Court of Queen's Bench of Alberta

Citation: Goodswimmer v. Canada, 2005 ABQB 479

Date: 20050628
Docket: 9703 06332
Registry: Edmonton

Between:

Chief Melvin Goodswimmer and Jerry Goodswimmer, Walter Goodswimmer, Francis Goodswimmer, Pierre Chowace, Mildred Chowace and Donald Badger, Councillors of the Sturgeon Lake Indian Band and on Behalf of the Sturgeon Lake Indian Band and the Sturgeon Lake Indian Band

Plaintiffs/Applicant

- and -

Her Majesty The Queen in Right of Canada and Her Majesty The Queen in Right of Alberta

Defendants

Reasons for Judgment of the Honourable Madam Justice D.A. Sulyma

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I. Introduction

[1] The Plaintiffs commenced an action against the Federal Crown (Canada) and Her Majesty the Queen in Right of Alberta (Alberta) in the fall of 1997, and amended their claim in July of 2000. They seek declarations with respect to their rights to certain lands; an order requiring Alberta to transfer the lands, including the mineral rights, to Canada in trust for the Plaintiffs; in addition to compensation and damages. In its Statement of Defence, Canada has denied the relevance of the Plaintiffs' claim and expressly denied certain of the allegations made by the Plaintiffs.

[2] I have been appointed as case manager. Document production has been proceeding for some time and is continuing. The issues raised by the pleadings and document production are numerous and far-reaching. As a result, there have been ongoing questions raised as to the scope of examination for discovery and whether various discovery topics should be dealt with in priority to others. Although oral examinations for discovery were commenced in July of 2004, these issues have lead to a break down in the process. This has resulted in two motions being brought before me, the first by the Plaintiffs who ask that Canada be directed to provide certain information, and the second by Canada which seeks a direction that oral discoveries begin with a particular topic. The parties have agreed that, as a result of ongoing document production, oral discoveries cannot resume until the summer of 2005.

II. First Motion

[3] The Plaintiffs seek an Order directing that Canada provide responses to undertakings refused or taken under advisement and to questions objected to during the 2004 examinations for discovery. According to the Plaintiffs, these undertakings and questions:

(i) were requests for further record production or concerned the identification of record collections;

(ii) involved extrinsic evidence and evidence of subsequent conduct;

(iii) were refused or taken under advisement on the basis of territorial scope;

(iv) concerned complaints and related information Canada may have received from others;

(v) concerned policy, policy development or policy implementation;

(vi) dealt with Canada's conduct in connection with consultations, negotiations, agreements and treaty implementation with other bands;

(vii) concerned treatment of lands outside of the Plaintiffs' reserves;

(viii) concerned the identification of legal opinions;

(ix) concerned legal opinions where waiver is implied;

(x) concerned negotiations and settlements;

(xi) concerned past employee contact information; or

(x) concerned information about witnesses.

A. Position of the Plaintiffs on Relevance and Materiality

[4] The Plaintiffs acknowledge that Rule 200(1.2) of the *Alberta Rules of Court* provides that during oral examinations for discovery, a person is required to answer only relevant and material questions. Similarly, Rule 187.1(2) states that the affidavit of records required by Rule 187(1) must disclose relevant and material records. The Plaintiffs submit, however, that the questions and undertakings in issue concern facts and evidence relevant to the issues raised by the pleadings, that these facts and evidence are not subject to privilege, and therefore the questions and undertakings must be answered as part of discovery.

[5] The Plaintiffs note that the test for relevance in discovery is set out in Rule 186.1, which reads:

> 186.1 For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected
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> > (a) to significantly help determine one or more of the issues raised in the pleadings, or
> >
> > (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

[6] Rule 186.1 is what has been described in the authorities as “the new Rule.” According to those authorities, this new Rule narrows the scope of relevance in comparison to what has been described as “the old Rule,” which allowed examination on issues “touching the matters in question.” The Plaintiffs submit that what is relevant and material must be determined in the context of the pleadings as a whole and not simply on the basis of the causes of action named: ***Hepworth v. Canadian Equestrian Federation*** (2000), 277 A.R. 138, 2000 ABCA 327 at para. 7. They maintain that a fact is material if it assists in proving (or disproving) an issue in the lawsuit and that evidence is relevant when it assists in the proving (or disproving) of such a fact: Fradsham, Allan A., P.C.J., *Alberta Rules of Court Annotated,* (Scarborough: Carswell, 2005) at p.448. They point out that, within the limits of Rule 186.1, courts have repeatedly emphasized that parties should be given wide latitude in asking questions on discovery: ***Hepworth*** at para. 11; ***Tremco Inc. v. Gienow Building Products Ltd.*** (2000), 255 A.R. 273, 2000 ABCA 105 at para. 15. They contend that admissibility and weight of the evidence should not be part of the determination of relevance: ***Hepworth*** at para. 6.

