SUPREME COURT OF YUKON

Citation: *Chance Oil and Gas Limited v Yukon (Energy, Mines and Resources*), 2021 YKSC 44

Date: 20210901
S.C. No. 17-A0002
Registry: Whitehorse

BETWEEN:

CHANCE OIL AND GAS LIMITED

PLAINTIFF

AND

THE GOVERNMENT OF YUKON, DEPARTMENT OF ENERGY MINES AND RESOURCES (OIL AND GAS BRANCH), AND THE MINISTER OF ENERGY, MINES AND RESOURCES AS REPRESENTATIVE OF THE GOVERNMENT OF YUKON

DEFENDANTS

Before Justice E.M. Campbell

Appearances:

Counsel for the plaintiff	Raymond Chartier, Chase Holthe and Oz Douglas
Counsel for the defendants	I.H. Fraser and Megan Seiling

REASONS FOR DECISION

Introduction

[1] Chance Oil and Gas Limited ("Chance"), formerly known as Northern Cross (Yukon) Ltd., has filed an action against the Government of Yukon ("Yukon") seeking compensation in excess of two billion dollars for the damages it allegedly suffered as a result of Yukon's decision to impose a Moratorium on hydraulic fracturing in the territory

and, more particularly, in the Eagle Plain Basin. The Moratorium came in effect on April 9, 2015, and is still in force.

[2] Chance is an oil and gas company that holds a number of oil and gas exploratory permits in the Eagle Plain Basin. Chance seeks compensation for cancellation and/or expropriation of its alleged oil and gas rights associated with its permits, negligent misrepresentation, unjust enrichment, and nuisance. Yukon denies any liability as a result of its decision to impose a Moratorium. It also denies that Chance has suffered damages or is entitled to compensation.

[3] Chance and Yukon disagree on the scope of document discovery required in this matter. They both take issue with the other party's affidavit of documents. Their disagreement is no better reflected than in the difference in the number of documents they each produced. Yukon listed 445 documents in its affidavit of documents, whereas Chance listed over 34,000 documents.

[4] Both Chance and Yukon have filed an application seeking to compel the other to comply with its document discovery obligations. On the one hand, Chance submits that Yukon has grossly under produced and seeks an order compelling Yukon to produce a further and better affidavit of documents. On the other hand, Yukon submits that Chance has grossly overproduced and seeks an order striking Chance's affidavit of documents and compelling Chance to produce a much more limited one. In the end, both parties are seeking an order compelling the other to entirely redo their document production.

[5] In addition, Chance seeks an order compelling Yukon to produce unredacted copies of certain documents over which Yukon has claimed case-by-case privilege.

Chance also contends that Yukon has waived litigation privilege over two documents and seeks an order compelling Yukon to produce a number of other documents on the basis of the doctrine of waiver by implication.

Issues

[6] The two applications raise the following issues:

1. What test governs document discovery between parties to a civil action before the Supreme Court of Yukon pursuant to Rule 25(3)?

2. Is Yukon's affidavit of documents defective?

    i) Has Yukon under produced? If so, should Yukon be compelled to provide a further and better affidavit of documents?

    ii) Are two documents produced by Yukon (a chain of emails and a Timeline) subject to litigation privilege? If so, does Yukon's waiver of privilege over these two documents constitute an implied waiver of privilege over a number of other documents over which Yukon has asserted privilege and possibly others?

    iii) Are First Nations confidential communications with Yukon pursuant to s. 14 of the *Oil and Gas Act* protected from disclosure pursuant to the common law case-by-case privilege?

3. Is Chance's affidavit of documents defective?

    i) Has Chance overproduced? If so, should Chance's affidavit of documents be struck and Chance compelled to provide a more limited affidavit of documents?

1. What test governs document discovery between parties to a civil action before the Supreme Court of Yukon pursuant to Rule 25(3)?

Overview

[7] I find that the test governing document discovery between parties to a civil action in the Yukon is the possible relevance test. In coming to this conclusion, I have considered the wording of Rule 25(3), read together with Rule 25 as a whole, as well as case law from the Supreme Court of Yukon and other jurisdictions, whose discovery

rules are similar to Rule 25(3). However, the possible relevance test must be applied in any given case in a manner that gives effect to the object and purpose of the rules, including the proportionality principle, which is embedded in Rule 1(6) of the Supreme Court of Yukon *Rules of Court*, ("*Rules of Court*").

Chance's position

[8] Chance submits that the standard of relevance at the discovery stage is broader than at trial, and that the test to apply to determine what is relevant for document discovery is the semblance of relevance (possible relevance) test.

[9] Chance submits that Yukon's position that it only has the obligation to disclose documents that are "actually in dispute in the litigation" is legally untenable and incorrect.

[10] Chance submits that courts have taken a broad and inclusive approach in interpreting the meaning of the expression "any matter in issue". According to Chance, Yukon's position that no production is required if it does not dispute a broad topic discussed in the pleadings, runs contrary to the case law.

Yukon's position

[11] Yukon submits that Chance's expansive view of what is the test for document discovery and what is a matter in issue in this case is not in line with the state of the law regarding document discovery nor with the pleadings.

[12] Yukon submits that the obligation of a party to produce documents under the *Rules of Court* is confined to those documents that contain information relating to the material facts in dispute in this litigation (or to secondary facts leading to the proof of those material facts), as identified and defined in the parties' respective pleadings.

[13] Yukon submits that courts across the country have recognized the need to adopt a narrower approach to relevance at the discovery stage than tangential or semblance of relevance in order to better circumscribe the scope of document discovery, which can quickly spiral out of control when not limited by an appropriate interpretation and application of the *Rules of Court*.

[14] Yukon submits that the *Rules of Court* should be interpreted and applied in a manner consistent with the principle of proportionality and the shift in culture required to ensure that pre-trial processes, including document discovery, are conducted in a way that further the ends of justice, rather than obstruct them with unnecessary burdens and delays.

[15] Yukon acknowledges that the concept of relevance in the context of document discovery is broader than relevance at trial. However, Yukon submits that, contrary to what Chance suggests, the semblance of relevance test is not the test adopted and applied in this jurisdiction. Yukon submits that in order to have meaningful document discovery that achieves the purpose of the pleadings and aids the litigation process rather than hindering it, the test should be closer to relevance at trial than to semblance of relevance.

Analysis

[16] The *Rules of Court* govern the discovery and production for inspection of documents (including electronic records) in a civil action.

[17] Rule 25(3) provides that:

> Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in this rule

> whether or not privilege is claimed in respect of the document. (my emphasis)

[18] In *Ross River Dena Council v Canada (Attorney General)*, 2009 YKSC 4 at paras. 10-11, Gower J. stated that Rule 25(3) mandates the production of documents containing information that may, not must, assist (directly or indirectly) a party either to advance its own case or to damage the case of its adversary with respect to a matter in issue between them.

[19] In that case, one of the issues Gower J. had to determine was whether an historical and anthropological report – in the possession of the defendant and prepared in relation to the Kaska Dena Council's submission for recognition of their comprehensive land claim in northern British Columbia – was relevant to the specific claims of the Ross River Dena Council in Yukon. In determining that the report met the test of relevance for production under Rule 25(3), Gower J. stated the following:

> [10] The leading case for the test for relevance in this context is *Peter Kiewit Sons Co. of Canada Ltd. v. British Columbia Hydro & Power Authority*, (1982) 134 D.L.R. (3d) 154 (B.C.S.C.). In that case, McEachern C.J. referred to the *Peruvian Guano* case from the English Court of Appeal. At para. 19 of McEachern C.J. quoted Lord Justice Brett in *Peruvian Guano*:
>
> > It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may--not which must--either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly,' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead

> him to a train of inquiry, which may have either of these two consequences...
>
> Although McEachern C.J. declined to follow *Peruvian Guano* on the facts before him, he did describe it as "an ancient and well established" authority "which has stood unchallenged in Britain and in [British Columbia] for 100 years" (para.22).
>
> [11] As mentioned, with the agreement of counsel, I was provided a copy of the Report to review, as well as copies of subsequent legal opinions obtained by Canada, which refer to the Report (dated September 30, 1982 and August 3, 1983, respectively). There are a number of references in the Report to the Kaska people in the Liard River drainage basin and in the Frances Lake area, which I take to be the Frances Lake in Yukon, north of Watson Lake. There is also specific reference to the Kaska Dena people residing in Watson Lake, Yukon. There are general references to the archaeological and cultural history of the Kaska Dene, including those Kaska in the Yukon. Whether and to what extent these references will assist RRDC in addressing the issues raised by Canada with respect to the identity of the Kaska tribe or the Kaska Nation, the relationship between RRDC and the Kaska, and the existence and location of the Kaska traditional territory, is not for me to decide at this stage. I agree with the submission of RRDC's counsel that the Report is relevant if it contains any evidence going to those issues. As I interpret *Peter Kiewet*, it is sufficient if this information "may" assist RRDC either to advance its own case or to undermine that of Canada's. I am satisfied that the Report meets this test of relevance.
> (my emphasis) [footnotes omitted]

[20] In light of this passage and of Gower J.'s decision as a whole, I am unable to agree with Yukon that Gower J. adopted and applied a test for document discovery that is narrower than the possible relevance test. He did not, as submitted by Yukon, adopt a test with a higher threshold for relevance, one closer to the notion of relevance at trial, based on the concept of material facts in dispute in the litigation. Gower J. adopted a broad relevance test, one of possible relevance.

