**FILE NO.:** SCT-5001-13
**CITATION:** 2018 SCTC 3
**DATE:** 20180403

# SPECIFIC CLAIMS TRIBUNAL

# TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

| | |
|---|---|
| **BETWEEN:** | |
| KAWACATOOSE FIRST NATION, PASQUA FIRST NATION, PIAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION, GEORGE GORDON FIRST NATION, MUSKOWEKWAN FIRST NATION AND DAY STAR FIRST NATION<br><br>Claimants (Respondents) | No one appearing for the Claimants (Respondents) |
| **– and –** | |
| STAR BLANKET FIRST NATION<br><br>Claimant (Respondent) | Aaron B. Starr and Galen Richardson, for the Claimant (Respondent) |
| **– and –** | |
| LITTLE BLACK BEAR FIRST NATION<br><br>Claimant (Applicant) | Aaron Christoff, for the Claimant (Applicant) |
| **– and –** | |
| STANDING BUFFALO DAKOTA FIRST NATION<br><br>Claimant (Respondent) | Mervin C. Phillips and Leane Phillips, for the Claimant(Respondent) |
| **– and –** | |

| | |
|---|---|
| PEEPEEKISIS FIRST NATION<br><br>Claimant (Respondent)<br><br>**– and –**<br><br>HER MAJESTY THE QUEEN IN RIGHT OF CANADA<br><br>As represented by the Minister of Indian Affairs and Northern Development<br><br>Respondent (Respondent) | Michelle Brass, for the Claimant (Respondent)<br><br>Lauri M. Miller and Donna Harris, for the Respondent (Respondent)<br><br>**HEARD:** March 20, 2018 |

## REASONS ON APPLICATION

**Honourable W. L. Whalen**

ON THE APPLICATION BY LITTLE BLACK BEAR FIRST NATION to permit the Applicant to examine the Respondent for the purpose of discovery.

**NOTE:** This document is subject to editorial revision before its reproduction in final form.

**Cases Cited:**

*Wewayakum Indian Band v Canada*, [1991] 3 FC 420, [1992] 2 CNLR 177 (FCTD); *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653, 69 DLR (4th) 489; *Canada v Akisq'nuk First Nation*, 2017 FCA 175; *Eli Lilly and Co v Apotex Inc*, 2006 FC 282, [2006] 4 FCR 104; *Faulding (Canada) Inc v Pharmacia SpA*, [1999] FCJ No 488, 87 ACWS (3d) 788; *Montana Band v Canada*, [2000] 1 FC 267, [1999] 4 CNLR 65 (FCTD); *Lehigh Cement Ltd v R*, 2011 FCA 120; *Eli Lilly Canada Inc v Novopharm Ltd*, 2007 FC 1195; *Merck & Co v Apotex Inc*, 2003 FCA 488, [2004] 2 FCR 459; *Six Nations of the Grand River Band v Canada (AG)*, [2000] OJ No. 1431, 48 OR (3d) 377 (Ont Div Ct); *Cherevaty v R*, 2016 FCA 71; *Haylock v Norwegian Cruise Lines Ltd*, 2003 FC 932, 239 FTR 147.

**Statutes and Regulations Cited:**

*Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, r 30, 60, 62, 63, 64, 65, 72, 73, 2, 5.

*Specific Claims Tribunal Act*, SC 2008, c 22, Preamble, ss 22, 13, 6, 34.

*Rules of Civil Procedure*, RRO 1990, Reg 194, r 31, 36.

*Federal Courts Rules*, SOR/98-106, r 235, 236, 234, 88, 237, 244, 238, 242, 243, 246, 248, 240, 81, 82, 3.

**Authors Cited:**

*The Oxford Canadian Dictionary*, 1st ed, *sub verbo* "format."

Master Linda Abrams, Kevin McGuinness and Jay Brecher, *Halsbury's Laws of Canada - Civil Procedure* (2017 Reissue).

Abrams and McGuinness, *Canadian Civil Procedure Law* (2nd ed).

Paul Perell and John Morden, *The Law of Civil Procedure in Ontario* (2nd ed).

## TABLE OF CONTENTS

## I. INTRODUCTION

[1] The Little Black Bear First Nation (Little Black Bear or Applicant) has applied to examine the Respondent for discovery in aid of determining which First Nations were intended to benefit from the allotment and eventual surrender of the Last Mountain Indian Reserve No. 80A (IR 80A). It also wants to know Canada's policy and rationale on those questions. The grounds for the Application are based on relevance and necessity, which the Respondent opposed on procedural and substantive grounds. The Respondent has generally indicated that it has no more information other than contained in the documents that have been produced so far after a careful and diligent search.

[2] The relief sought in the Application is stated as follows:

> a. an Order for leave of the Tribunal to make an application pursuant to Rule 30 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 [*Tribunal Rules* or *Rules*]; and
>
> b. an Order permitting the Applicant to examine the Respondent for discovery pursuant to paragraph 60(1)(a) of the *Rules*.

[3] The Applicant originally sought oral or written discovery, but at the hearing it asked for the right to examine orally and withdrew the written alternative because it feared Canada's strategy was to resist answering. The Respondent denied this and indicated it had been ready to cooperate.

[4] In support of the Application, the Applicant filed the Affidavit of Emily Guglielmin, dated June 22, 2017 (Guglielmin Affidavit) plus transcribed excerpts of elder testimony from a hearing held on June 20, 2016.

[5] The Applicant also filed Written Examinations dated May 30, 2017 requiring the Respondent to answer the following questions:

> 1. Does Canada agree that one of the unwritten promises of Treaty 4 was that Canada would establish fishing stations for those First Nations who wished to continue their traditional harvest of fish?

2. What was Canada's policy with respect to setting aside reserves as fishing stations for Indian Bands in Treaty 4 territory?

3. How did Canada decide which bands were entitled to have fishing reserves set aside on their behalf? i.e., What criteria were used? Why were fishing reserves set aside for certain bands and not others? Did Canada differentiate between landlocked bands and those with reserves bordering lakes?

4. How did Canada decide when to set aside fishing reserves?

5. How did Canada decide where to set aside fishing reserves?

6. Does Canada agree that it had a duty to act fairly and rationally in setting aside reserves? If not, why not?

7. Why was IR 80A set aside as a fishing station?

8. Why was IR 80A set aside as a fishing station for the Touchwood Hills and Qu'Appelle Valley Indians?

9. Was IR 80A set aside for specific bands? If so, then why were specific bands not listed when it was surveyed?

10. If Canada says that IR 80A was not set aside in part for Little Black Bear First Nation, then was a fishing reserve ever set aside for Little Black Bear?

11. If Canada says that a fishing reserve was never set aside for Little Black Bear, then on what basis was it decided that Little Black Bear would not receive a fishing station?

12. If no fishing reserve was ever set aside for Little Black Bear, does Canada agree that it had and continues to have a duty to set aside a fishing reserve for Little Black Bear? [Exhibit A of the Guglielmin Affidavit]

[6] Ultimately, none of the other Claimants have consented to the Application, but neither did they object.

