expert reports which makes use of existing deadlines in the Timetable and has not to date posed a threat to the overall Timetable and the fixed trial date. The present case is distinguishable from *Green* given that thousands of refusals are at issue here and there has been significant case management both of the overall proceedings by a Judge and with respect to the refusals by this Court which has resulted in material efficiencies and agreement between the parties. There is no reason to abandon this approach at this time. Accordingly, it would not be reasonable or appropriate for me to make any orders in the circumstances.
- [36] At the conclusion of today's attendance, I remain unclear as to how Vale would be able to review and respond to the questions in the Bridge Chart within the Timetable unless there is significant overlap. At the same time, I am unclear how sufficient discovery can be achieved if Vale is only required to address refusals which apply to all 26 sites and not any refusals specific to single sites or less than 26 sites.
- [37] As a result of my discussions with counsel, Vale has agreed to review the 2,000 questions to determine which it is willing to answer or address and to the extent possible, identify those which overlap with the additional 8,000 questions. Vale does not agree to review the 8,000 additional questions. Counsel advised that have a case conference with Myers J. on January 10, 2025. However, the parties agreed today that Vale's counsel will inquire into the possibility of an earlier attendance.

[38] I advised counsel that I am available for a case conference on December 20 and 23, however, it did not appear as if any issues would have progressed beyond today's discussions to make one worthwhile. I remain available to provide any orders, directions and/or case management with respect to these issues as Myers J. may direct or request or the parties may otherwise require.

Associate Justice McGraw

Date: January 10, 2025