[7] The Plaintiffs have categorized the questions and undertakings in issue on this motion, as has the Crown. The Plaintiffs urge the Court not to have regard to the bare statements contained in Canada’s list of categories but rather to consider the pleadings, the issues of history raised, the nature and terms of various treaties, and the time frames of historical events. They argue that any particular grouping of the questions should not to be determinative of their relevance and materiality.

[8] Although there are differences in the manner in which the Plaintiffs and Canada group or categorize the questions in issue, in the end result, the essential discovery dispute is clear. The Amended Statement of Claim raises causes of action based on breaches of duties and obligations which the Plaintiffs allege that Canada owed them. They contend that these duties arose out of the interaction between the parties over a lengthy history as well as from various statutes and constitutional provisions, including Treaty No. 8.

[9] They allege that Canada breached Treaty No. 8 by interfering with certain protected activities, failing to provide land for reserves and in severalty, compromising the usual vocations protected by Treaty No. 8 by enacting the *Natural Resources Transfer Agreement, 1930*, failing to provide economic benefits under the treaty, failing to adequately pay and to index annuities, failing to protect against "White" competition within Treaty No. 8 territory, failing to prevent interference with their traditional way of life, failing to ensure fair and proper compensation for loss of use of reserve and traditional lands, and wrongfully restricting the passing of Indian status. They contend that many of these alleged breaches have been ongoing since execution of the treaty in 1899.

[10] They also allege that fiduciary duties were owed them by Canada at all material times and that these duties were breached, in some instances from the time of execution of Treaty No. 8. The alleged breaches of fiduciary duties in issue relate to the conduct of Canada in treaty negotiations, the process of Reserve land selection, conduct in the negotiation of the terms of the 1990 Agreement between the parties, the enactment and implementation of the Natural Resources Transfer Agreement, 1930, and other matters such as the enactment and implementation of the *Indian Act* and *Bill C-31*.

[11] Other causes of action which the Plaintiffs suggest are raised by the facts as pled include "negligent misrepresentation by Canada regarding Sturgeon Lake forming part of reserve in 1908," equitable fraud in relation to the land surrender provisions in Treaty No. 8, want of consideration, mistake, breach of s. 15(1) of the *Constitution Act, 1982*, and a failure by Canada as trustee for the Plaintiffs to account for lands and minerals within Treaty No. 8 territory.

[12] The Plaintiffs argue that the alleged actions and inactions of Canada, its failure to fulfill the duties which it owed, and the knowledge and intention of Canada associated with each action or inaction as alleged, constitute the range of material facts which ought to be the proper subject of discovery. They submit that discovery on the terms of Treaty No. 8 and on the conduct of the parties in connection with the various alleged breaches involves a tremendous number of avenues of relevant inquiry. Further, they contend that First Nations treaties and relationships with trust elements open additional areas of relevant inquiry.

[13] The Plaintiffs argue that aboriginal treaty interpretation is subject to unique principles that admit extrinsic evidence even where no ambiguity exists and that incorporate into the terms of the treaty oral representations notwithstanding that they may not have been made to the particular plaintiffs involved. These arguments rely on various authorities which set out the principles to be applied in the interpretation of treaties: ***R. v. Badger***, [1996] 1 S.C.R. 771 at

para. 41; ***R. v. Marshall***, [1999] 3 S.C.R. 456 at paras 14, 41; ***R. v. Taylor and Williams*** (1981), 34 O.R. (2d) 360 at para. 20; and ***Lac La Ronge Indian Band v. Canada*** (1999), 188 Sask.R. 1 at paras. 48-49, 1999 SKQB 218, rev'd on other grounds (2001), 206 D.L.R. (4th) 638, 2001 SKCA 109, app'n for leave to appeal to S.C.C. dismissed [2001] S.C.C.A. No. 647. The Plaintiffs submit that the latter case allows for a consideration of subsequent conduct and that ***Halfway River First Nation v. British Columbia (Ministry of Forests)*** (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470 at para. 114 is authority for the principle that the Crown's subsequent conduct in its dealing with other Treaty No. 8 First Nations can also be relevant to the interpretation of that treaty.

[14] They submit that this approach to extrinsic evidence creates a particularly wide scope of relevance which embraces Canada's conduct relative to other treaties with similar terms entered into by Canada under similar circumstances for comparison purposes. Whether the comparison carries sufficient weight to be admissible would be a question for the trial judge.

[15] The Plaintiffs contend that a proper inquiry into the alleged breaches of treaty and fiduciary duties will necessarily cover varying time periods and concentric "circles" of territory. They allege that, because the action deals with "the jurisdiction of rights and of laws", and the knowledge, intention and actions of the parties, relevance does not simply end at the boundary of a reserve or at the border of a treaty area. They argue that the need for latitude in discovery should carry the day over any attempt to determine the legal issues raised by the pleadings in advance of trial.