[7] The Claimant, Standing Buffalo Dakota First Nation (Standing Buffalo), filed a Response expressing doubt that examination for discovery would assist in determining its interest in IR 80A. However, if the Application was allowed, it asked that the Parties be granted leave to ask questions arising from the Respondent's answers. At the hearing of the Application, Standing Buffalo was supportive of the Application.

## II. BACKGROUND

[8] This Claim concerns the surrender, disposition and management of IR 80A located on the Little Arm River in the Qu'Appelle Valley, northwest of Regina, Saskatchewan. IR 80A is located in Treaty 4 territory, a large area that includes most of the southern part of Saskatchewan, including the Qu'Appelle Valley and Touchwood Hills.

[9] IR 80A consisted of 1,408 acres (about 2.2 square miles). It was originally surveyed by John C. Nelson and confirmed by Order in Council 1151 on May 17, 1889 as "a Fishing Station for the use of the Touchwood Hills and Qu'Appelle Valley Indians". The Order in Council did not indicate what Bands made up the Touchwood Hills and Qu'Appelle Valley Indians, and it is not apparent that that information was contained in any other documentary record. In 1918, IR 80A was surrendered by the Touchwood Agency chiefs (consisting of the George Gordon, Poorman (today known as Kawacatoose), Day Star and Muscowequan Bands) and the Qu'Appelle Valley Agency chiefs (consisting of the Muscowpetung, Pasqua, and Piapot Bands). Settlement proceeds were shared between these seven Bands, although they are now disputing the propriety of the surrender.

[10] The seven Bands are the original Claimants in this proceeding: i.e. Kawacatoose First Nation, Pasqua First Nation, Piapot First Nation, Muscowpetung First Nation, George Gordon First Nation, Muskowekwan First Nation and Day Star First Nation. They filed a joint Declaration of Claim alleging improper surrender and mismanagement of IR 80A

[11] The other Claimants, Little Black Bear First Nation, Standing Buffalo Dakota First Nation, Star Blanket First Nation and Peepeekisis First Nation all came forward seeking intervenor or party status when they were served with Notices pursuant to section 22 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], advising them that the specific claim might affect their interests. It was determined that a validity standing sub-phase should be held to determine which of these First Nations had a valid interest in IR 80A, and on consent all were made Parties to the validity standing sub-phase. The present Application is made in the context of the conduct of this sub-phase.

## III. THE LAW

### A. The Rules Underlying Examination for Discovery

[12] The Tribunal adjudicates this dispute pursuant to Rule 30 of the *Tribunal Rules*, which requires the Tribunal's leave to make an application, except under subrule 60(2):

> **30** Except for an application referred to in the Act, subrule 60(2) or Part 11, leave of the Tribunal is required before an application can be made to the Tribunal.

[13] Paragraph 60(1)(a) and subrule (2) of the *Tribunal Rules* provides that a party may apply to examine a person before the hearing for the purpose of discovery. Leave is not required if all parties consent to the examination:

> **60 (1)** A party may make an application to examine a person before the hearing
>
> **(a)** for the purpose of discovery;
>
> …
>
> **(2)** Leave is not required to make the application if all parties consent to the examination.

[14] Because all of the Parties to the proceeding did not consent, the Applicant must obtain leave to bring the Application. By virtue of the fact of this hearing, it is obvious that leave is granted.

[15] Subrule 60(3) of the *Tribunal Rules* requires an applicant to set out whether the proposed examination is to proceed orally, in writing, or both. It must also set out whether the party to be examined has consented to it, and to indicate whether any other parties have consented to the examination:

> **60 (3)** In addition to the information required under Rule 34, the notice of application must set out the following information:
>
> **(a)** whether the examination is proposed to be conducted orally, in writing or both;
>
> **(b)** whether the person or party proposed to be examined has consented to the examination; and
>
> **(c)** whether any other parties have consented to the examination.

[16] The Applicant complied with subrule 60(3), except it did not specifically state that no Parties had consented. The Respondent's opposition could be inferred from its June 12, 2017

letter appended as Exhibit B to Ms. Guglielmin's Affidavit. At the hearing, the Respondent submitted that this letter demonstrated its willingness to participate in examination for discovery in writing, although the extent of the complaints about the proposed questions would suggest otherwise. In any event, the Respondent filed a formal Response detailing its opposition, thereby attorning and correcting any deficiency.

[17] Where the application for examination is granted, Rule 62 of the *Tribunal Rules* permits the Tribunal to direct the parties regarding the format and location of the examination, and if an oral examination, how it is to be recorded:

> **62** If the Tribunal permits the examination to be conducted, it may provide the parties with directions regarding
>
> **(a)** the format and location of the examination; and
>
> **(b)** in the case of an oral examination, the means by which it is to be recorded.
> [emphasis added]

[18] The use of the word "permits" likely refers to the procedural step of obtaining leave to examine and related questions. This is because the matters that may be directed under the Rule seem to relate to logistical issues, including format, location and the means of recording an oral examination. The Oxford Canadian Dictionary defines "format" as "the style or manner of an arrangement, design or procedure" (*The Oxford Canadian Dictionary*, 1st ed, *sub verbo* "format"). I conclude that Rule 62 of the *Tribunal Rules* does not deal with the scope of questions that may be asked, but rather particulars of location, facility and technical issues.

[19] Where the Crown or a First Nation is being examined for discovery, subrule 63(1) of the *Tribunal Rules* requires it to designate a person to be examined on its behalf:

> **63 (1)** When the Crown or a First Nation is examined for discovery, it must designate a person to be examined on its behalf.

[20] That designated representative must inform herself/himself to be able to respond to the broad scope of questioning sanctioned in Rule 64 of the *Tribunal Rules*. Under Rule 64, it is *mandatory* that the person being examined answer every question posed to the best of his/her knowledge, information and belief. Rule 65 of the *Tribunal Rules* requires the examination be conducted under oath:

> **64** The witness must, to the best of their knowledge, information and belief, answer every question posed to them that is relevant to the specific claim.
>
> **65** Examinations must be conducted under oath.

[21] Rule 72 of the *Tribunal Rules* provides that the examining party must pay certain costs, including fees and disbursements related to the recording of the examination, and the reasonable travel expenses of the witness being examined:

> **72** The examining party must pay the following costs:
>
> **(a)** all fees and disbursements related to the recording of the examination;
>
> **(b)** if an interpreter was required, the fees and disbursements of the interpreter; and
>
> **(c)** the reasonable travel expenses incurred by the witness.

[22] Rule 73 of the *Tribunal Rules* contemplates written examination, and in that situation, requires the examining party to provide the witness to be examined with a concise list of separately numbered questions to be answered. The witness must provide all parties with an affidavit setting out her/his answers within 30 days:

> **73** If an examination is to be conducted in writing, the examining party must serve the party whose witness is being examined with a list of concise, separately numbered questions for the witness to answer.

[23] The Applicant complied with Rule 73 by serving a Written Examination with direction to answer the separately numbered questions contained in the attached Schedule and as stated above.

[24] It is worth taking note of other Tribunal rules that may have a bearing on this Application.