[21] In addition, I note that the test proposed by Yukon based on the notion of "material issue" is the test specifically set out in Rule 25(25) that allows a party to seek an order from the court to compel document production from a third party to an action.

[22] Rule 25(25) provides that the court may compel production of documents from a third party, if:

> …
>
> (a) the document is relevant to a material issue in the action, and
>
> (b) it would be unfair to require the applicant to proceed to trial without having discovery of the document.

[23] Reading Rule 25(3) and Rule 25(25) harmoniously, and in the context of the *Rules of Court*, I conclude that the *Rules of Court* refer to different terminology to indicate that a higher threshold of relevance is required before ordering a third party, who is not involved in the litigation, to produce documents.

[24] This is also the conclusion that the Court of Appeal of Prince Edward Island reached and recently reiterated in interpreting Rule 30.02(1) of the Prince Edward Island *Rules of Civil Procedure*, which is worded similarly to our Rule 25(3)[1].

[25] In *Creighan v MacPhee*, 2018 PECA 1 ("*MacPhee*") at paras. 31 and 33, the Court of Appeal reiterated that Rule 30.02(1) requires production of documents based on possible relevance, not actual relevance. It also recognized that the expression: "every document relating to any matter in issue in an action" has been given a broad and liberal interpretation.

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[1] Rule 30.02(1) of the Prince Edward Island *Rules of Civil Procedure*, PEI Civ Pro Rules Amended to September 1, 2020, provides that: "Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in Rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document" (my emphasis)

[26] The court *in MacPhee* also cited *McCabe v Wawanesa Mutual Insurance Co*, 2017 PECA 12, with approval, regarding what it found to be the higher threshold that applies to compel document production from a third party under Rule 30.10. The court compared the two thresholds as follows:

> [31] In *McCabe v. Wawanesa Mutual Insurance Co*., 2017 PECA 12, Mitchell J.A. described the different tests for relevance:
>
> Relevance
>
> [20] The test for relevancy in relation to non-party documents is not the same as that for parties to an action. Rule 30.02 is the rule dealing with discovery of documents in possession, control or power of a party. That rule mandates production of "every document relating to any matter in issue in an action." This phrase has been given a wide and liberal interpretation. It is the possibility of relevance that governs productability between parties. This has been called the broad relevance test (*Aluma Systems Canada Inc. v. Strait Crossing Inc*., 2002 PESCTD 19).
>
> [21] The test for relevance under Rule 30.10 is whether or not the documents sought are "relevant to a material issue in the action." This is clearly a higher test than that relating to document production for a party (*Lowe v. Motolanez*, *supra*; *Tribax Management Ltd. v. Laswind Investment Ltd*., [2006] O.J. 3439 (ONSC)). Firstly, the possibility of relevance is insufficient. The documents must be relevant. Secondly, it is not enough to find that the documents are relevant to a matter or any matter in issue; rather, the document must be relevant to a material issue in the action. What is material is determined by the governing substantive and procedural law and the pleadings. Evidence is material if what it is offered to prove is in issue according to the governing substantive and procedural law and the pleadings in the proceeding (*R. v. Candir*, 2009 ONCA 915, at para.49). (my emphasis)

[27] I note that prior to British Columbia amending their Supreme Court Civil Rules to move to a two-tier disclosure process (*Yahey v British Columbia*, 2018 BCSC 123 ("*Yahey*") at paras. 5-6), British Columbia's rule of document production between parties to a civil action was worded similarly to our Rule 25(3) and interpreted in a broad and liberal way. In *Richard v British Columbia*, 2009 BCCA 77 at para. 21 (which postdate *Peter Kiewit Sons Co. of Canada Ltd v British Columbia Hydro & Power Authority* (1982), 134 DLR (3d) 154 (BCSC) ("*Kiewit*")), the British Columbia Court of Appeal stated at para. 21:

> I acknowledge the evident tension between systemic allegations and individual occurrences in class actions of this nature. However, I am not persuaded that the chambers judge erred in finding that the Class Member Files are relevant and producible at this stage of the proceeding. As she pointed out, this case is at the stage of discovery. Relevance is broadly defined, and covers any document that directly or indirectly may enable a party to advance his case or to destroy that of the opposing party, or which may lead to a train of inquiry or disclose evidence: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., 2002 BCCA 219, 100 C.L.R. (3d) 146 at para.12 (my emphasis)

[28] Even under the new British Columbia disclosure process (which came into effect on July 1, 2010), after the initial obligation to produce documents, subject to privilege, limited to those that could be used at trial to prove or disprove "material fact" under Rule 7-1(1), a party may request broader document discovery on the basis of the possible relevance test:

> Rule 7-1(11) allows a party to request further documents that "relate to any or all matters in question in the action." The standard for disclosure under this provision requires parties to disclose documents that may provide a "train of inquiry" that could lead to relevant evidence (*Biehl v. Strang*, 2010 BCSC 1391; *Przybysz v. Crowe*, 2011 BCSC 731; *Yahey* at para.6)

[29] In addition, in *Kiewit*, McEachern C.J. declined to follow the possible relevance test established in *Peruvian Guano* in the specific circumstances of the case before him on the basis that the plaintiff in that major civil litigation was seeking the disclosure of several categories of documents that were of only questionable relevance and could only be sorted through at great expense. In that case, the defendant had already disclosed approximately 30,000 documents and had just provided a further 12-page inventory of documents for inspection. McEachern C.J. noted that the defendant's production of documents, up to that stage, was "entirely appropriate" (para. 29). It is in that context that he stated at paras 23 and 24:

> I respectfully decline to follow the *Peruvian Guano* case, supra, or slavishly to apply Rule 26(1) in a case such as this, where thousand or possibly hundreds of thousands of documents of only possible relevance are in question. I do not intend to suggest, however, that the *Peruvian Guano* case does not correctly state the law in most cases. That question does not arise for considerations here.
>
> It does not follow that this motion should be dismissed because, notwithstanding the foregoing, every reasonable effort must be made to enable the Plaintiffs to locate any documents which may assist the parties to ascertain the truth. What is not permissible, or reasonable, in my view, is to require a party, in a case such as this, to incur enormous expense in what may be a futile search for something which may not exist.

[30] Rule 25(3) has not been amended since Gower J.'s decision in 2009; and, I see no reason to depart from his conclusions, with which I agree, regarding the broad scope of document discovery required from parties to a civil action under Rule 25, and more specifically Rule 25(3). The test that applies is the test of possible relevance - a party has the obligation to disclose every document, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may--

not which must--either directly or indirectly enable the party requiring the affidavit either to advance their own case or to damage the case of their adversary.

[31] Having said that, I agree that Rule 25(3) cannot be applied blindly and mechanically in isolation from the pleadings and the nature of the case before the court.

[32] When a judge is being asked to exercise their discretion to order production, they must consider the broad obligations to disclose and produce documents that parties have under the rules in light of the object and context of the rules, including the principle of proportionality (see *Fraser v. Runinghan*, 2020 PECA 3 at para. 38) that is embedded in Rule 1(6) as follows:

> The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
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> (a) the dollar amount involved in the proceeding,
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> (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
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> (c) the complexity of the proceeding

[33] In addition, while the Supreme Court of Yukon has not adopted specific rules or practice directions (except for Rule 25(18)) regarding discovery of electronically stored information (e-discovery), it is clear that the principle of proportionality plays a central role in determining the required scope of e-discovery in a given case.

[34] The Sedona Canada Principles, which have been widely accepted by the courts and the legal community in Canada, provide guidance on best practices regarding e-

discovery. They identify proportionality and cooperation between the parties as being the overarching principles that should guide e-discovery in civil cases.

[35] More particularly, the second Sedona Canada Principle outlines factors that parties involved in an e-discovery process should consider to ensure that steps they take are proportionate and reasonable (how much time, effort and expense a party should reasonably put into e-discovery) in the circumstances:

> **Principle 2**: In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account: (i) the nature and scope of the litigation; (ii) the importance and complexity of the issues and interests at stake and the amounts in controversy; (iii) the relevance of the available electronically stored information; (iv) the importance of the electronically stored information to the Court's adjudication in a given case; and (v) the costs, burden and delay that the discovery of the electronically stored information may impose on parties.

[36] Those factors largely align with the factors to consider under Rules 25(3) and 1(6) in determining the parties' document discovery obligations in a given case.

[37] Accordingly, when a party applies for further production, proportionality requires the court to balance a number of elements including the burden, costs, and delay associated with additional production against the likely probative value of the requested documents and the potential prejudice to the moving party if the application were denied in light of the type of case opposing the parties based on the factors set out in Rule 1(6).

[38] As previously stated, the Sedona Canada Principles, not only speak to the importance of proportionality but also to the importance of cooperation between the parties (Sedona Canada Principles 7, 8 and 9). While each party has relied on the Sedona Canada Principles in support of their respective positions on the role of proportionality in document discovery, both sides appear to have overlooked the strong

recommendations made by the Sedona Conference Working Group for parties to communicate and cooperate early on and throughout the e-discovery process.

[39] While there is evidence that the parties corresponded on the scope of their respective document discovery obligations, there is no evidence before me that they have meaningfully done so early on or prior to exchanging their affidavit of documents and completed their e-discovery process. It may well be that counsel's opposite views on the scope of their document discovery obligations under the *Rules of Court* would have prevented them from finding common grounds in any event. However, they would have been in a position to identify their disagreements prior to expending time, energy and money on their respective production of documents.