[16] The Plaintiffs are one of many signatories to Treaty No. 8 living under both provincial and federal laws. They allege that the treaty has created a group of signatories who are representative of one other as far as Canada's policy and the application of laws are concerned. Therefore, complaints that arise from members of this group of similarly affected parties are relevant in assessing Canada's knowledge of what was happening to these Plaintiffs. They also suggest that complaints made by an umbrella association on behalf of all First Nations with treaty rights is relevant to Canada's knowledge about developments under those treaties, to the formation of its policy, and to assessment of the duty owed by Canada to the Plaintiff's.

[17] The Plaintiffs allege that Canada has recognized that its policies on hunting, fishing and trapping rights under various treaties should be formed on a regional, if not national, basis. They contend that discovery on the existence of policies and directives and the process of policy-making leads the inquirer to information and communications from a variety of sources. They argue that the policies themselves are relevant as the expression of Canada's intent or understanding in carrying out its obligations under the treaty and are evidence of subsequent conduct in connection with treaty interpretation. Finally, they submit that the process of forming policy is part of the fiduciary duty alleged and is relevant to determining the content of that fiduciary duty.

[18] The Plaintiffs argue that, given the requirement for consistency in treaty implementation noted by the Court in ***Halfway River***, inquiry into whether Canada's implementation of policy

with respect to the Plaintiffs varied from its treatment of other bands is relevant to the issue of whether a breach of fiduciary duty occurred .

[19] The Plaintiffs take the position that relevance can be widened in connection with the alleged breach by Canada of its treaty obligation to provide reserve lands in perpetuity. They maintain that, where a First Nation is found to have an entitlement to additional lands, lands outside of the Plaintiffs' reserves and throughout the ceded territory are potentially subject to acquisition into the reserve of the First Nation and therefore Canada's conduct in dealing with those lands is relevant. Further, the Plaintiffs maintain that the effect on wildlife resources where commercial harvesting of the resource or habitat impact is regulated by Canada without consideration for Treaty No. 8 rights is relevant.

[20] In April of 2005, the Plaintiffs sought leave to provide further written submissions regarding this motion based on factum materials from another action. I allowed the further submissions.

[21] The Plaintiffs rely on comments made in the factum of the Minister of Canadian Heritage, submitted by its counsel, the Attorney General of Canada, in the appeal recently heard by the Supreme Court of Canada in ***Mikisew Cree First Nation v. Canadian Heritage (Minister of)***, specifically the following statements made at paras. 49 and 50 of the factum:

> Treaty No. 8 does not stand in isolation. It is part of a series of similar treaties made between the Crown and the Indians of western Canada. In these treaties, the Indians surrendered their interests in their traditional lands, including their rights to hunt, trap and fish within those lands. In exchange, the Crown undertook to provide reserve lands, annual payments, assistance with the transition to an agricultural way of life, and (in all but the first two treaties), the right to hunt, trap and fish throughout the treaty territory in any lands required for settlement or related purposes.
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> One of the considerations often referred to by the Crown's representatives during the negotiation of the numbered treaties was the need to ensure fairness by dealing with the Indians on terms similar to those agreed upon in earlier treaties. The provisions of the numbered treaties were modeled on earlier treaties which the Crown had made in the Province of Canada. The earlier promises are relevant because the Indians were aware that the promises made to them were intended to be similar to those made in previous treaties.

[22] The Plaintiffs maintain that Canada was required to treat the various First Nation signatories to Treaty No. 8 consistently. As a result, it reiterates its argument that the Crown's subsequent conduct in its dealings with other Treaty No. 8 First Nations is relevant to the interpretation of the treaty. Also, given the statements made by Canada in its ***Mikisew*** brief that there is a relation between the treaties, the Plaintiffs argue that it is untenable for Canada to suggest that its interpretation and implementation of Treaties No. 10 and 11 are not relevant. The

Plaintiffs submit that Canada has taken two disparate positions in its submissions here and in the ***Mikisew Cree First Nation*** case with respect to what is relevant to treaty interpretation.

B. Position of the Plaintiffs on Privilege Claims

[23] The Plaintiffs submit that the party asserting privilege over evidence has the onus of proving the privilege exists. They say that both solicitor-client privilege and litigation privilege were asserted during discovery in this case. The Plaintiffs concede that there is a *prima facie* presumption of inadmissibility with respect to both forms of privilege. They acknowledge that inquiry regarding Canada's actions in responding to its obligations under Treaty No. 8 led to questions about legal opinions. However, the Plaintiffs contend that, given Canada had not yet filed its affidavit of records when these questions were posed and that even privileged records would have to be described in some basic way (date, author, recipient, general subject matter) in an affidavit of records (insofar as doing so would not defeat a sustainable claim of privilege), their inquiries were appropriate. They rely on ***Poitras v. Sawridge Band***, 2002 CarswellNat 935 at para. 5 (F.C.T.D.) in support of their argument.