[25] The *Tribunal Rules* are to be read and applied according to the general principles stated in Rule 2, namely: to promote a just, timely and cost-effective process, while at the same time appreciating the distinctive character of these historic claims and the cultural diversity surrounding them:

> **2** These Rules must be interpreted and applied so as to secure the just, timely and cost-effective resolution of specific claims while taking the cultural diversity and the distinctive character of specific claims into account.

[26] The Preamble of the *SCTA* also emphasizes the distinctiveness of specific claims, the

need to adjudicate in a just and timely manner, and the over-arching goal of reconciliation:

> Recognizing that
> …
> resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations;
>
> there is a need to establish an independent tribunal that can resolve specific claims and is designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner;
> …

[27] Section 13 of the *SCTA* provides that in exercising its jurisdiction, including in respect of the examination of witnesses, the Tribunal has all the powers, rights and privileges that are vested in a superior court of record:

> **13 (1)** The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all the powers, rights and privileges that are vested in a superior court of record…

[28] Finally, it is important also to realize that the *Tribunal Rules* are not intended to be exhaustive. Where a Tribunal rule does not cover a practice or procedure, the *Federal Courts Rules*, SOR/98-106, may be adapted by analogy:

> **5** The Tribunal may provide for any matter of practice or procedure not provided for in these Rules by analogy to the *Federal Courts Rules*.

[29] As a judge exercising the powers vested in a superior court of record, albeit sitting as a member of the Specific Claims Tribunal, exercising the jurisdiction of the *SCTA* and applying its *Rules*, I approach my task as a superior court judge working in the context of the law of examination for discovery recognized by ordinary Canadian law.

[30] In Canada, the right to discovery is generally automatic. *Halsbury's Laws of Canada* has stated it succinctly: "…a party to an action is liable to be examined orally for the purposes of discovery by all parties adverse in interest… A person may not avoid oral discovery by providing a written statement setting out his or her version of the facts and evidence. The right to obtain discovery is absolute." (Master Linda Abrams, Kevin McGuinness and Jay Brecher, *Halsbury's Laws of Canada - Civil Procedure* (2017 Reissue), at HCV-177 (QL); footnotes omitted). In Ontario, for example, subrule 31.03(1) of the *Rules of Civil Procedure*, RRO 1990,

Reg 194 [*Ontario Rules*], provides that "[a] party to an action may examine for discovery any other party adverse in interest, once,…". The right to examination for discovery is also automatic under the *Federal Courts Rules*:

> **235** Except with leave of the Court, a party may examine for discovery any adverse party only once.

[31] The *Tribunal Rules* are very similar to the *Federal Courts Rules*, although there are some significant differences. As noted, the right to examination for discovery in the Federal Court is automatic. There is no requirement to seek initial leave. However, the right does not accrue until pleadings are closed and the examining party has filed an affidavit of documents, or the adverse party consents or is in default of filing pleadings: see subsection 236(1) of the *Federal Courts Rules*. By analogy, that requirement has been met in the present case. Subject to rule 234 of the *Federal Courts Rules*, the examination for discovery may be oral or in writing, and in simplified actions it may only be in writing: rule 88 and rule 296 of the *Federal Courts Rules*. A party cannot examine for discovery both orally and in writing unless it obtains leave of the court, or the consent of the party being examined, and the consent of all other parties: see rule 234 of the *Federal Courts Rules* (just discussed). Where the Crown is to be examined, the Attorney General of Canada is required to appoint a representative: see subsections 237(1) and (2) of the *Federal Courts Rules*. The person being examined is required to inform himself/herself and may be required to better inform himself/herself and resubmit to examination if unable to answer a question: see rule 244 of the *Federal Courts Rules*. All of these *Federal Courts Rules* may be significant in a tribunal proceeding where the tribunal rules are silent, incomplete or unclear.

[32] The *Federal Courts Rules* also deal with the examination of non-parties (rule 238), permitted objections (rule 242), limiting oppressive, vexatious or unnecessary examinations (rule 243), correcting inaccurate answers (rule 245), answers by the examined person's counsel (rule 246) and inadmissibility of undisclosed information (rule 248). These rules may be of procedural assistance by way of analogy in matters before the Tribunal, although not in this case. Indeed, it would always be prudent for counsel to be familiar with both sets of rules when dealing with an application before the Tribunal.

[33] A significant difference between the *Tribunal Rules* and the *Federal Courts Rules* on discovery is the scope of permitted examination. Whereas under Rule 64 of the *Tribunal Rules*,

the person examined must answer all questions "relevant to the specific claim", rule 240 of the *Federal Courts Rules* requires the witness to answer any question "relevant to any unadmitted allegation of fact in a pleading filed by the party filed being examined or by the examining party". It seems clear that the permitted scope of questioning is broader under the *Tribunal Rules* than the *Federal Courts Rules*. I believe this difference is purposeful because of the historic nature of the Tribunal's claims, the cultural sensitivities involved and the objective of reconciliation. I conclude that Rule 64 of the *Tribunal Rules* leaves no residual room for the application of rule 240 of the *Federal Courts Rules*.

### B. Procedural Safeguards

[34] In *Wewayakum Indian Band v Canada* , [1991] 3 FC 420 at para 31, [1992] 2 CNLR 177 (FCTD), Justice Addy articulated the general purpose of discovery:

> The purpose of discovery, whether oral or by production of documents, is to obtain admissions to facilitate proof of the matters in issue between the parties. The prevailing trend today favours broadening the avenues of fair and full disclosure to enable the party to advance his own case or to damage the case of his adversary. Discovery can serve to bring the issues more clearly into focus, thus avoiding unnecessary proof and additional costs at trial. Discovery can also provide a very useful tool for purposes of cross-examination. [quoting from *Reading & Bates Construction Co et al v Baker Energy Resources Co* (1988), 25 FTR 226 at 229]

[35] This statement suggests that fairness at hearing or trial is an underlying purpose of discovery, so that parties can learn the case to be met or obtain admissions that may facilitate the process. The rules of the particular court or tribunal may of course impose limitations on the way in which the discovery proceeds and the nature of the questions that may be asked. Courts have also limited discovery where it appears that a party is trying to use the rules to cause delay, complicate the proceeding or achieve some unrelated ulterior motive; for example, where the procedure is being used to engage in a "fishing expedition" by posing over-broad or speculative questions for information without any real expectation about impact on outcome or relevance to the case (see Abrams and McGuinness, *Canadian Civil Procedure Law* (2nd ed), Chapter 13 at §13.2 (QL); Paul Perell and John Morden, *The Law of Civil Procedure in Ontario* (2nd ed), Chapter 7 at §7.88 (QL)).

[36] The standard and application of principles of fairness and natural justice may differ as

between courts and administrative tribunals. By comparison to courts, many tribunals follow a greatly relaxed process in order to overcome administrative rigidity and achieve efficiency. The Supreme Court of Canada explained the difference in *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at para 49, 69 DLR (4th) 489 [*Knight*]:

> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (Judicial Review of Administrative Action (4th ed. 1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.

[37] As the Supreme Court of Canada observed in *Knight*, courts and administrative tribunals are different, and their processes may differ according to their needs yet be fair. The question is where do administrative flexibility and efficiency intersect with the rules of natural justice and procedural fairness?