[40] I would therefore strongly invite parties to major litigation in this jurisdiction involving e-discovery to, at least, discuss early on in the discovery process their views regarding the scope of document discovery required in a case, as well as the format and organization of the information subject to production. I would also invite parties to cooperate on these issues, whenever possible.

[41] I now turn to Chance's application.

2. Is Yukon's affidavit of documents defective?

i) Has Yukon under produced? If so, should Yukon be compelled to provide a further and better affidavit of documents?

Overview

[42] Considering my finding that the scope of document discovery (possible relevance test) required under the *Rules of Court* is broader than the test applied by Yukon to its production of documents. Considering as well that Yukon's admissions are narrower than contended by Yukon, I find that Yukon's affidavit of documents is deficient, as

Yukon has under produced, and that it shall file a further and better affidavit of documents after a final determination is made on its application to strike.

Chance's position

[43] Chance submits that Yukon's document production is wholly inadequate and seeks an order compelling Yukon to:

a) start its documents collection process anew, and

b) provide a further and better affidavit of documents.

[44] Chance submits that it is entitled to proper and full discovery. Chance contends that due to the complexity of the factual matrix underlying the dispute between the parties, the lengthy timeframe at issue, and the various causes of action pled in its Statement of Claim, there is a sizeable number of documents relating to the matters in issue in this case. According to Chance, it is clear that by only producing 445 records, Yukon has failed to produce several relevant records.

[45] Chance submits that Yukon's position that it only needs to produce documents it perceives as related to an "issue in dispute" has led to Yukon producing an affidavit of documents that does not comply with its obligation to disclose "every document relating to any matter in issue in this action". Chance submits that, as it bears the burden of proof in this dispute, Yukon's improper application of a narrow test for relevance unfairly works to Chance's disadvantage.

[46] In addition, Chance submits that Yukon's narrow and selective framing of what it considers the "issues in dispute" excludes, or arbitrarily narrows, issues essential to the determination of Chance's claims on their merits. Chance submits that, as most of the documents relevant to its claims are in the possession and control of Yukon, Chance is

greatly prejudiced by the deficient approach Yukon followed. Chance adds that Yukon's narrow and defective approach to document production has prevented Chance from being able to determine for itself what documents help to establish its claims. Chance submits that by denying access to thousands of relevant documents, and by further making the subjective determination of what issues "are not in dispute" and not subject to production, Yukon has improperly prejudiced Chance's ability to make its case.

[47] Chance also submits that Yukon's collection of documents is defective because:

a) the initial issues list Yukon used to identify custodians of documents ignores a number of issues raised by Chance's Statement of Claim. Chance also submits that the defective issues list has resulted in the exclusion of numerous key officials who likely possess relevant records as custodians;

b) the list of keywords Yukon used to search its records fails to include a number of relevant terms and variations of important terms;

c) the short list of questions (eight in total) that Yukon used for its manual review, significantly and arbitrarily narrowed some of the issues raised in the pleadings and wholly excluded others; and

d) a number of relevant categories of documents are missing from Yukon's collection of documents.

[48] In addition, Chance submits that the fact it produced a number of relevant records that Yukon did not produce, even though they should also have been in Yukon's possession, demonstrates that Yukon's production of documents is deficient.

[49] Finally, Chance submits that Yukon is acting in contravention to the principle of proportionality, as its document discovery is not reasonable.

[50] With respect to the scope of the Case Management Conference Order of February 20, 2020, Chance submits that Yukon's position does not reflect nor align with the order made. Chance submits that the Order compels Yukon to produce documents regarding all causes of action pleaded, not only the ones that are not the subject of Yukon's application to strike.

Yukon's position

[51] Yukon submits that it has complied with its document discovery obligation, and that Chance seeks to obtain documents that Yukon cannot or does not have the obligation to produce as they:

a) do not relate to matters of fact in dispute in this case; or

b) are not in Yukon's possession, control or power.

[52] Yukon submits that, contrary to Chance's assertions, there is a modest number of disputed facts of limited complexity in this matter. Yukon also submits that it has made a number of factual admissions in this case and that an admitted fact is no longer in issue. Yukon adds that documents regarding admitted facts are not subject to document discovery because evidence regarding those facts are irrelevant and inadmissible. Yukon contends that facts that are immaterial or irrelevant to Chance's causes of action are not "in issue" even if they are pleaded.

[53] In addition, Yukon submits that Chance seeks discovery on a number of issues that are not issues of fact, but issues of law, which are not amenable to document

discovery unless the information sought is related to the proof of disputed material facts from which legal conclusions may be drawn.

[54] With respect to the tort of negligent misrepresentation, Yukon submits that Chance did not plead that Yukon positively made any false or misleading representation that Chance would be permitted to use hydraulic fracturing to explore for or exploit hydraulic fracturing. Yukon submits that, instead, Chance relies on the concept of misrepresentation by silence. In any event, Yukon submits that, according to Rule 20(12), particulars of every false representation Yukon allegedly made to Chance regarding hydraulic fracturing or every instance where Yukon remained silent when it allegedly had a duty to speak on that issue must be pleaded before Yukon is required to produce documents on those particular representations or communications. Yukon submits that pleading generally that Yukon failed to explicitly tell Chance, prior to the imposition of the Moratorium, that Chance would not be permitted to use hydraulic fracturing to explore for or exploit oil and gas resources is not sufficient to comply with Rule 20(12). Yukon points out that it has disclosed and produced all of its relevant documents regarding the only meeting that Chance specifically referred to in its pleadings in relation to the tort of negligent misrepresentation.

[55] Yukon also submits that Chance seeks documents that are not in the possession, control or power of Yukon, but of third-party entities that are distinct and apart from Yukon and that Yukon does not have the obligation to seek to obtain documents from third parties.

[56] With respect to the e-discovery process it followed, Yukon submits that it has appropriately identified the individuals who currently hold relevant government records

(custodians), and that these individuals have access to the records of former government employees or officials identified by Chance in its application as missing from Yukon's list. Yukon also submits that the list of issues and keywords it applied during its e-discovery process are adequate and sufficiently broad to capture all relevant records in this matter.

[57] In addition, Yukon submits that it should not be compelled to produce records related to Chance's claims that are the subject of its application to strike, until its appeal on this issue is heard and a final determination made.

[58] Yukon submits that since, at the initial case management conference in this matter, it advised Chance and the Court that it intended to bring an application to bifurcate the trial into a liability stage and a damages stage, it should not be compelled to produce documents on the issue of damages until its application is heard and determined. Yukon submits that, if its application to bifurcate is successful, document discovery on damages should not take place until after a final decision is rendered on the liability portion of Chance's claims.

[59] In the alternative, Yukon submits that Chance's alleged damages, as pleaded, are expressed in round numbers, and not particularized in any way. Yukon takes the position that, until particulars are provided, damages, as pleaded, do not constitute a "matter in issue" over which production can take place. In the further alternative, Yukon submits that once the claims for damages are particularized, the quantum of some claims will likely not be contested, and, as such, document discovery will not be required.

The Case Management Order of February 20, 2020

[60] Chance and Yukon have differing views regarding the scope of Veale C.J.'s, as he then was, Case Management Order of February 20, 2020 (the "CMC Order") regarding the timing and scope of their production of documents. Chance submits that both parties had to complete their document production in relation to all of Chance's claims by June 30, 2020, whereas Yukon submits that the CMC Order only compelled the parties to produce documents relating to Chance's claims that were not the subject of Yukon's application to strike.

[61] The CMC Order provides, among other things, for a timeline for the filing of Yukon's application to strike. The wording of the order reveals that Yukon communicated its intention to file an application to strike to Chance and the Court before or at the time of the case management conference.

[62] The CMC Order also sets out a timeline for Chance to file a Fresh Statement of Claim and for Yukon to file a Statement of Defence. Yukon has filed a Statement of Defence in which it states that it will not plead to the causes of action it applied to strike until a final determination is made on its application to strike.

[63] On January 20, 2021, I granted Yukon's application to strike the tort of unlawful interference with economic interests, and the order of mandamus sought by Chance against the Minister of Energy Mines and Resources from Chance's Statement of Claim with leave to amend. I dismissed Yukon's application regarding the other causes of action pleaded by Chance. Yukon has appealed my decision. The appeal is ongoing. Chance has, since then, decided to abandon its claim in unlawful interference with

economic interests. In addition, it is no longer seeking an order of mandamus against the Minister of Energy, Mines and Resources.

[64] Considering the CMC Order as a whole, the context in which it was made as well as the Statement of Defence Yukon filed, I find that the scope of the CMC Order did not extend to compelling Yukon to provide its affidavit of documents in relation to all of Chance's claims by June 20, 2020. The CMC Order only compelled the parties to produce their documents regarding the two causes of action that Yukon did not apply to strike, namely, Chance's claims of negligent misrepresentations and statutory cancellation of its permits. As a result, I am of the view that Yukon shall not be compelled to produce its documents in relation to the causes of action that are the subject of its application to strike until a final decision is made on that application.

[65] However, there is nothing in the wording of the CMC Order that would ground a finding that Yukon's obligation to produce documents excluded the issue of damages for the two causes of action that are not the subject of Yukon's application to strike. In addition, while Yukon may have indicated its intention to bring an application to bifurcate the trial of this action into a liability stage and a damages stage, Yukon has yet to file anything in that regard.