[24] The Plaintiffs submit that privilege, including solicitor-client privilege, is waived by implication where the claimed privilege is the very issue of the action (***Nowak v. Sanyshyn*** (1979), 23 O.R. (2d) 797 at paras. 6 to 11 (H.C.J.)); where evidence is given of a privileged communication (***Rogers v. Bank of Montreal***, [1985] 4 W.W.R. 508 at paras. 3 and 16 to 18, 62 B.C.L.R. 387 (C.A.)); or when a party by his testimony or pleading voluntarily raises a defence or asserts a claim which makes his knowledge of the law relevant (***Alberta Wheat Pool v. Estrin***, [1987] 2 W.W.R. 532 at paras. 29 and 30 (Q.B.), aff'd (1987), 17 C.P.C. (2d) xxxix (Alta. C.A.); ***Petro Can Oil & Gas Corp. v. Resource Service Group Ltd.*** (1988), 32 C.P.C. (2d) 50 at para. 18 (Alta. Q.B.)). They contend that a party asserting their reliance on legal advice is not permitted to engage in selective waiver as all of the party's knowledge of the relevant law, however derived, is placed in issue by such an assertion: ***Ed Miller Sales &Rentals Ltd. v. Caterpillar Tractor Co.*** (1992), 3 Alta. L.R. (3d) 210 at para. 12 (Q.B.).

[25] The Plaintiffs maintain that, if legal advice received by Canada about the proper interpretation of Treaty No. 8 or about the content of the duty owed was the basis for Canada's "intent" to act, the legal advice in question should not be subject to the protection of privilege unless Canada provides sufficient information to support that claim.

[26] The Plaintiffs advise that a number of objections were made to questions about land settlements between Canada and other bands. Although Canada gave lack of relevance as the reason for its objection to these questions, the Plaintiffs suggest that privilege associated with "without prejudice" settlement negotiations should be considered. They note that, in ***Middlekamp v. Fraser Valley Real Estate Board*** (1992), 96 D.L.R. (4th) 227, the British Columbia Court of Appeal said that there is an exception to the class privilege afforded communications during settlement negotiations where the parties agreed that evidence would be furnished in connection with the litigation in which the application was made and that an exception might apply out of such matters as fraud or to meet a defence of laches, want of notice,

or passage of a limitation period: See also Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (Butterworths: Toronto, 1999) at p. 815.

[27] The Plaintiffs urge the Court to take a principled approach to settlement privilege and to weigh the privilege with the objectives and wider latitude associated with discoveries. They submit that circumstances may exist where there is a competing interest of sufficient significance to demand production. They suggest that, in the present action, the importance of consistent implementation of treaty rights and equal treatment of beneficiaries within a fiduciary relationship weigh heavily on the side of requiring Canada's conduct in negotiations and settlements to be open to discovery.

[28] The Plaintiffs note that Canada refused to provide any contact information which it might have for former employees. They submit that confidential information is not subject to class privilege: Gordon D. Cudmore, *Choate on Discovery*, 2nd ed. (Toronto: Carswell, 1993) at p. 3-150.1. The Plaintiffs argue that witness information is relevant and generally not considered confidential: ***Ortega v. 1005640 Ontario Ltd. (c.o.b. Calypso Hut 3)***, [1999] O.J. No. 2432 (S.C.J.). According to them, ***Barrett v. Newfoundland and Labrador Credit Union*** (1997), 159 Nfld. & P.E.I.R. 83 (Nfld. S.C.T.D.) indicates that information to identify a witness is not privileged, although the court may limit the amount or extent of personal information about the witness that must be furnished. They submit that the end of the actual employment relationship appears to affect the last three elements of the Wigmore test for establishing privilege.

C. Position of Canada on Motion 1

[29] Canada notes that, although the current Statement of Claim is broad in scope and relates to events surrounding or connected to Treaty No. 8 and the Natural Resources Transfers Agreement of 1930, a significant number of the allegations made in the Statement of Claim concern a 1990 Treaty Land Entitlement Agreement (T.L.E. Agreement) entered into between the Plaintiffs and the federal and provincial Crowns. Canada points out that there are a number of unrelated claims scattered throughout the Plaintiffs' current pleading, including a claim based on Canada's enactment of firearms legislation; a claim to land entitlement based on "current population in perpetuity;" a claim based on Canada's enactment of legislation to restore Indian status to certain persons who had lost that status in 1985; claims relating to particular interpretations of the Treaty No. 8 terms respecting livestock and agricultural implements and annuity payments; a claim respecting roadways crossing the Plaintiffs' reserves; a claim relating to a dam on Sturgeon Creek; and a claim respecting the granting of permits for resource extraction and wildlife exploitation. In its Statement of Defence, Canada has generally denied the relevance of the Plaintiffs' claims and expressly denied specific claims.