[38] The Supreme Court of Canada has recognized that there is a spectrum of procedural fairness in administrative law (*Knight* at para 46):

> …the concept of fairness is entrenched in the principles governing our legal system [citation omitted], and the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making.

[39] While the Tribunal is meant to be flexible and efficient in dealing with the cases before it so that it can achieve its mandate of the just, timely and cost-effective resolution of claims, it is also expected to do its work carefully, fairly and according to accepted standards of law accepted by Canadian superior courts.

[40] For a number of reasons, I conclude that the Tribunal is at the judicial end of the spectrum of procedural fairness.

[41] First is the fact that Tribunal adjudicators are superior court judges who exercise "all the powers, rights and privileges that are vested in a superior court of record" (subsections 6(2) and 13(1) of the *SCTA*). Secondly, that superior court judges decide Tribunal claims indicates that a judicial standard of adjudication is expected. Furthermore, the Tribunal's decisions are final and

conclusive between the parties and are not subject to appeal, although they are subject to judicial review (section 34 of the *SCTA*). The principles of natural justice are typically the focus of judicial review, which suggests that procedural fairness is important in the adjudication of specific claims. The finality of Tribunal decisions also makes it imperative that questions of procedure, admissibility of evidence and the general application of law be determined with care and according to established, accepted principles of Canadian law. Superior courts deal with these issues daily. Because superior courts exist in every province of Canada, are bound nationally by the principle of *stare decisis*, and are accustomed to dealing with federal and provincial legislation, and the common law (or civil code in Quebec), superior courts offer an evenness of approach and application no matter which province a specific claim may arise in.

[42] The Federal Court of Appeal held in *Canada v Akisq'nuk First Nation*, 2017 FCA 175 at para 23, that the Specific Claims Tribunal engages in a court-like process:

> It is not necessary for me to fully resolve this debate or to enumerate the participatory rights enjoyed by the parties. Having regard to the adjudicative nature of the decision at issue, the court-like process prescribed by the Rules (particularly Rules 57-103 dealing with pre-hearing disclosure, pre-hearing examinations and pre-hearing evidence taken by way of discovery, oral history or expert evidence, and Rules 104-105 dealing with the hearing procedure), the absence of a statutory right of appeal, and the importance of the decision to the parties, it is sufficient to conclude that the parties were entitled to a meaningful opportunity to present their cases fully and fairly. In turn, this required, at a minimum, that the parties be informed of, and know, the case they had to meet and then be afforded the opportunity to adduce evidence and make submissions responsive to that case.

[43] These observations affect my approach in the Application before me. Given the automatic right to examination for discovery in Canadian common law superior courts, I am reluctant to apply a different standard in the Tribunal context without clearer specific direction. I therefore conclude that the threshold for granting leave to examine for discovery is very low. As discussed in paragraphs 17 and 18 above, the requirement for leave seems tied more to logistical and technical concerns than substantive or legal. Because the Tribunal is interested in assuring that the process goes forward as efficiently and inexpensively as possible, intervention at the leave stage can be helpful. For example, applications at the eleventh hour prior to a validity or compensation hearing may be unjustified; or steps taken by a party that seem intended to delay or frustrate the process can be identified and weeded out at the leave stage.

### C. Relevance

[44] As already touched upon, the basis on which questions may be asked in an examination for discovery is whether they are "relevant to the specific claim" (Rule 64 of the *Tribunal Rules*). Relevance is therefore a central question in whether an examination for discovery should be granted.

[45] In *Eli Lilly and Co v Apotex Inc*, 2006 FC 282 at para 19, [2006] 4 FCR 104, Prothonotary Aronovitch compared the threshold of relevancy at the discovery and trial stages, and concluded that the threshold was lower at the discovery stage. Favourably quoting Hugessen J. in *Faulding (Canada) Inc v Pharmacia SpA*, [1999] FCJ No 488 at para 3, 87 ACWS (3d) 788, Prothonotary Aronovitch stated:

> For the purposes of discovery, relevance is a broader notion than relevance for the purposes of trial. The point is made as follows in *Faulding*, where Justice Hugessen declined to strike answers given in an examination which the defendant argued were irrelevant to the action, writing at paragraph 3:
>
> > I may say at the outset, that the questions asked and answers given, while they may be of questionable relevance in the light of the pleadings, and I make no finding in that regard, are not what I may call egregiously irrelevant. In other words, the questions all bear on what the inventors did, how they did it and when they did it in the course of making their invention. They are not questions that are totally beside and outside the issues raised in the case. [emphasis added in *Eli Lilly and Co v Apotex Inc*]

[46] Justice Hugessen elaborated and expanded on this finding in *Montana Band v Canada*, [2000] 1 FC 267 at paras 4–5, [1999] 4 CNLR 65 (FCTD) [*Montana*]:

> I start my consideration of the matter with some reflections upon the nature and scope of examinations for discovery and interrogatories in modern civil procedure, and in particular under the Federal Courts Rules, 1998 [SOR/98-106].
>
> The general purpose of examination for discovery is to render the trial process fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them. It is in the interest of justice that each party should be as well informed as possible about the positions of the other parties and should not be put at a disadvantage by being taken by surprise at trial. It is sound policy for the Court to adopt a liberal approach to the scope of questioning on discovery since any error on the side of allowing questions may always be corrected by the trial judge who retains the ultimate mastery over all matters relating to admissibility of evidence; on the other hand any error which unduly restricts the scope of discovery may lead to serious problems or even injustice at trial. [emphasis added]

[47] In *Lehigh Cement Ltd v R*, 2011 FCA 120 at paras 34–35, the Federal Court of Appeal also discussed relevancy in the context of examination for discovery:

> The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute. See *Eurocopter* at paragraph 10, *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287, 381 N.R. 93 at paragraphs 61 to 64; *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraphs 30 to 33.
>
> Where relevance is established the Court retains discretion to disallow a question. The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. See *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraph 34. The Court might disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope": *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 312 N.R. 273 at paragraph 10; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2008 FCA 131, 166 A.C.W.S. (3d) 850 at paragraph 3.

[48] I conclude that relevancy should be given a broad and liberal meaning at the discovery stage; or put differently, the relevancy threshold should be low. Otherwise, the Tribunal could be deciding final relevancy. This is more properly the job of the trial judge, who has a broader view. The function of a trial judge is to determine relevance, admissibility and the weight of *all* of the evidence at trial, and to make an overall decision based on that assessment. Again, given the finality of the Tribunal's trial decisions, a party seeking discovery should be given fair leeway. Discovery should be permitted where the purpose of the enquiry has a semblance of relevancy.

## IV. LEGAL ANALYSIS

### A. General Nature of the Question for Examination

[49] The Applicant's questions are directed at Canada's knowledge, information and belief as to which Bands were the intended beneficiaries of IR 80A, and the Crown's policy and position in the establishment of fishing reserves generally and particularly in relation to IR 80A.