Chance's Amended Fresh Statement of Claim

[66] Chance's and Yukon's applications are to be decided on the basis of the pleadings, including the amendments contained in Chance's Amended Fresh Statement of Claim ("AFSOC") that I recently authorized Chance to file. However, as I am of the view that it is premature to order Yukon to produce documents in relation to Chance's claims that are the subject of its application to strike until a final determination is made

on appeal, I will only review the allegations that are relevant to the two causes of action that are not covered by Yukon's appeal (the claims of negligent misrepresentation and statutory cancellation of Chance's permits). The allegations are as follows:

[67] Chance is a corporation that carries on business in the area of energy exploration and development. The corporation officially changed its name from Northern Cross to Chance on April 12, 2017.

Chance's acquisition of exploratory licences in the Eagle Plain Basin

[68] In or around 2006, the oil and gas industry nominated locations in the Eagle Plain Basin for exploration under the *Oil and Gas Act*, RSY 2002, c. 162 (the "*Act*"), by way of a Request for Posting ("RFP"). As a result, Yukon launched a disposition process under the *Act*. Consultations took place. A report to the Minister was prepared in relation to each of the permits later acquired by Chance. None of the reports indicated any concerns about hydraulic fracturing. Calls for Bids were then issued.

[69] In 2006-2007, Chance became the successful bidder on 13 exploration permits in the Eagle Plain Basin in exchange for capital spending of over 21 million dollars.

[70] In 2009-2010, Chance obtained two additional exploration permits in the Eagle Plain Basin following the same regulatory bidding process.

[71] In total, Chance's 15 exploration permits encompassed 1.3 million acres in the Eagle Plain Basin.

[72] Chance states that an appropriate time to have indicated any concerns regarding the use of hydraulic fracturing would have been at the RFP stage. However, at no time during that stage and the bidding process did Yukon express any concerns regarding the use of hydraulic fracturing. In contrast, in March 2017, in response to 15 new RFPs,

Yukon publicly stated that there was a Moratorium on hydraulic fracturing in the Yukon, and that no fracking would be allowed in the exploration for and the development of oil and gas in the territory.

[73] Chance states that neither the Calls for Bids nor the Permits themselves indicated any restrictions on hydraulic fracturing, nor did they limit Chance's activities to the pursuit of conventional resources. In addition, there was no indication that any restrictions on hydraulic fracturing would be imposed in the future.

[74] Chance states that Yukon knew and understood all along that Chance obtained its permits with the expectations that the lands subject to its permits contained unconventional resources, which would require hydraulic fracturing to extract.

The grouping applications

[75] In 2011, Chance successfully applied to Yukon to group its 15 permits into five areas of contiguous land. Chance states that it made its grouping applications in anticipation of a major exploration program for unconventional geological opportunities. Chance also states that the unconventional opportunities it had identified were the primary reason for applying to group its permits.

[76] Chance states that grouping of permits is not usually done in cases where conventional resources are sought, as these resources are, by their very nature, typically geographically limited. Instead, grouping is commonly done where the resources expected to be found are unconventional ones, as shale formations tend to be geographically pervasive, making the evaluation in a given well relevant over a broader region.

[77] In addition, Chance states that the technical requirements of drilling, evaluating and completing wells for unconventional resources locked in shale are also quite different from those for conventional resources.

[78] Chance states that, at the time, hydraulic fracturing was a permitted and recognized method associated with the pursuit of unconventional resources. In addition, some amount of hydraulic fracturing is required both in exploration work and as a well stimulation technique to commercially extract conventional resources.

[79] Chance states that, based on the content of its applications, including the depths of its planned wells (which were significantly greater than those typically drilled for conventional resources), the communications it had with Yukon surrounding its grouping applications, and Yukon's decision to approve its grouping applications, Yukon understood, knew and accepted that Chance's goal was to pursue unconventional resources activities, which necessarily requires the use of hydraulic fracturing.

[80] However, Chance states that although there was every opportunity to do so during the grouping process, Yukon never indicated any concerns with the use of hydraulic fracturing.

Chance's oil and gas exploration activities in the Eagle Plain Basin

[81] In 2012 and 2013, Chance drilled four wells (McParlon A-25, East Chance E-78, West Chance H-28 and Ehnjuu Choo B-73).

[82] Through its 2013-2014 drilling program, Chance acquired 325 square kilometers of 3D seismic data and 25 kilometers of 2D seismic data.

[83] Chance sent the 2D and 3D seismic data as well as the data gathered through a number of Significant Discovery Licenses in the Eagle Plain Basin - Chance had

acquired a majority working interest in and operatorship since 1994 - for interpretation. The Resource evaluation revealed a large area of shale holding approximately 8.6 billion barrels of oil equivalent in place in the lands subject to Chance's permits. Chance states that these resources can only be extracted by way of hydraulic fracturing.

[84] In addition, Chance states that some amount of hydraulic fracturing is required in exploration work and as a well stimulation technique to commercially extract conventional resources. Chance states that the Moratorium has impaired and impeded its ability to enhance production of low/high permeability conventional reservoirs, and that, as a result, the pursuit of conventional resources in the lands subject to Chance's permits has also been harmed.

[85] Chance undertook its exploration activities at a cost of approximately $115,000,000.

[86] Chance states that if it had known hydraulic fracturing would not be permitted in the future, it would not have embarked on the type of capital-intensive exploration program that it conducted. Chance states that this information was well known to Yukon as it either formed part of its application materials or was disclosed as part of Chance's reporting requirements.

Tenure of Chance's Permits

[87] Chance's 15 permits (0005 to 0017, 0019 and 0020) were valid for an initial term of six years with a renewal term of four years. Since the initial extensions, Chance has applied for and received further tenure extensions on Permits 0008 to 0011, and 0019.

[88] However, the most recent extensions were for tenures less than requested. Despite formal requests by Chance, tenure extensions on Permits 0006 and 0007 were not approved and have since expired. In addition, Chance voluntarily surrendered Permit 0005 (see Response to Notice to Admit (#31))

Rentals for Chance's permits

[89] Chance paid annual rent on its permits, as required under the regulatory scheme, from August 31, 2013, until August 30, 2015.

[90] Following the imposition of the Moratorium, Chance obtained deferrals on payments of rent due on August 13, 2015, and August 31, 2016 (Accrued Rentals).

[91] No further annual rentals have accrued since August 31, 2016, as the regulatory requirement for payment of annual rentals has been replaced with a requirement to provide a lease renewal deposit.

[92] In or about November 2016, Chance communicated to Yukon a formal refusal to pay the Accrued Rentals on the basis that its exploration rights had been impaired by the Moratorium.

[93] In August 2017, Chance paid a portion of the Accrued Rentals under protest.

[94] To date, Chance has paid a total of $3,375,121.73 in rent to Yukon for its permits.

Work deposits for Chance's permits

[95] Chance also paid work deposits, as required by the regulatory scheme, for its permits.

[96] On or about October 15, 2013, Yukon fully reimbursed Chance's work deposits on permits 0005-0011, 0019 and 0020 for a total amount of $1,125,194.25. It partially

reimbursed Chance's work deposits on permits 0012-0017 in the amount of $3,544,061.73 from the principal amount of $4,401,230.24.

[97] Chance states that the reimbursements were made in acknowledgment that expenditures made by Chance were within the regulatory parameters.

The Moratorium

[98] In May 2013, the Yukon Legislative Assembly established the Select Committee Regarding the Risks and Benefits of Hydraulic Fracturing ("the Committee"). The Committee held hearings at the legislature and in communities across the territory.

[99] Chance participated in the process. It made a presentation to the Committee on January 31, 2014.

[100] The Committee issued its final report and recommendations in January 2015. Chance alleges that none of the recommendations included a ban or a Moratorium on hydraulic fracturing.

[101] According to Chance, one of the recommendations was that further study of the potential economic impacts of developing a hydraulic fracturing industry was important and should be undertaken. Chance states that no such studies have been undertaken or commissioned by Yukon.

[102] On April 9, 2015, Yukon formally adopted all of the Committee's recommendations. The same day, Yukon announced a ban on hydraulic fracturing in all areas of the territory, except for the Liard Basin in southeast Yukon.

[103] The Moratorium is still in effect. Chance states that there is no indication as to if and when it will be lifted, or what preconditions would need to be fulfilled before it is lifted. I note that in its Response to the Notice to Admit, Yukon stated that while the

Liard Basin was exempted from the Moratorium when it was first announced, it is no longer exempted.

[104] At the time the Moratorium was announced, Chance's permits in the Eagle Plain Basin were the only ones affected by the Moratorium, as Chance was the only oil and gas company conducting activities in the affected area.

[105] At the time of the Committee's review, Chance states that it was proposing and seeking approval for an extensive development program that focused on unconventional resources and would contemplate hydraulic fracturing at some point. Chance further states that such development was only possible through the use of hydraulic fracturing and represented, to Chance's knowledge, the only significant existing hydraulic fracturing plan in Yukon. That plan was stopped by the announcement of the Moratorium in April 2015. Chance alleges that the timing and impact of the Moratorium are indications that it was implemented or ordered to prevent Chance from moving forward with its planned development of its resources under its permits.

[106] Beginning in April 2015, Chance communicated its concerns relating to Yukon's acceptance of the Committee's recommendations and the Moratorium.

[107] Following the Moratorium, Chance requested that Yukon grant it a number of concessions.