[30] Canada states it was the Plaintiffs' wish to commence the discovery process by oral discovery of Canada notwithstanding the bulk of the claims made are purely historical in nature and that the Plaintiffs then refused to follow the discovery plan on which the parties had agreed.

[31] Canada notes that in Alberta there are approximately 44 First Nations in total, with approximately 123 reserves located within the territories of Treaty No. 6, No. 7 and Treaty No. 8. There are approximately 23 First Nations in Treaty No. 8 territory in Alberta .

[32] As a preliminary matter, Canada urges that a challenge to its document production is beyond the scope of the present motion and is not properly before the Court. In any event, it takes the position that production has been appropriate and that the questions asked in discovery indicate that the Plaintiffs had not properly reviewed production.

[33] Canada submits that questions in the following categories are not relevant:

(i) questions relating to other agreements;

(ii) questions about all Treaty No. 8 bands or Indians;

(iii) questions about all Alberta Indians, bands or treaties;

(iv) questions seeking disclosure of personal information;

(v) requests for additional records.

[34] Canada suggests that four other categories of questions are improper, the latter two as a result of privilege concerns:

(vi) questions requiring the creation of documents;

(vii) questions that are otherwise improper;

(viii) questions requiring disclosure of solicitor-client privilege;

(ix) question requiring disclosure of settlement privilege.

[35] Canada notes that the terms “relevant” and “material” are now defined by Rule 186.1, which contemplates both oral and documentary discovery. It submits that the Alberta Court of Appeal has clearly stated that the new rules (200(1.2), 186.1) are intended to limit the scope of discovery: ***Johnston v. Bryant*** (2003), 327 A.R. 378 (C.A.), and that members of this Court have acknowledged this was the purpose behind the Rule change. Canada points out that one member of this Court has described the resulting change in discovery practice as revolutionary: ***A.M. v. Matthews***, 2004 ABQB 152; ***Pinder v. Sproule*** (2003), 333 A.R. 132, 2003 ABQB 33.

[36] Canada submits that it properly refused to answer the many questions asked by the Plaintiffs about the various treaty land entitlement agreements it has entered into with other bands as these questions are not relevant and material within the meaning of Rule 186.1. Canada contends that, to the extent the Plaintiffs are relying on the Supreme Court of Canada decisions

in ***R. v. Badger*** and ***R. v. Marshall*** as expanding the scope of discovery, these cases are about treaty interpretation and are of no assistance to this Court in considering the ambit of oral discovery under the current *Alberta Rules of Court*. More specifically, neither case suggests that the Plaintiffs can rely on modern agreements between the federal Crown and other bands to interpret Treaty No. 8, which was executed in 1899.

[37] In Canada's view, there are two other Supreme Court of Canada cases which are more pertinent to this motion: ***R. v. Van der Peet***, [1996] 2 S.C.R. 507 at para. 69, in which the court held that claims to aboriginal rights must be adjudicated on a specific rather than a general basis; and ***Wewaykum Indian Band v. Canada***, [2002] 4 S.C.R. 245, where it rejected the concept that there is an over-arching fiduciary duty that is engaged in all aspects of the Crown's relationship with any given band and explained that the Crown's fiduciary duty relates to specific Indian interests. Canada maintains that it was inappropriate for the Plaintiffs to commence their discovery by focussing on the situation of other bands, rather than that of the parties to this litigation.

[38] Canada submits that the decision of the Saskatchewan Court of Appeal in ***Lac La Ronge Indian Band*** supports the position it took in refusing to answer these questions at discovery as the Court of Appeal ultimately rejected the "current population in perpetuity" interpretation of the treaty land entitlement clause in Treaty No. 6. Canada notes that, although Mr. Justice Gerein in the trial decision of ***Lac La Ronge*** did discuss the use of subsequent conduct in treaty interpretation in connection with Treaty No. 6, he expressly refused to admit evidence of later settlement discussions and negotiations as evidence that could be used to establish what was intended at the time of Treaty No. 6. Canada argues that the Plaintiffs here are attempting to advance an argument that was explicitly rejected in ***Lac La Ronge***; that is, that modern agreements can be taken as evidence of a party's intention at the time a treaty was entered into.

[39] In terms of questions about all Treaty No. 8 Indians or bands, the Crown suggests that, while the treaty is general in application, the claim of any particular band to benefits under Treaty No. 8 is necessarily fact specific. The Sturgeon Lake Band should only be permitted to discover on what is relevant and material to it, not to every band or every person in Treaty No. 8. Canada argues that the Plaintiffs should not be permitted to fish for facts concerning other bands and their members.

[40] Canada argues that it is entirely appropriate for the Court to establish limits on the scope of discovery in terms of time periods or territories which may be addressed: ***Cheyne v. Alberta***, 2003 ABQB 244.