[50] The thrust of the Applicant's enquiry seems both material and relevant given that the purpose of the validity sub-phase is to determine which Bands have an interest in IR 80A, and may therefore also have status to continue as a Party at the validity hearing. Which Bands the

Government intended to benefit, and its general and particular policies and practices at the relevant times, must be of fundamental interest to all of the Claimants. In other words, the question is of significance not only as between Little Black Bear and Canada, but also as between Little Black Bear and the other First Nations that are Parties to the Claim. Canada's knowledge, information and belief in respect of the questions Little Black Bear wishes to pose involve a broader dynamic involving itself and the other Claimants. Because the *lis* is also between Claimants, relevance has a multi-edged context at this stage of the proceeding.

[51] Little Black Bear was one of the First Nations responding to the Tribunal's Section 22 Notice. It is attempting to establish that it has sufficient status to go forward to the validity phase of the proceeding. If it is not successful in demonstrating a sufficient interest, it will likely be foreclosed from participating in the rest of the proceeding. Much is at stake. Canada's role in the events is pivotal, all of which warrants permitting the Applicant considerable leeway.

[52] Little Black Bear stated that the documents so far produced by Canada do not disclose a policy for establishing fishing stations at the time either generally, or specifically in respect of IR 80A. Nor do the documents shed light on what Bands Canada intended to benefit or what Bands made up the "Touchwood Hills and Qu'Appelle Valley Indians". The other Parties, including Canada have not taken issue with this allegation.

[53] Canada has stated that it has conducted a diligent search of archival records with the result that it had located and produced the numerous documents described in the affidavit of documents that were served on all of the Claimants. It further suggested that there is no clear evidence to answer the questions, so allowing the Application will not likely bring the issues more clearly into focus. If this is so, the Respondent can commit to that position under oath. I do not think the Applicant is asking Canada to conduct a further search if it has already been done carefully and is unlikely to uncover more information. It is asking Canada to commit to a position.

[54] Also, documents are only one possible source of knowledge, information and belief. If the Respondent has no knowledge, information or belief from any other source about the questions of interest to the Applicant, it can depose that too. Of course, if the Respondent has further information, knowledge or belief from any source, documentary or otherwise, it should

state it. The Applicant's enquiry is germane and fair. It wants to know Canada's position on these questions so that it is not surprised at the sub-phase hearing, and so that it may prepare accordingly.

[55] The Respondent argued that if the evidence existed to answer the questions the Applicant seeks answers to, there would be little need for the sub-phase hearing. I do not agree. It may simply mean that Canada can shed no more light on it and the documentary record cannot fill all the gaps. The questions still remain as to which Bands lived in the area at the material times, which ones used IR 80A, to what purpose they used it, how often they used it, whether they had other fishing stations, what oral history might shed light on the matter, pertinent anthropological or historical evidence and perhaps other matters that may assist in resolving the issues.

[56] The Crown also submitted that granting the Application would permit the Applicant to engage in a "fishing expedition", which courts do not approve of or allow. In the case of *Eli Lilly Canada Inc v Novopharm Ltd*, 2007 FC 1195, Prothonotary Tabib described what a "fishing expedition" was, and the Federal Court of Appeal, 2008 FCA 287 (para 61) quoted her observations with approval. At paragraph 19, Prothonotary Tabib stated:

> To say that a document might conceivably lead to other documents, which, although not in themselves relevant, might then conceivably lead to useable information, is not enough. It is precisely the type of fishing expedition which the jurisprudence of this Court consistently refused to sanction. That is not to say that the moving party must establish that the document sought will necessarily lead to useable information: a reasonable likelihood will suffice; an outside chance will not.

[57] I do not see the Applicant attempting to engage in a fishing expedition here. It is not seeking indirect documents that could conceivably lead to other documents or information that might prove useful. It is asking factually based questions about whether there was a policy at the time, what the policy was, what Bands were intended to be benefited and by what rationale. It is not asking to see entire files from which produced documents originated or other sources of documents in the hope that they might turn up or refer to something that could prove useful. As I have said, it may be that the information does not now exist. But if that is the case, that is relevant too.

### B. The Guglielmin Affidavit

[58] As a preliminary matter, the Respondent took issue with Emily Guglielmin's Affidavit in support of the Application. The Respondent submitted that the Affidavit was improper, both in form and substance, and sought to strike it.

[59] Having stated that she was an Associate of the Applicant's counsel's law firm, Ms. Guglielmin deposed that she had spoken with their lead researcher about documents produced to date. She then deposed that a Draft Common Book of Documents circulated March 13, 2017 contained 183 documents, none of which articulated Canada's policy or rationale for setting aside fishing reserves on Treaty 4 land or elsewhere. She continued that the earliest documents in their possession stated simply that "IR 80A was surveyed as a fishing station for the Touchwood Hills and Qu'Appelle Valley Indians" (Guglielmin Affidavit at para 4) without any further explanation as to why it had been set aside. As a result, she believed that the historical documentary record for the Claim was incomplete. In other words, she presumed that Canada must have had a policy in creating fishing stations at the time, and a reason why it had done so in this case. In her view, the underlying policy and explanation were not apparent in the documents produced so the documentary record was incomplete.

[60] She then explained that in order to address the perceived gap in the historical record, the firm had engaged its own historical expert, who undertook research "over a period of several months from late 2016 to April 2017" (Guglielmin Affidavit at para 6) but was unable to determine Canada's policy for setting aside fishing reserves. She stated that the Applicant had eventually corresponded with the Respondent, indicating its intention to examine for discovery on the issue and enclosing the questions it intended to pose. The letter dated May 30, 2017, was appended as an exhibit to the Affidavit and said in part:

> It is evident that the questions attached hereto are of fundamental importance to the present claim and the standing sub-phase in particular. Given that the bands entitled to share in IR 80A were never clearly set out at the time the reserve was set aside, it is crucial that the parties and the Tribunal understand Canada's policy and rationale for setting aside fishing reserves in Treaty 4 territory. Furthermore, by rejecting the claim of some First Nations and offering to negotiate with others, without providing any substantive reasoning, this matter concerns not only fairness but the reasonable expectations of the parties to understand why some, and not others, were determined to be beneficiaries to IR 80A. The answer is fundamentally a question grounded in policy or discretion or both.

[61] Ms. Guglielmin then deposed that Canada had responded in a letter of June 12, 2017, stating that its client was in the process of trying to find a deponent qualified to provide the information sought, expressing concern about the proposed questions, and disagreeing that Canada was obligated to provide an explanation of fishing reserves not derived from the available evidence.

[62] Ms. Guglielmin concluded that answers to the written questions were of fundamental importance to the sub-phase and ultimate claim, and that Canada's rationale and policy in setting aside fishing reserves were "crucial" given that the Bands entitled to share in IR 80A were never clearly identified at the time the Reserve was established. She concluded her Affidavit with the following statements:

> I verily believe that there is evidence that Canada made its determination based upon policy, either written or otherwise, in deciding which bands are the beneficiaries of the fishing reserve IR80A.
>
> I verily believe that Canada has in its power, possession and control information respecting its administration and designation of fishing reserves for Treaty 4 Indians, and it is for that reason we are seeking to examine Canada on the subject. [paras 15–16]

[63] Ms. Guglielmin also referred to a letter from Canada dated February 28, 2012 and appended as Exhibit D to her Affidavit. Canada objected to the letter's production to the Tribunal because it had been sent on a "Without Prejudice" basis. The objection has merit. Only Canada can waive the "Without Prejudice" nature in its own communication. This is a fundamental, pragmatic and long-standing principle in Canadian procedural law that encourages communications between parties without fear of disclosure to a court. Parties' ability to conduct such communications greatly facilitates the process. Accordingly, Exhibit D to the Guglielmin Affidavit will be struck.