[108] Chance states that the initial permit extensions that were granted on its 15 permits as well as Yukon's substantial reimbursement of Chance's outstanding work deposits were made in recognition that the Moratorium stripped Chance of its sub-surface rights.

[109] Chance states that its tenure continues to run on its remaining permits. Chance also states that its losses continue to accrue.

[110] Chance states that the Moratorium continues to impair or prevent it from being able to complete or fulfill certain regulatory requirements - associated with converting some of its permits into oil and gas leases - that are mandated by Yukon. In addition, Chance states that, due to the Moratorium, it is unable to conduct workovers on certain wells as is being demanded by Yukon. Chance states that these demands, made impossible by Yukon's own Moratorium, may force Chance to abandon some of its wells, compounding the impact of the Moratorium and inflicting further losses on Chance.

[111] Furthermore, Chance states that in October 2016, China National Offshore Oil Company Ltd. ("CNOOC") withdrew as an investor due to the implementation of the Moratorium and its impact on Chance. Chance states that the uncertainty of tenure caused by the Moratorium has and continues to cause harm to Chance by, among other things, making it difficult or impossible for Chance to attract or secure investments (which investment became necessary with CNOOC's withdrawal) or financing, or to make any type of long-term plans.

Misrepresentations

[112] In June 2011, Chance secured CNOOC as a major investor in order to fulfill work commitments under its permits. An affiliate of CNOOC invested over $115,000,000 in Chance on the understanding that they would be pursuing unconventional resources.

[113] Soon after, Chance took various CNOOC representatives on a tour of the territory. The delegation was introduced to a variety of Yukon's representatives. On

June 30, 2011, as part of the tour, Chance attended a meeting with Yukon's representatives and presented a plan to focus on evaluating unconventional resources based on CNOOC's interest and investment objectives. At no time during these discussions did Yukon indicate that hydraulic fracturing might not be permitted.

[114] Chance states that over the course of many years including before, at the time of, and subsequent to granting the permits to Chance, Yukon engaged in a course of conduct and made representations that encouraged Chance and its principal investor, CNOOC, to expend capital on developing the lands covered by its permits and the rights granted under its permits.

[115] Chance states that, prior to imposing the Moratorium in April 2015, no representatives of Yukon had ever represented to Chance, its investors or the public generally, that any limitation would be imposed on the use of hydraulic fracturing to explore and develop the rights granted by the permits. Specifically, all representations made over the course of several years were expressly (or impliedly by omission) confirmatory of Chance, or any other party, being able to use hydraulic fracturing as a means of exercising rights held under oil and gas dispositions, including Chance's rights granted by the permits. This included, among other things, representations directly to Chance, such as formal correspondence including granting of the permits, grouped permits, informal correspondence including letters, emails and meetings and representations to the public at large including the RFP process and the Government of Yukon's other general encouragement of industry to expend capital in the territory.

[116] Chance states that Yukon actively promoted and encouraged oil and gas exploration and development in the Yukon, and thereby communicated to Chance that it

should invest and continue to invest in the territory. Chance states that Yukon has benefitted from such investment.

[117] Chance states that from the RFP phase onwards, Yukon represented to Chance that it supported oil and gas development, that its dispositions granted rights to oil and gas, and that hydraulic fracturing would be, subject to regulatory compliance, permitted.

[118] Chance states that Yukon's representatives made those types of representations at both formal and informal meetings and phone calls including but not limited to the following dates: March 10, 2009; June 2009; December 2, 2010; May 19 and 20, 2010; June 29, 2011; November 2011; January 30, 2012; June 19, 2012; August 31, 2012; August 22, 2014; February 3, 2014; December 2, 2014; October 26, 2015; March 2016, a meeting at the 2016 Summer Meeting of Canada's Premiers.

[119] Chance also refers specifically in its AFSOC to a representation made in a Yukon Energy Prospectus issued with the Eagle Plain 2010 Call for Bids highlighting the presence of unconventional resources in that area.

[120] Chance states that Yukon made representations that the oil and gas rights granted under its permits encompassed rights to explore and exploit oil and gas resources without any differentiation between conventional and unconventional resources.

[121] Chance states that it relied on Yukon's representations as well as on the regulatory framework, which does not differentiate between unconventional and conventional resources, and spent over $140,000,000 in pursuit of its rights to explore, develop and produce its resources. Chance states that Yukon ought to have foreseen such reliance.

[122] In addition, Chance alleges that Yukon benefited from Chance's investment. Chance submits that over 20,000,000 of its expenditure directly benefitted Yukon's businesses and citizens.

[123] Chance alleges that it has suffered loss and damages as a result of its reliance on Yukon's misrepresentations (including the annual rentals and Accrued Rentals it paid, as well as capital expenditures, operating and administrative costs and cost of capital it incurred). Chance also alleges that the Moratorium has fundamentally impaired its ability to meaningfully exercise its rights to oil and gas in the lands subject to its permits, resulting in damages for loss of opportunity. The damages Chance claims for negligent misrepresentations are pleaded at para. 95 of its AFSOC.

Statutory cancellation of Chance's permits

[124] Chance states that it has not breached any terms or conditions of its permits nor has Yukon alleged any breaches. In its Response to the Notice to Admit, Yukon stated that, in 2016, Chance refused to pay $1,191,551.73 of rental fees owing on its permits and that Yukon notified Chance repeatedly that the payment was required under the *Act* and was overdue.

[125] Under this claim, Chance states that the Moratorium amounts to a cancellation of its permits under s. 28(1)(a) of the *Act* and that it is entitled to the compensation provided by s. 58 of the *Oil and Gas Disposition Regulation*, OIC 1999/147.

[126] Chance adds that it was not provided notice of Yukon's intention to cancel its permits pursuant to s. 60 of the *Act*.

[127] The amount of statutory compensation claimed by Chance is outlined at para. 95 of its AFSOC.

Analysis

[128] While Rule 25(3) governs the disclosure and production obligation of a party to a civil action, Rule 25(6) addresses the content of a party's affidavit of documents and the timing of its delivery:

> A party to an action shall, within 30 days after the close of pleadings under Rule 23(5), deliver to every other party an affidavit of documents in Form 110 or 111 disclosing to the full extent of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power.
>
> …
>
> (i) that are in the party's possession, control or power and that the party does not object to producing;
>
> (ii) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and
>
> (iii) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.
>
> (b) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relating to any matter in issue in the action other than those listed in the affidavit.

[129] Pursuant to Rule 25(21), the court may order the disclosure or production for inspection of documents that are not privileged, or may order service of a further and better affidavit of documents when it is satisfied by any evidence that relevant documents in a party's possession, control or power have been omitted from the party's affidavit of documents.

[130] As I have already stated, a broad relevance test, one of possible relevance, applies at the document discovery stage of a proceeding. The test is to be applied in light of the principle of proportionality embedded in the Rules.

[131] My finding that the disclosure obligation of a party to an action is broader than the test advocated and applied by Yukon to its production of documents directly leads to the conclusion that Yukon's affidavit of documents falls short of listing all the documents it is required to disclose and produce, subject to privilege, under the *Rules of Court*.

[132] In addition, I find that Yukon's broad view of the scope of its admissions contributed to Yukon delivering to Chance an affidavit of documents that is too narrow.

[133] Yukon has made a number of admissions in its Statement of Defence. It has clarified the scope of some of its admissions in its Response to Chance's Notice to Admit that was filed as part of the record on this application. Yukon's non-binding views regarding its admissions were also communicated to Chance in exchanges that were filed on this application.

[134] I agree with Chance's position that Yukon's admissions are not as broad and far reaching as contended by Yukon. What is in issue between the parties cannot be determined simply by looking, in isolation, at the specific factual allegations admitted by Yukon without considering the impact of other relevant factual allegations it has not admitted and their combined effects on the action before the court.

[135] In addition, given the long timeframe at issue (Chance obtained its first 13 permits at issue in or about 2006 and the Moratorium was imposed in 2015) and the nature of the two causes of action that are not the subject of Yukon's application to strike (more particularly whether there exists a "special relationship" between the parties

that gives rise to a duty of care with respect to the tort of negligent misrepresentation, and whether the Moratorium amounts to a cancellation of Chance's permits), I agree with Chance that there is a sizeable number of relevant documents relating to the matters in issue in this case that have not been included in Yukon's affidavit of documents and that, as a result, Yukon has under produced.

[136] As what is in issue between the parties is determined by the pleadings, I now turn to the two causes of action that are not subject to Yukon's appeal.

The tort of negligent misrepresentation

[137] The tort of negligent misrepresentation has five elements:

a) The existence of a duty of care based on a "special relationship" between the representor and the representee;

b) The representation is untrue, inaccurate, or misleading;

c) The representor acted negligently in making the representation;

d) The representee reasonably relied on the negligent misrepresentation; and

e) The reliance was detrimental to the representee in the sense that damages resulted (*Queen v Cognos*, [1993] 1 SCR 87 at 110).

[138] In addition, in cases of misrepresentation by silence, the plaintiff also has to establish that the representor had a duty speak in the circumstances when it remained silent. (*Scotsburn Co-Op Services v W.T. Goodwin Ltd*, [1985] 1 SCR 54 at paras. 24-27; *Fletcher v Manitoba Public Insurance Co,* [1990] 3 SCR 191 at para. 211; *and Sidhu Estate v Bains*, [1996] BCJ No 1246 (BCCA) at para. 31).