[41] Canada contends that the Plaintiffs' questions concerning all Alberta Indians, bands or treaties are too broad to be relevant and material. It suggests that this was precisely the type of aimless discovery that the Rule changes were designed to prevent. It submits that the statements made by Acton J. in ***Cheyne*** at paras. 30 to 36 and Associate Chief Justice Sulatycky in ***Mikisew Cree First Nations v. Canada***, 2003 ABQB 316 and (2003) 341 A.R. 365 (Q.B.) apply.

[42] Canada takes the position that questions which required it to disclose any personal information of its current or former employees were not relevant and material and therefore were properly refused. It submits that persons who work for the federal government have a legitimate interest in maintaining confidentiality over their personal information and that the Plaintiffs' questions directly attacked that interest.

[43] Canada maintains that, while this Court has the ability to order that questions be answered that require disclosure of personal information, this discretion should be exercised sparingly and only in cases where the general test under Rule 186.1 has been made out. Canada submits that, in this case, the test of relevance has not been met by the Plaintiffs with regard to the questions which Canada refused to answer.

[44] It suggests that this is the general approach that was taken by Madam Justice Veit in ***T.W. v. University of Alberta Hospital*** (2000), 267 A.R. 169, 2000 ABQB 387. The plaintiff in that case alleged that she had been sexually assaulted by the individual defendant during the course of a hospitalization and sought disclosure of records relating to another complaint against the same defendant. Although Veit J. held that disclosure should be ordered, she also found that the defendant hospital had properly refused to disclose another patient's records without a court order and had properly refused to disclose employee records without notice to the appropriate union. She directed disclosure only after inspecting the records in question and being satisfied that they were not privileged, that the records could reasonably be expected to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, and that on the facts of the case there was no privacy concern that would cause the Court to exercise any procedural discretion it had to limit discovery of documents.

[45] Canada notes that, although a general privacy interest was engaged in ***T.W.***, the disclosure order was predicated on the hospital not identifying the other complainant. The Court directed that the hospital edit out that information "to protect the privacy of the former patient."

[46] While Canada's privacy argument is primarily directed at the questions in category (iv), it also advances this argument in relation to category (i) questions. It urges the Court to consider the privacy interests of the other bands referred to in those questions. Canada notes that the Plaintiffs here seek to inquire in detail into the affairs of other First Nations, none of whom have been provided with any notice of the Plaintiffs' interest in their contracts or agreements.

[47] The example provided by Canada of a category (v) question was a request made by the Plaintiffs for a copy of an inter-departmental committee report on game laws and Indian treaties. Canada argues that if a question is not relevant and material standing on its own, it need not be answered, regardless of whether there is an alleged connection to documents already produced. Canada relies on ***Mr. K. v. E.K.*** (2004), 362 A.R. 195, 2004 ABQB 159, in which Madam Justice Read concluded that unless a document can be shown to be of more than minor assistance in determining the issues raised in the pleadings, it need not be produced. Canada also refers to ***321665 Alberta Ltd. v. Mobil Oil Canada, Ltd.***, 2002 ABQB 967 in this regard.

[48] Canada submits that questions in category (vi) asking that it create records were properly refused. It cites as authority ***Sigalov v. Tranmer*** (1996), 184 A.R. 221 (C.A.), and notes that the comments of Mr. Justice O'Leary in that case are directly on point. Canada states that it has made strenuous efforts to produce an extensive collection of documents for the Plaintiffs and that it cannot be compelled to go further than that and to answer questions that requires it to create documents that do not exist.

[49] Canada's category (vii) consists of questions which it suggests are otherwise improper. It urges the Court to confirm that it should not be compelled to answer any of these questions.

[50] Category (viii) includes questions where the Plaintiffs sought information that is subject to solicitor-client privilege. Canada notes that, although certain of the questions were abandoned, it appears that the Plaintiffs are continuing to pursue these questions on this motion. Canada refers to Question No. 245 (Canada's numbering): "With regard to the reference to Treaty No. 8 in this document advise us as to whether or not anyone in the Government of Canada ever sought a legal opinion with regard to the portions of this document dealing with Treaty No. 8 in order to assist Canada in fulfilling its obligations to Sturgeon Lake Cree Nation pursuant to the terms of Treaty No. 8."

[51] Canada states that, if the Plaintiffs are arguing that it must describe the contents of privileged documents based on an analogy to the requirements for claiming privilege in an affidavit of records, this position is directly contrary to established authority in this Court. In ***Dorchak v. Krupka; Roy v. Krilow*** (1997), 196 A.R. 81 (C.A.), Mr. Justice Côté emphasized that privilege is an important substantive rule of law and that any system of listing or describing privileged documents which gives away privileged information is unthinkable. Canada concedes that there is some Federal Court authority which would allow an Indian band to attack the federal Crown's claim of solicitor-client privilege, but argues that this applies only in the context of an express trust, which it suggests is not present here: ***Samson Indian Nation and Band v. Canada*** (1995), 125 D.L.R. (4th) 294 (F.C.A.) In any event, Canada submits that this decision is not binding on this Court.