[64] The Respondent further complained that the Affidavit offended rules 81 and 82 of the *Federal Courts Rules*, which provides:

> **81 (1)** Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

> **(2)** Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.
>
> **82** Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.

[65] The basis of the complaint was that the Affidavit stated the deponent's belief without accompanying grounds for the belief, as required by subrule 81(1) of the *Federal Courts Rules*, and the Tribunal should therefore draw an adverse inference pursuant to subrule 81(2) of the *Federal Courts Rules*. I do not agree.

[66] Firstly, Ms. Guglielmin deposed that as an Associate of the law firm she was assisting with the case and had personal knowledge of the matters deposed to, "except where stated to be upon information and belief" (Guglielmin Affidavit at para 1). I take this to mean that apart from personal involvement, she had been able to review the file and take such steps as were necessary to inform herself. She was certainly in a position to have done so. Secondly, she referred to having spoken with the firm's lead researcher about the documents produced. I am satisfied that her conclusions about what the documents did *not* disclose was informed by that communication.

[67] Additionally, she indicated that the firm had undertaken its own research that had not produced answers to the Applicant's questions. She appended her firm's letter dated May 30, 2017 (signed by Mr. Aaron Christoff) discussing the Applicant's questions and concerns, and enclosing the written questions that the Applicant proposed Canada answer to address those questions and concerns. I am satisfied that these were the informational basis of Ms. Guglielmin's statements of belief, and that they were substantial and appropriate. These sources provided adequate "grounds" within the meaning of subrule 81(1) of the *Federal Courts Rules*, as well as "evidence of persons having personal knowledge of material facts" from the Applicant's perspective as required under subrule 81(2) of the *Federal Courts Rules*.

[68] With respect to paragraphs 15 and 16 of the Affidavit, I am satisfied that they were conclusions based upon the preceding statements and permitted exhibits attached. While they may not have been very helpful, they did not offend the *Federal Courts Rules*. At this stage, Ms. Guglielmin was drawing a logical inference that Canada had a reason for setting aside IR 80A, and that it must have had certain Bands in mind when referring to the "Touchwood Hills and

Qu'Appelle Valley Indians". This is not offensive to the *Federal Courts Rules*.

[69] Next, the Respondent objected that Ms. Guglielmin had deposed as counsel to contentious issues in dispute between the Parties. As authority that this was not permitted it referred to the Federal Court of Appeal decision in *Merck & Co v Apotex Inc*, 2003 FCA 488, [2004] 2 FCR 459, where the Court stated at paragraph 48:

> I find the affidavit of co-counsel totally lacking in value and in credibility. This Court does not look favourably, if at all, to affidavits deposed by counsel when the affidavits refer to contentious issues of substance (see Rule 82 of the Federal Courts Rules and cases listed in David Sgayias et. al., Federal Court Practice 2003 (Toronto: Carswell, 2002), at p. 387; International Business Machines Corp. v. Printech Ribbons Inc., [1994] 1 F.C. 692 (T.D.), Nadon J.). Counsel in the case at bar was not qualified as expert; he is in no position to make scientific statements and to delve into the scientific explanation of the patent as opposed to its legal construction. Nor is he in a position to comment on the "colloquiality" of the name lisinopril. Counsel was only involved in the file in late 1999; he does not know what Apotex knew in earlier years nor can he explain the sudden reversal in Apotex' position. Counsel refers to a series of documents filed during the discovery process without giving any indication as to their context and he does not refer to any testimony by expert witnesses that would support his understanding of these documents. In other words, counsel is in no position to make Apotex' case on its motion to amend. [emphasis added]

[70] The Respondent also referred to *Eurocopter v Bell Helicopter Textron Canada Ltée*, 2013 FCA 261 and *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, 2006 FCA 133.

[71] As in *Merck*, the lawyers in these other cases had deposed to what amounted to expert opinions for which they were not qualified and that were in dispute; or, they had expressed opinions or conclusions based on documents not disclosed, referred to or explained. That is not the situation here. Ms. Guglielmin disclosed the sources of her beliefs, as discussed above, and she was not attempting to provide expert opinion. I see nothing improper.

[72] The Respondent also argued that Ms. Guglielmin's Affidavit offended rule 82 of the *Federal Courts Rules*, which it submitted "provides [that] a solicitor shall not depose to an affidavit and present argument to the court based on that affidavit except with leave of the court" (see paragraph 64 above; Respondent's Brief of Law and Argument at para 15). The Applicant had not sought leave. Ms. Guglielmin was not the solicitor of record on the Application, nor did she appear before the Tribunal to argue it. Messrs. Ryan Lake and Aaron Christoff were the

solicitors of record and Mr. Christoff appeared before the Tribunal to make submissions. The point is that a lawyer cannot argue an application supported by his/her own affidavit. There was no need to seek the Tribunal's leave to file Ms. Guglielmin's Affidavit.

### C. The Affidavit of Documents

[73] The Respondent complained that the Applicant was seeking "to examine the Crown on document production processes to establish that allegedly non-produced and relevant documents exist" (Respondent's Brief of Law and Argument at para 22). It also submitted that the Applicant was "seeking to challenge" the Respondent's affidavit of documents (Respondent's Brief of Law and Argument at para 25). It relied on *Poitras v Sawridge Band*, 2001 FCT 456 at paragraphs 2 to 4, where the Applicant sought to examine the Crown's deponent on the preparation and content of an affidavit of documents sworn by another Crown deponent. Justice Hugessen held that because a document could be shown to have been produced from a particular file, does not make every other document in the file automatically relevant and produceable. Nor is the Applicant allowed to examine the Respondent's files at large to see if there are any other relevant documents that have not been included in the affidavit of documents. A party questioning an affidavit of documents bears a heavy burden.

[74] The Respondent did not specify what part or parts of the Applicant's materials filed in support of the Application supported its contention that the Applicant sought to examine the Respondent on its production process or challenge its affidavit of documents. Perhaps the source of the objection was Ms. Guglielmin's statement in paragraph 16 of her Affidavit that she believed Canada had in its "power, possession and control information respecting its administration and designation of fishing Reserves for Treaty 4 Indians". However, I have already concluded that this statement was a reasonable general inference based on logic and the information reported in the preceding parts of the Affidavit.

[75] I am satisfied that the Applicant is not challenging the affidavit of production or the Respondent's production process. It is attempting to determine Canada's position and whether there is other information, documentary or otherwise, to explain why Canada decided that certain Bands were intended beneficiaries of IR 80A, while others were not. Also, only some of the Claimants or their predecessors had been called upon to participate in the surrender of IR 80A

and the rest had not. This goes to the heart of the issue from the Applicant's perspective and is a proper subject for discovery.