[139] As Chance's case largely rests on its allegation that Yukon remained silent regarding its concerns on the use of hydraulic fracturing or restrictions that may be imposed on the use of hydraulic fracturing, when it had a duty to speak, this additional element must be considered when determining what is in issue between the parties.

[140] However, I note that Chance also pleads that Yukon positively misrepresented to Chance that Yukon supported oil and gas development, that Chance's permits granted rights to both conventional and unconventional oil and gas resources, and that hydraulic fracturing would be, subject to regulatory compliance, permitted.

[141] In *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 ("*Imperial Tobacco*"), the Supreme Court of Canada, at para. 42, restated the elements to consider when determining whether a duty of care based on a "special relationship" exists:

> … In a claim of negligent misrepresentation, both these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties: *Hercules Managements Ltd. v Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24. In *Hercules Managements*, the Court, per La Forest J., held that a special relationship will be established where; (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation, and (2) reliance by the plaintiff would be reasonable in the circumstances of the case (*ibid.*). Where such a relationship is established, the defendant may be liable for losses suffered by the plaintiff as a result of a negligent misstatement.

[142] In addition, the existence of a duty of care based on a "special relationship" may arise:

a) explicitly or by implication, from the relevant statutory scheme; or

b) from specific interactions between the plaintiff and the government, where a duty of care is not negated by the statute; or

c) from both interactions between the parties and the government's statutory duties. (*Imperial Tobacco*, at paras. 43-46)

[143] As I have already reviewed Chance's allegations of negligent misrepresentation, I will now turn to the admissions Yukon made in its Statement of Defence and Response to Notice to Admit in relation to this cause of action.

[144] Yukon concedes that the relevant features of the oil and gas disposition process operate as pleaded by Chance.

[145] Yukon also admits to publicly promoting investment in oil and gas exploration (both before and after the Moratorium). Yukon adds, however, that, prior to the Moratorium, the topic of hydraulic fracturing never came up in promotional efforts.

[146] Yukon admits that it encouraged Chance to expand resources on oil and gas exploration. Yukon states that it was aware that anyone seeking to produce oil and gas in the Yukon might at some point consider hydraulic fracturing as a technique to support the production of oil and gas resources if the geology of the deposits made the use of the technique appropriate and economically attractive.

[147] Yukon also admits that no restriction on the use of hydraulic fracturing was contained within any of the Calls for Bids, RFP processes and permits.

[148] In addition, Yukon states that its public statements on the acceptability of hydraulic fracturing in shale gas development are not inconsistent with the recommendations of the Select Committee. I note, that, by so stating, Yukon expressly admits to making public statements at some point in the past about the acceptability of hydraulic fracturing.

[149] However, Yukon does not admit that it represented to Chance that Chance would be entitled to utilize hydraulic fracturing in order to access and extract resources, including through the Calls for Bids, RFP processes and permits granted to Chance.

[150] Yukon does not admit that it represented to potential investors that the use of hydraulic fracturing would be permitted. Yukon adds that this statement is inaccurate and not a matter in issue in the litigation.

[151] With respect to the grouping of Chance's permits, Yukon admits that Chance successfully applied to group its permits into five areas of contiguous land. However, it does not admit that it knew that Chance's rationale for grouping its permits was to facilitate the efficient exploration of unconventional resources. Instead, Yukon states that the grouping applications were explicitly made on the basis that Chance intended to explore for both conventional and unconventional resources. Yukon does not admit that it knew that unconventional resources typically cover a larger geographic area than conventional resources. In addition, Yukon does not admit that Chance's drilling program was designed to assess several shale intervals in the Eagle Plain Basin. The parties also disagree on the various depths of the wells drilled by Chance.

[152] Yukon also states that Chance repeatedly disavowed any immediate intention to use hydraulic fracturing techniques.

[153] Also, Yukon does not admit that hydraulic fracturing is required to access the resources Chance has discovered or that are contained in the lands covered by its permits. Yukon states that it has no information one way or another relating to the issue of physical impossibility of extracting unconventional resources without hydraulic fracturing. Yukon adds that it seems very unlikely that there could be any oil and gas that could not be extracted without the use of hydraulic fracturing.

[154] Yukon takes the position that the question of economic viability is not one that can be answered because Chance's pleadings do not specify a time at which the

economic viability of hydraulic fracturing is to be assessed as opposed to other resources extraction method. However, Yukon states that it is prepared to admit that, at some times, at some price levels, some oil and gas resources can only be profitably extracted using hydraulic fracturing.

[155] With respect to damages, Yukon admits the amount that Chance paid in rent in relation to its permits. However, it states that Chance has refused to pay $1,191,551.73 in rental fees that it owes to Yukon on its permits. In addition, Yukon admits the amount that Chance has paid in work deposits. Yukon also admits the amount it reimbursed to Chance on its work deposits. However, Yukon has made no admission regarding the amount that Chance alleges it invested in its exploration program or other investment it made or expenses it had in relation to its permits.

[156] Finally, Yukon does not admit the value of the oil and gas resources Chance allegedly identified through its exploration program.

[157] I note that Yukon's admissions regarding the regulatory disposition process as well as the content of its representations are very general in nature. In addition, Yukon's admissions are not sufficient or broad enough in scope to address and cover the entire factual matrix required to make a determination on each of the elements of the tort of negligent misrepresentation.

[158] For example, while Yukon has admitted that no restriction on the use of hydraulic fracturing was contained within any of the Calls for Bids, RFP processes and permits, that admission, even in light of Yukon's admission regarding the RFP statutory process generally, is not broad enough to cover or provide the context in which Yukon allegedly remained silent on this issue during that time. That contextual information is relevant to

the determination of whether Yukon had a duty of care based on a "special relationship" between the parties, and whether Yukon had a duty to speak, both of which are not conceded by Yukon. In addition, Yukon has not made any admissions as to whether it had any concerns regarding hydraulic fracturing or was considering a ban on fracking at the material times, such as during the RFP processes, when it is alleged that Yukon remained silent on that issue. That information is relevant to the determination of whether Yukon had a duty to speak and whether its silence constitutes a representation that was untrue, inaccurate, or misleading.

[159] Furthermore, Yukon's admissions regarding the amounts of Chance's payments to Yukon relating to its permits, and the amounts and general timing of Yukon's refunds to Chance are not sufficient to fully address the issue of damages as raised by Chance in its pleadings in relation to this tort. For example, considering Chance's statutory reporting requirements, one could expect Yukon to have records in its possession containing information regarding Chance's investment or spending in its exploration program. As stated earlier, as Yukon has not brought an application to bifurcate the trial into a liability stage and a damages stage it cannot rely on its intention to do so to justify its position that it should not be compelled, at this point, to produce documents on the issue of damages. In addition, Yukon cannot rely on the fact that Chance has not particularized its damages, when there is no evidence that Yukon has requested particulars on that issue, to delay Yukon's disclosure on damages until particulars are provided.

[160] Those few examples of areas where I find that Yukon's production of documents is deficient, coupled with my finding that Yukon has applied a narrower test for

production than provided by the *Rules of Court* and has taken a broader view of the scope of its admissions, lead me to conclude that Yukon has under produced and shall review its production of documents to ensure that its affidavit of documents lists all of the documents in its possession, control or power containing information relating to any matters in issue regarding each of the elements of the tort of negligent misrepresentation listed above. As explained later in my decision, I arrive at the same conclusion regarding the claim of statutory cancellation of Chance's permits.

[161] However, as it is the obligation of the parties to a civil action to provide an affidavit of documents that complies with the *Rules of Court*, and as counsel have the ultimate responsibility of ensuring that disclosure is provided in accordance with the *Rules of Court* (*LTS Infrastructure Services Limited Partnership v Rohl Enterprises Ltd*, 2019 NWTSC 10 ("*LTS Infrastructure Services*") at para. 22), I am of the view that it is not for the Court to craft for the parties an exhaustive list of all the matters in issue and all the categories of records related to the matters in issue that shall be included in their respective affidavit of documents, and I decline to do so.

[162] Instead, as per the Sedona Canada Principles, I invite counsel for Yukon and Chance to discuss and agree on a list of issues as well as on categories of records that should be included in Yukon's affidavit of documents based on my findings regarding the broad test applicable to document disclosure and production in this jurisdiction, and the limited scope of Yukon's admissions.

[163] In case of disagreement, the parties may, after a final determination is made on Yukon's application to strike, submit their respective lists of issues and categories of

records subject to disclosure, taking into consideration my findings, in case management where a decision will be made.

[164] Nonetheless, I believe it useful to address some of the specific examples raised by the parties regarding the categories of documents to be included in Yukon's affidavit of documents based on the matters in issue with respect to the tort of negligent misrepresentation to illustrate my finding.

Yukon's promotional efforts to attract investment in oil and gas exploration in the territory.

[165] Chance's description of the oil and gas regulatory disposition process, generally admitted by Yukon, is sufficiently detailed to reveal that Yukon issued public documents and made public statements prior to, during, and after the RFP processes through which Chance bid and obtained 15 exploratory permits. In its AFSOC, Chance provides an example of a promotional document, a prospectus issued by Yukon as part of the Eagle Plain Basin 2010 Call for Bids process that specifically refers, amongst other things, to the presence of unconventional resources in that area. The prospectus, which is part of Chance's production of documents, states that the "Eagle Plain Basin is an under-explored region of oil and gas resources in Yukon" and invites potential investors to "Seize the Opportunity". The prospectus is included at pages 178 to 181 of the Joint Application Record.