[52] Canada claims that the Plaintiffs' submissions regarding waiver are not relevant as clearly there is no evidence of any waiver by the federal Crown of its claim to solicitor-client privilege, which was promptly invoked at discoveries. Canada contends that the Plaintiffs were simply fishing for privileged information and the questions were properly refused.

[53] Finally, Canada notes that the questions asked by the Plaintiffs respecting its agreements with other Bands may require it to disclose information that is subject to settlement privilege. Canada contends that the rationale behind this form of privilege in part informed the reasons in ***Lac La Ronge***.

D. Analysis

1. Relevance and Materiality

[54] Canada appears to suggest that simply denying the relevance of a number of the Plaintiffs' allegations indeed negates their relevance. I do not accept that a denial of the relevance of a claim or defence by an opposing party is determinative of this discovery issue. However, I also reject the Plaintiffs' contention that the unique principles of aboriginal treaty interpretation, which allow for the admission of extrinsic evidence that might not be permitted in the interpretation of other types of agreements, apply so as to make questions concerning modern agreements relevant to the interpretation of Treaty No. 8. In that regard, I accept Canada's submission that the Supreme Court of Canada in ***Van der Peet*** and ***Wewaykum Indian Band*** determined that aboriginal rights must be adjudicated on a specific rather than a general basis and that the fiduciary duty imposed on the Crown does not exist at large.

[55] The relevance and materiality of the questions and general areas canvassed must be determined in relation to the specific claims being advanced by the Plaintiffs, which are grounded in Treaty No. 8, taking into consideration the authorities which allow for extrinsic evidence to explain the context in which a treaty was signed, and to demonstrate that the Crown consistently interpreted terms or language in the treaty in a particular manner with respect to this band or different signatories.

[56] Although I recognize that the ambit of discovery in Alberta has changed as a result of Rule 186.1, and that the rationale for this change was that discovery can be excessive, expensive and potentially abusive, I agree with the Plaintiffs that the issues here are complex, far-reaching, and steeped in historical conduct. While the federal and provincial Crowns rely heavily on the 1990 T.L.E. Agreement as barring the Plaintiffs' claims, I note that during the same general time period in which they entered into the entitlement agreement with this band, they negotiated agreements with other bands in Treaty No. 8 territory which the Plaintiffs say differed in details that might be important to their claims.

[57] In my view, answers to questions about such other agreements could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings or to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings. The relevance of the questions is apparent from an examination of the totality of the claims, and their nature, including consideration of the prayer for relief. The other agreements and the negotiations leading to those agreements are also relevant as a result of the allegations in the Statement of Claim of breach of fiduciary duty and misconduct by Canada .

[58] In so finding, I have had regard to the Supreme Court of Canada's statement in ***Wewaykum Indian Band*** that a fiduciary duty imposed on the Crown does not exist at large but rather in relation to specific Indian interests. However, I conclude that the particular interests

that are the subject matter of this dispute, as pled, are sufficient to ground possible fiduciary obligations and breaches of such, which in turn can be canvassed on discovery.

[59] I have also had regard to the comments made by Canada in its brief in ***Mikisew***, which acknowledged that Treaty No. 8 does not stand in isolation and that promises made in later treaties were intended to be similar to those made in previous treaties. In my view, those comments in and of themselves do not open the door to a fishing expedition in discovery as to how Canada has interpreted other treaties and implemented those treaties throughout history.

[60] Further, I have had regard to the decision of the Saskatchewan Court of Appeal in ***Lac La Ronge*** regarding subsequent conduct and its questionable value in treaty interpretation. However, I find that the questions about other agreements entered into by Canada relating to the land entitlement of this and other bands in Treaty No. 8 territory are relevant and material.

[61] My decision in this regard may expand the categories of answerable questions to include all Treaty No. 8 Indians or bands, but only with respect to negotiations and conduct relating to land entitlement agreements. Simply put, I find that Canada's negotiations and agreements with other bands in Treaty No. 8 regarding land entitlement issues, including those which were based on current population, are relevant and material to the Plaintiffs' claims and therefore are discoverable, subject to the right of those bands to advance privacy or privilege concerns (see discussion below) and subject to my ruling on the second motion, which sets out the initial topic for discovery.

2. Privacy Interests

[62] Canada's position is that the Court should consider the privacy interests of other bands. I agree. Accordingly, I direct that the Plaintiffs give notice to any other band whose interests might be affected by this application advising that they may address me, as case manager, on the issue of their privacy concerns or settlement privilege, within 60 days of their receipt of such notice.