### D. Questions Beyond Living Memory, Legal Position and Legal Opinion

[76] The Respondent questioned the utility of an examination for discovery where its deponent would not have personal knowledge of the events in question because of their historical nature. That deponent would have to rely on the documents already produced and available to all the Parties. The Applicant countered that if this argument prevailed, examinations for discovery might never be conducted in Tribunal proceedings because of the historical nature of claims.

[77] In the *Montana* case at paragraph 18, Hugessen J. rejected the argument, finding that institutions, including the Crown, have memories that are manifested not only in documents but in other forms such as practices and traditions:

> The objection that the facts in issue which form the subject of the interrogatories are beyond living memory seems, with respect, to be specious. Especially where matters of Aboriginal rights are concerned, tradition custom and oral history may be valid sources of historical fact. The deponent on discovery is not a simple witness but is the representative of and speaks for a party qua party. Furthermore, institutions may also have memories and the Crown is quintessentially one such institution. To say that the Crown can have no factual information about anything which goes beyond living memory (as a practical matter, some time after the First World War) seems to me to be absurd. Governments, more than most institutions, are notorious for keeping records of what they do and such records may be constantly referred to and relied upon as a source of current practice even today. While most such records will be in documentary form it is by no means inconceivable that institutional memory may manifest itself in other forms such as practices and traditions. If these are the source of factual allegations by or against the Crown, they may surely be made the proper object of discovery.

[78] I agree with this analysis and reject the complaint. As I have already stated, I expect that the Applicant is trying to eliminate any possible surprise at the sub-phase hearing. It may well be that there are no further relevant documents to be found or produced. However, the Applicant wants to be sure that there is no knowledge, information or belief on the issue from sources other than documents. Again, if there is no further information available from any other source, the Respondent should depose to that position in a discovery. The Applicant is entitled to know the Respondent's full position on the question.

### E. Questions About Legal Positions

[79] Finally, there was controversy about whether the Applicant could ask questions requiring the Respondent to offer a legal opinion. This question was addressed in *Six Nations of the Grand River Band v Canada (AG)*, [2000] OJ No. 1431, 48 OR (3d) 377 (Ont Div Ct). Under Rule 36.01 of the *Ontario Rules*, the examined party was required to answer any proper question related to "any matter in issue in the action". The Court held at paragraphs 9 and 11:

> As for discovery, Rule 31.06(1) requires the examined party to answer any proper question related to "any matter in issue in the action". On a plain reading of the Rule, the word "matter" is wide enough to include both a question of fact and the actual position taken by a party on a legal issue. Every day, parties are asked on examination for discovery, "What is your position on liability? Do you admit liability?" While the cases referred to by Lane J. give a much more restricted interpretation of the right of discovery, recent experience shows the real need, particularly in complex matters, to narrow the legal issues well in advance of trial. For the reasons given by Kent J., we agree that Rule 31.06(2) should be given the broad purposive interpretation he gave it in order to focus the issues in the litigation.
>
> …
>
> 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, that 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.

[80] This case has been cited with approval by courts across Canada, including the Federal Court of Appeal (*Cherevaty v R*, 2016 FCA 71 at para 18). I agree and would add that there is a difference between a legal opinion and a legal position. The latter may be founded on the former. It is the legal position that may be the proper focus of a question in an examination for discovery.

[81] In view of the foregoing discussion and conclusions, I am satisfied that the Application is justified and proper.

### F. The Best Form of the Examination for Discovery

[82] The next question is whether an examination for discovery at this point will cause undue

delay or expense. There is also the question of whether the examination, if granted, should proceed orally or in writing.

[83] In the *Montana* case at paragraph 8, Hugessen J. observed that the Court should, as a matter of policy, encourage the use of written interrogatories because they are likely to be far less time consuming and should do away with the need to adjourn an examination to allow the witness to inform herself of the appropriate facts:

> While the usual practice is for examinations on discovery to be conducted orally, the Rules make provision for examination by means of written interrogatories and it seems to me that the Court should, as a matter of policy, encourage the use of such interrogatories in appropriate cases. They are likely to be far less time consuming and should do away entirely with any necessity for adjourning the discovery to allow the witness to inform him or herself of the appropriate facts.

[84] In *Haylock v Norwegian Cruise Lines Ltd*, 2003 FC 932 at para 7, 239 FTR 147, Prothonotary Hargrave quoted and applied Hugessen J.'s finding in *Montana*, concluding that written interrogatories should take less time and be less costly, thus also addressing rule 3 of the *Federal Courts Rules*' direction that the rules be interpreted and applied so as to secure the just, most expeditious and least expensive determination of proceedings. The *SCTA* and *Rules* offer the same direction.

[85] The Applicant cited paragraph 7 of *Haylock* where Prothonotary Hargrave quoted Hugessen J.'s observation in *Montana* that "the usual practice is for examinations on discovery to be conducted orally". It also referred to *Grant v Keane*, 2001 CarswellOnt 4842, where Master Beaudoin stated at paragraph 7 that: "Oral examination is the normal rule and is considered the most effective means of discovery." In *Ozerdinc Family Trust v Gowling Lafleur Henderson LLP*, 2015 ONSC 2366 at para 19, Master MacLeod described oral discovery as superior to written discovery because it better accommodated assessment of credibility and witness performance, as well as having the advantage of spontaneity. However, he acknowledged that written discovery was another option, and one that could be compelled.

[86] While oral examination may have once have been the "usual practice" under the Federal Court regime, *Montana* appears to have modified that practice in favour of written examination. The *Grant* and *Ozerdinc* cases were heard under *Ontario Rules*, which differ from those of the Federal Court. In the context of the Tribunal's procedure, I conclude that it depends on the

circumstances. The Tribunal should probably give written examination first consideration, but consider why oral discovery might be preferred where a party asks for that method. It is a matter of discretion, remembering always that the Tribunal's objective is to achieve the most just, timely and cost-effective resolution of the claim before it.

[87] In this case, we have the benefit of questions having been written and offered in advance. They have been reproduced at paragraph 5 above. They have been in the Respondent's possession for almost a year, and the Respondent indicated more than nine months ago that it was in the process of finding someone qualified to provide the requested information.

[88] One of the Respondent's submissions was that examination for discovery would unduly delay the proceedings and add cost that could also prejudice the other Claimants. I do not agree. As previously stated, the Respondent has had the written questions for over ten months, while the Parties took time to explore (unsuccessfully) alternate resolution of the sub-phase. The Respondent has had more than sufficient time to consider the questions and to find a representative deponent.

[89] Under these circumstances, I cannot see that examination for discovery by written questions should take long to respond to, or cause unjustified or greater expense than has already been incurred on the subject. It will not now be necessary to find a time and place for the examination, wait for it to occur, or risk the chance of adjournment to answer further or related questions that the witness could not deal with at the time. There will also be no necessity to pay for the recording of the examination, transcripts or the reasonable travel costs of the witness to be examined. In fact, in this case, I conclude that oral examination would likely take more time and undoubtedly involve more cost because it would be necessary to coordinate a time and place for its conduct, remembering too that the numerous other Claimants would also be entitled to attend. Then transcripts would have to be prepared and distributed. I am concerned that there be no threat of delay to the sub-phase hearing that is scheduled to commence on September 17, 2018. Because the written questions have been in hand for so long, getting down to the business of responding should take less time than an oral examination, and should not undermine the scheduled hearing date. It is therefore preferable that examination for discovery in this case proceed by way of the prepared written questions.