[166] Chance states in its AFSOC that it relied on Yukon's efforts to promote and encourage oil and gas exploration when it invested in oil and gas exploration in the Eagle Plain Basin.

[167] Yukon takes the position that because it does not dispute that it publicly promoted investment in oil and gas exploration in the Yukon (before and after the

Moratorium), it does not have to produce records relating to its promotional efforts as they do not relate to any matter in issue in the litigation.

[168] However, I note that Yukon's position does not take into consideration its own admission in its Statement of Defence that it made public statements regarding the acceptability of hydraulic fracturing in shale gas development without indicating when, how and in what context it made those statements. I note that Yukon also stated in its response to Chance's Notice to Admit that the topic of hydraulic fracturing never came up in its promotional efforts.

[169] In addition, Yukon's position does not take into consideration that this category of records may provide information that is relevant to the question of how it attracted investment and the context in which Chance participated in the RFP processes in or around 2006 and 2009-2010 as well as the context in which it continued to invest in its exploration programs before the announcement of the Moratorium, which are matters in issue raised by the essential elements of the tort of negligent misrepresentation as pleaded by Chance.

[170] As a result, I find that Yukon has the obligation to disclose and produce, subject to privilege, all the records in its possession, power or control relating to its efforts to promote investments in oil and gas resources in the Yukon from, at least, 2004 (a few years prior to the 2006 RFP process by which Chance became the successful bidder on its first permits at issue in this case) and April 2015 (when the Moratorium was announced) that were issued or published for Chance specifically, the oil and gas industry in general and the public at large. I am of the view that one could reasonably

expect these documents to contain information that may, not must, assist Chance or Yukon either to advance their own case regarding the issues of:

a) how Yukon attracted investment;

b) whether it made false or misleading representations regarding the use of hydraulic fracturing, and the rights to explore and exploit unconventional resources, for which, according to Chance, hydraulic fracturing is required,

c) if Yukon had a duty to speak about restrictions on hydraulic fracturing, or concerns it may have had with hydraulic fracturing at the time;

d) if it was reasonable for Chance to rely on the alleged misrepresentations; and

e) The existence of a "special relationship" between Chance and Yukon.

Yukon's representations to Chance, the oil and gas industry and the public in general (including, but not limited to, promotional records)

[171] Yukon also takes the position that it does not have to produce documents relating to its representations or silence on the permissibility of hydraulic fracturing or the right of successful bidders to explore and extract both conventional and unconventional resources to the industry or the public at large because Chance has not pleaded to whom those representations were made, that it was aware of those specific representations, and that it relied on those representations. Yukon is of the view that Chance is going on a fishing expedition when it seeks disclosure of those documents.

[172] However, Yukon's position does not take into consideration its own admission that it publicly made representations regarding the acceptability of hydraulic fracturing in shale gas development.

[173] In addition, Yukon relies on Rule 20(12) to submit that the full particulars of a representation must be pleaded before it can be compelled to disclose documents regarding that representation.

[174] Considering the number of years between the RFP processes that led to Chance acquiring 15 permits in the Eagle Plain Basin and the Moratorium, I am of the view that Yukon's position that Chance has to particularize every representation it alleges that Yukon made about the permissibility of hydraulic fracturing and the rights of successful bidders to explore and extract both conventional and unconventional resources, as well as every instance where Yukon remained silent when it had a duty to speak about the concerns it may have had regarding fracking or restrictions that may be imposed on the use of fracking before it has to disclose documents regarding those representations is not tenable in this case. In addition, I note that, in its AFSOC, Chance specifically identified a number of steps in the regulatory process where Yukon would have remained silent when it had a duty to speak about the issue of hydraulic fracturing. It also identified a number of specific representatives and officials with which it had communications about its oil and gas permits and operations during those years at different times. Chance also provided in its AFSOC a number of dates where those representations would have been made by Yukon.

[175] I am also of the view that as a member of the oil and gas industry and as a successful bidder and holder of 15 exploratory permits in the Eagle Plains Basin that has performed exploratory work in that area, Chance would have been the recipient of at least, several of Yukon's representations published for the oil and gas industry or the public in general on those topics.

[176] As a result, I am of the view that Yukon shall disclose all the documents in its possession, power or control that contain representations by Yukon about the permissibility of hydraulic fracturing and the right of successful bidders to extract both conventional and unconventional resources, at least, between 2004 and April 2015, not only to Chance specifically but also to the oil and gas industry and the public at large.

[177] Yukon's obligation to disclose and produce relevant documents only extends to those documents that are in its possession, power or control. I am satisfied, and Chance does not dispute, that the following entities are not part of the Government of Yukon, that they are third parties to this litigation: the Yukon Environmental and Socio-Economic and Assessment Board ("YESAB"), the Water Board for the Yukon Territory, and the Select Committee Regarding the Risks and Benefits of Hydraulic Fracturing. As a result, Yukon does not have the obligation to seek out documents from these third parties. Nonetheless, Yukon has the obligation to disclose relevant records of communications it had, documents it received from third parties or documents it sent to third parties, including the third parties listed above, that are in its possession, power or control.

Statutory Cancellation

[178] Pursuant to s. 28 of the *Act*, the Minister has the power to cancel an oil and gas disposition (permit) if the Minister is of the opinion that any or any further exploration for or development of the oil and gas in a location is not in the public interest. Chance alleges that the Moratorium amounts to a cancellation of its permits under the *Act*. Chance contends that, as a result, it is entitled to financial compensation in accordance with s. 58 of the *Oil and Gas Disposition Regulation*.

[179] Under this cause of action, it is not the validity of the Moratorium that is challenged but its impact or effect on Chance's permits and its oil and gas operations pursuant to its permits, i.e. whether the Moratorium amounts to a cancellation under the *Act.* I note that the term cancellation or "to cancel" is not defined under the *Act* or the *Regulation*.

[180] Yukon denies that the Moratorium amounts to a cancellation. Consequently, Yukon admits that it has never issued a notice to Chance of its intention to cancel Chance's permits pursuant to s. 28 of the *Act*.

[181] Apart from stating the obvious, i.e. that the Moratorium prohibits Chance from using hydraulic fracturing in relation to any of its oil and gas permits or activities in the Eagle Plain Basin, there is no agreement or admissions regarding the extent of the impact or effects of the Moratorium on Chance's permits or oil and gas activities under its permits.

[182] In addition, Yukon denies that Chance has met its obligations in relation to its permits. Yukon pleads that Chance has neglected to pay approximately $2,000,000 in rentals due under its permits. Also, Yukon denies that it has never notified Chance that it was in breach of a term or a condition of its permits. Yukon's position is that it did notify Chance that rental payment was required and overdue.

[183] Yukon admits that Chance has requested tenure extensions for the majority of its permits and that Yukon has granted or denied the tenure extensions as set out in Chance's AFSOC and Notice to Admit.

[184] Yukon also admits that Chance applied for refunds under the applicable regulations, and was paid refunds, subject to certain conditions, as provided for under the regulations.

[185] Yukon admits the amount Chance has paid in rent to Yukon in relation to its permits.

[186] Yukon admits the amounts Chance has paid in work deposits on its permits. It also admits that it has partially reimbursed Chance's work deposits after the Moratorium. However, Yukon does not admit that Chance requested the reimbursement of its work deposits on the basis that the Moratorium prevented it from pursuing unconventional resources. In addition, Yukon denies that it granted tenure extensions and partially reimbursed Chance's work deposits in recognition that the Moratorium stripped Chance of its sub-surface rights to oil and gas pursuant to its permits.

[187] Also, Yukon does not admit the amounts claimed by Chance for expenses relating to the other heads of compensation provided under s. 58 of the *Regulation*. So far, Yukon has not requested any particulars regarding the amounts claimed by Chance under those heads of compensation.

[188] Therefore, the impact or effects of the Moratorium on Chance's permits and oil and gas activities in the Eagle Plain Basin, pursuant to its permits, and whether the Moratorium amounts to a cancellation under the *Act* are matters in issue between the parties.

[189] Again, while it is not for the Court to craft a complete list of matters in issue that delineates the parties' obligations to disclose and produce documents, I am also of the

view that whether Chance is entitled to compensation and, if so, what amount, are also matters in issue in this case.

[190] As a result, any documents that are not privileged and that relate to these above-mentioned matters in issue are producible. They include, but are not limited to, records containing information regarding:

a) the scope of Chance's rights under its permits, including the permits themselves;

b) the impact or effects, (or anticipated impact or effects) of the Moratorium or anticipated Moratorium on Chance's rights under its permits and its operations in the Eagle Plain Basin pursuant to those permits;

c) Yukon's view of whether or not the Moratorium amounts to a cancellation of Chance's permits;

d) recognized use of hydraulic fracturing in oil and gas exploitation including whether it is required in certain circumstances;

e) financial compensation payable or potentially payable by Yukon to Chance if the Moratorium were to constitute a cancellation; and

f) rentals paid by Chance on its permits and rentals due by Chance to Yukon on its permits;

[191] Yukon contends that, based on the scope of its admissions regarding the refunds it issued to Chance under the regulatory framework, there is no facts in dispute regarding those refunds. Yukon submits that, as a result of its admissions, the only matter in issue is whether the fact that Yukon paid Chance constitutes, as a matter of law, an admission by Yukon that the Moratorium constitutes a cancellation under the

Act and that Chance is entitled to compensation provided by the legislation. Yukon contends that, as there are no material facts in dispute, there is no requirement for any further production related to the refunds.