[63] The Plaintiffs asked questions at the discovery that sought to compel Canada to provide personal information respecting current and former employees. Canada argued that these persons have a legitimate interest in maintaining confidentiality of their personal information and that the Plaintiff's questions constitute a direct attack on that interest.

[64] As the names of the employees in question have been provided by Canada, I find that it is indeed only private third party information which the Plaintiff's seek and therefore exercise my discretion to rule that disclosure of this information need not be provided.

3. Questions Seeking Additional Records

[65] The Plaintiffs asked questions at the discovery that sought to compel Canada to produce additional documents; for example, a copy of the inter-departmental committee report on game

laws and treaties. I find that these questions are not relevant and material on their own. Further, if it can be said they are in some way relevant or material, I adopt Madam Justice Read's analysis in ***Mr. K. v. E.K.***, and find that it has not been shown that the documents that are sought under this category would be of more than minor assistance in determining the issues raised in the pleadings. Therefore, the questions in this group do not meet the standard established in the Alberta Rules.

4. Requests to Create Documents

[66] The Plaintiffs asked questions at discovery that sought to compel Canada to create documents that do not exist. For instance, Canada was asked to provide a hierarchal list of persons that would have been responsible for the administration of Band capital and revenue accounts. While generally a party is not compelled to create a document that does not exist, the officer produced on discovery for Canada could have been asked to inquire into and advise as to the hierarchy of persons responsible for the administration of Band capital and revenue accounts (to the extent that the relevance and materiality of this was established). As a result, it is not inappropriate that a request be made for a written list in these circumstances.

5. Questions that are Otherwise Improper

[67] I find that these questions were not relevant and material in accordance with the Alberta *Rules of Court*.

6. Solicitor/Client Privilege

[68] The question still being pursued is whether anyone in the Government of Canada ever sought a legal opinion in order to assist Canada in determining if it was properly fulfilling its obligations to ***Sturgeon Lake Cree Nation*** pursuant to the terms of Treaty No. 8. Although the Plaintiffs have suggested that there is an obligation on Canada's officer to describe the contents of privileged documents, this is contrary to established authority: ***Dorchak***. The question involved clearly seeks disclosure of communications leading to legal advice between solicitor and client. The solicitor-client privilege attaches and the question need not be answered. There is no basis here to find either a general or a specific waiver of that privilege.

7. Final Category

[69] Canada submits that questions seeking disclosure of material respecting agreements with other bands is subject to settlement privilege. I have already found that notice ought to be given to the bands in question regarding questions which may involve their privacy interests. I cannot find on the basis of Canada's argument alone at this stage that a settlement privilege would attach to the documents so as to preclude these questions. However, I am prepared to hear further submissions from the other bands involved in this regard.

E. Conclusion

[70] If the parties require further assistance or clarification as to the manner in which the ambit of discovery is to be circumscribed, they may come back before me and I will deal with the individual questions if necessary in open Court.

II. Second Motion - Order of Oral Discovery

[71] Canada's cross-motion was for an order directing that oral discovery commence with the events surrounding the 1990 T.L.E. Agreement. The Provincial Crown joined in this request, as it is clearly Alberta's position that, if the 1990 Agreement is a complete bar to the Plaintiffs' claims, the action against it will necessarily be dismissed and Alberta will not need to deal further with the discovery or litigation process.

[72] If the 1990 Agreement precludes the Plaintiffs' claims, as alleged by the two Crowns, it is logical that the first part of what undoubtedly will be lengthy oral discoveries should focus on that issue. Clearly, both the federal and provincial Crowns contemplate making motions for severance of that issue although the discovery process is not complete.

[73] The Plaintiffs respond by indicating that the whole of the claim is historical and it is necessary to canvass all of the historical issues in the order of their choice. In that regard, the Plaintiffs again urge the Court to look at the unique nature of aboriginal claims. They submit that a modern issue cannot be examined absent the historical background.

[74] I have a discretion as case manager and pursuant to the *Rules of Court* to direct the parties to commence what will be extremely lengthy discoveries at a certain point in time and in relation to specific issues raised by the pleadings. That is particularly so given the defences raised by the provincial and federal Crowns and the complex nature of the issues and document production involved.

[75] I direct that the oral discovery, on resumption, commence with the issue of the T.L.E. Agreement, including the immediate events and negotiations leading up to that agreement and other such agreements entered into by Canada with Treaty No. 8 bands or Indians in the same time frame.

Heard on the 1st day of February, 2005.
Dated at the City of Edmonton, Alberta this 28th day of June 2005.

D.A. Sulyma
J.C.Q.B.A.

Appearances:

Jeffrey R. W. Rath
for the Plaintiffs

Paul Shenher, Sherry Daniels and Sheila Reid
for the Defendant Canada

Michell G. Crighton
for the Defendant Alberta

Kevin W. Fedorak
for the Defendant Town of Valleyview