### G. The Written Questions

[90] The next issue is the propriety of the questions themselves. The Respondent took exception to most of the questions on the basis of issues discussed. However, the appropriateness of the questions themselves is still necessary given that submissions were made about them on both sides.

[91] I see no difficulty with most of the questions. As a general observation, I would underline that all of the questions must presume a preamble of what knowledge, information or belief the Respondent has about the subject matter of each question posed. There might have been less controversy had the questions been framed with this preamble.

**Question 1:**

> 1. Does Canada agree that one of the unwritten promises of Treaty 4 was that Canada would establish fishing stations for those First Nations who wished to continue their traditional harvest of fish?

[92] Question 1 might have been framed as follows: Does Canada have knowledge, information or belief as to whether there were unwritten promises underlying Treaty 4 that Canada would establish fishing stations for those First Nations who wished to continue their traditional harvest of fish? Question 1 asks for factual information and also perhaps a legal position, both of which are proper. In paragraph 3(a) of its Response to the Application, Canada objected that this was raising a new issue at a time in the proceedings when most of the witnesses had already testified and there had been no opportunity to ask questions. However, the Applicant provided partial transcripts of the testimony of five witnesses who had testified about it, including under cross-examination by the Respondent. I therefore conclude that Question 1 is proper.

[93] In considering all the proposed questions I have tried to frame them similarly with the suggested preamble.

**Questions 2 to 5:**

> 2. What was Canada's policy with respect to setting aside reserves as fishing stations for Indian Bands in Treaty 4 territory?

3. How did Canada decide which bands were entitled to have fishing reserves set aside on their behalf? i.e., What criteria were used? Why were fishing reserves set aside for certain bands and not others? Did Canada differentiate between landlocked bands and those with reserves bordering lakes?

4. How did Canada decide when to set aside fishing reserves?

5. How did Canada decide where to set aside fishing reserves?

[94] These questions seem very straight forward in asking for Canada's knowledge, information and belief in respect of the allocation of IR 80A. They are proper questions for discovery.

**Question 6:**

6. Does Canada agree that it had a duty to act fairly and rationally in setting aside reserves? If not, why not?

[95] This question seems more directed at a legal opinion than a legal position. It also seems rather pointless. It goes without saying that Canada had duties when entering into and carrying out treaties, executing the provisions of the *Indian Act*; and in performing those duties, it surely had an obligation to be fair and rationale. Could the question be answered other than in the positive? In my view, the question is improper because it lacks focus, clarity and purpose. It is not a proper question to be asked on discovery.

**Questions 7 to 11:**

7. Why was IR 80A set aside as a fishing station?

8. Why was IR 80A set aside as a fishing station for the Touchwood Hills and Qu'Appelle Valley Indians?

9. Was IR 80A set aside for specific bands? If so, then why were specific bands not listed when it was surveyed?

10. If Canada says that IR 80A was not set aside in part for Little Black Bear First Nation, then was a fishing reserve ever set aside for Little Black Bear?

11. If Canada says that a fishing reserve was never set aside for Little Black Bear, then on what basis was it decided that Little Black Bear would not receive a fishing station?

[96] Like questions 2 to 5, these questions seem straightforward and are proper questions for discovery.

**Question 12:**

> 12. If no fishing reserve was ever set aside for Little Black Bear, does Canada agree that it had and continues to have a duty to set aside a fishing reserve for Little Black Bear?

[97] The focus of the question on Canada's "duty" may have caused a concern that the Respondent was being asked to express a legal opinion, or even admit liability. However, taking the view that the Applicant should be allowed some leeway, I think the question might be reframed as follows: If no fishing reserve was ever set aside for Little Black Bear, does Canada have knowledge, information or belief that it had or continues to have a duty to set aside a fishing reserve for Little Black Bear? If reframed this way, I see no difficulty with the question.

### H. Standing Buffalo's Request

[98] Standing Buffalo asked that the Parties be granted leave to ask questions arising from the responses of the Respondent. I am not prepared to do so. The request is too vague, open and untimely. I fear that it could prolong the process and threaten the scheduled hearing date. If another Claimant had questions it wanted to ask, it should have formulated and presented them in the appropriate manner.

## V. CONCLUSION

[99] For all these reasons, the Application is granted. The examination will go forward on the basis of the written questions with the modifications indicated. Question 6 will not be permitted. The other Claimants will not be permitted to ask questions arising from the responses of the Respondent.

[100] Costs shall be considered upon completion of the sub-phase at the instance of the Applicant.

W. L. WHALEN

Honourable W. L. Whalen

**SPECIFIC CLAIMS TRIBUNAL**

**TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

**Date: 20180403**

**File No.: SCT-5001-13**

**OTTAWA, ONTARIO April 3, 2018**

**PRESENT: Honourable W. L. Whalen**

BETWEEN:

**KAWACATOOSE FIRST NATION, PASQUA FIRST NATION, PIAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION, GEORGE GORDON FIRST NATION, MUSKOWEKWAN FIRST NATION AND DAY STAR FIRST NATION**

**Claimants (Respondents)**

**and**

**STAR BLANKET FIRST NATION**

**Claimant (Respondent)**

**and**

**LITTLE BLACK BEAR FIRST NATION**

**Claimant (Applicant)**

**and**

**STANDING BUFFALO DAKOTA FIRST NATION**

**Claimant (Respondent)**

**PEEPEEKISIS FIRST NATION**

**Claimant (Respondent)**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**
**As represented by the Minister of Indian Affairs and Northern Development**

**Respondent (Respondent)**

**COUNSEL SHEET**

**TO**: **Counsel for the Claimants (Respondents) KAWACATOOSE FIRST NATION, PASQUA FIRST NATION, PIAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION, GEORGE GORDON FIRST NATION, MUSKOWEKWAN FIRST NATION AND DAY STAR FIRST NATION**
No one appearing
Knoll & Co. Law Corp.

**AND TO**: **Counsel for the Claimant (Respondent) STAR BLANKET FIRST NATION**
As represented by Aaron B. Starr and Galen Richardson
McKercher LLP, Barristers and Solicitors

**AND TO**: **Counsel for the Claimant (Applicant) LITTLE BLACK BEAR FIRST NATION**
As represented by Aaron Christoff
Maurice Law, Barristers and Solicitors

**AND TO**: **Counsel for the Claimant (Respondent) STANDING BUFFALO DAKOTA FIRST NATION**
As represented by Mervin C. Phillips and Leane Phillips
Phillips & Co., Barristers and Solicitors

**AND TO**: **Counsel for the Claimant (Respondent) PEEPEEKISIS FIRST NATION**
As represented by Michelle Brass
Brass Law

**AND TO**: **Counsel for the Respondent (Respondent)**
As represented by Lauri M. Miller and Donna Harris,
Department of Justice