[192] While I agree with Yukon that the amounts of the refunds themselves are not in issue, I disagree with Yukon's narrow position that there is no requirement for any further production relating to those refunds. While documents relating to Yukon's, Chance's, or a third party's views regarding those refunds or reasons behind the refunds may not be binding or determinative of the issue of whether the Moratorium constitutes a cancellation under the *Act* or whether compensation is payable under s. 58 of the *Regulation*, one could reasonably expect those documents to contain information that may, not must, assist Chance or Yukon either to advance their own case regarding the issue of cancellation or compensation, or to damage the case of the other party. The same can be said about the exchanges that Chance and Yukon had about those refunds and the specific timing of these exchanges and refunds, even though Yukon admitted that the refunds were issued after the Moratorium.

[193] Therefore, documents relating to Yukon's, Chance's, or a third party's expressed views (in possession or control of Yukon) of whether the Moratorium constitutes or not a cancellation of Chance's permits, or views regarding the impact of the Moratorium on Chance's rights under its permits or its oil and gas operations are subject to production, subject to privilege, under the *Rules of Court*.

[194] I now turn to the process that Yukon followed with respect to its collection of documents.

Yukon's collection of documents

[195] Yukon contracted an outside consulting firm to assist with the e-discovery aspect of its collection of documents. Yukon identified seven of its employees as holders of potentially relevant records in this case (custodians). From there, Yukon collected 739,104 records that its custodians identified as potentially relevant. Duplicates were removed to bring the number down to 628,186 documents. The application of a list of 33 keywords reduced the number of documents to 86,993. That number was further reduced to 53,922 documents by using continuous active learning software. The continuous active learning technique was again used to identify the most likely relevant records. Through that process, approximately 16,000 documents were identified. Those documents were manually reviewed for relevance by a team of lawyers based on the following issue list:

a) Did Chance intend to explore for unconventional oil and gas resources only, or were conventional resources part of its exploration program?

b) Did Yukon make any representations to Chance before April 2015 on whether or not Chance would be able to use hydraulic fracturing to develop oil and gas resources?

c) What was the nature of CNOOC involvement or investment in Chance's business?

d) Presentations by Chance, Yukon, or CNOOC at the June 30, 2011 meeting.

e) Whether or not hydraulic fracturing is required to explore for or extract conventional oil and gas resources in Eagle Plain Basin.

f) Whether or not the four wells drilled were targeted at exploring for conventional or unconventional resources?

g) Did Yukon extend Permits 0005-0011, 0012-0017, and 0020 because the fracking Moratorium stripped Chance of its subsurface rights?

h) Was Chance ever in breach of any of the terms of its permits?

[196] Based on that issue list, the team of lawyers identified 3,975 documents. Those documents were then reviewed by counsel for Yukon who identified 445 relevant records. Ten of those records were withheld fully from production on the basis of privilege. Twenty documents were partially redacted on the basis of privilege.

[197] Chance does not take issue with the general e-discovery process followed by Yukon. However, Chance submits that Yukon's process was defective and resulted in underproduction because: it failed to identify as custodians a number of individuals with relevant records; the list of keywords or search terms that Yukon used to search its records is deficient; and fails to include variations of important terms. Chance submits that the short list of questions (eight in total) that Yukon used for its manual review significantly narrowed some of the issues raised in the pleadings and excluded others. Finally, Chance submits that there are a number of relevant categories of documents that are missing from Yukon's collection of documents.

[198] Yukon submits that it followed a thorough document collection process and that it put a lot of efforts into its collection and identification of relevant documents. Yukon submits that the number of documents it identified as relevant demonstrate that Yukon ensured the documents it produced are relevant to a matter at issue between the parties rather than simply producing a document because it contains a keyword.

Identification of custodians

[199] Chance appears to misapprehend the notion of custodians that Yukon applied to its document collection.

[200] The persons who have been identified as “custodians” by Yukon are those individuals who currently, or at the time of the document collection, hold Government of Yukon’s records, including the records of former employees. Former government employees or officials are no longer custodians of government records. Also, Government of Yukon employees who have been involved in this matter and have since moved to another position are no longer custodians of relevant government records. Their successors in office or position take over as custodians of those government records.

[201] In addition, Yukon ensured that relevant records that may have been created or received by previous members of the Executive Council (former Premiers and Ministers) were included in its collection of documents.

[202] Finally, a number of individuals identified by Chance as custodians were not Government of Yukon’s officials or employees when they may have created or received relevant documents. As a result, they were not or are not holders of the Government of Yukon’s records.

[203] As for the other individuals listed by Chance, I am satisfied that their relevant records are held by the persons appearing on Yukon’s list.

[204] Accordingly, I am satisfied that Yukon’s list of custodians is appropriate and need not be expanded.

List of search terms (keywords)

[205] Chance submits that Yukon's list of 33 keywords is incomplete either because whole terms are missing or because certain variants are not included. Chance submits that Yukon used a list of search terms that was too narrow and that resulted in the exclusion of several relevant documents. Chance submits that Yukon should search back through its documents based upon the longer list of keywords and variants it submitted.

[206] Yukon submits that Chance's keyword list is unnecessarily long because it focuses on words instead of issues. Yukon submits that it created its lists based on matters in issue rather than records that simply contained keywords appearing in the pleadings. Yukon submits that it went through the Statement of Claim and the Statement of Defence to identify the matters that are in dispute between the parties and crafted its list of issues on that basis. Yukon submits that its list contains enough keywords to identify relevant documents in this case even if it does not include variants of some of the terms already appearing on its list.

[207] After having reviewed both lists provided by the parties, I am concerned that Yukon's list of keywords does not include the word "shale" and variations of certain words, such as the name of Chance's permits and of Chance's wells. If a word is relevant enough to identify as a keyword, known and used variations of that word should also be included in that list.

[208] However, I find that Chance has not provided sufficient information to justify including the names of several of CNOOC representatives in the list of keywords

considering it has decided to withdraw its claim of unlawful interference with economic interests.

List of issues used by Yukon for its relevance manual review

[209] Yukon stated that it crafted its issues list by comparing Chance's Statement of Claim with Yukon's Statement of Defence to identify the matters at issue between the parties in this case.

[210] However, as previously explained, I am of the view that Yukon's approach to the matters at issue between the parties is too narrow at the document discovery stage of the proceeding. After reviewing the list of issues identified by Yukon, and as stated earlier when reviewing the matters in issue between the parties regarding the two causes of action that are not subject to Yukon's appeal. I am of the view that Yukon's list is not sufficiently comprehensive to ensure that Yukon identified every document that, not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may--not which must--either directly or indirectly enable the party requiring the affidavit either to advance their own case or to damage the case of their adversary.

[211] Therefore, I am of the view, that Yukon's list of issues is not sufficiently comprehensive to allow Yukon to meet its document production obligations under the *Rules of Court*.

Conclusion

[212] As a result of the deficiencies I identified in Yukon's document discovery, I am of the view that Yukon shall prepare and provide a further and better affidavit of documents.

[213] I come to this conclusion after having also considered the principle of proportionality in this case. Yukon will undoubtedly incur significant expenses as a result of my decision, which involves that Yukon reviews its disclosure and production of documents based on a broad relevance test (possible relevance) and, consequently, applies a broader list of issues and keywords to the documents it initially collected (628,186 documents after removing duplicates). However, I am satisfied that the steps I am requiring Yukon to go back to are proportionate to the relevance of the records that are missing from Yukon's disclosure and production of documents, the significant amounts at stake in this case as well as the long timeframe and factual matrix involved in this case.

[214] Again, I invite counsel to discuss and agree on a list of issues and keywords that should be applied to Yukon's electronic and manual document review after a final determination is made on Yukon's application to strike.

[215] As previously stated, in case of disagreement, the parties may request a case management conference to discuss the list of issues and keywords to be applied to Yukon's review of documents as well as the relevant categories of records that shall be included in Yukon's affidavit of documents that take into consideration my findings in order to resolve the issue.

[216] However, Yukon shall not be compelled to review its disclosure and production of documents, and to provide a further and better affidavit of documents prior to a final determination being made on its application to strike, as I am of the view that it would be counterproductive to do so.

ii) Are two documents produced by Yukon (a chain of emails and a Timeline) subject to litigation privilege? If so, does Yukon's waiver of privilege over these two documents constitute an implied waiver of privilege over a number of other documents over which Yukon has asserted privilege and possibly others?

Overview

[217] As part of its production of documents, Yukon disclosed to Chance a chain of emails exchanged between territorial public servants from April 12 to 21, 2017, as well as its attachment, a Timeline that refers to specific events related to Chance's oil and gas operations in Yukon. Chance is of the view that these two documents are subject to litigation privilege and that Yukon has waived privilege by producing them. Chance seeks an order compelling Yukon to disclose and produce various other records related to these two documents based on Yukon's alleged implied waiver of litigation privilege.

[218] Based on the content and timing of the chain of emails and Timeline produced by Yukon, I find that the two documents are subject to litigation privilege because they were created for the dominant purpose of litigation. In addition, I am of the view that by producing these two documents to Chance, Yukon has implicitly waived litigation privilege it may otherwise have been entitled to claim over the following records that pre-date a meeting scheduled for April 21, 2017, referred to in the chain of emails at issue, and Yukon shall disclose them to Chance:

a) all source documents used or consulted or prepared to create the Timeline;

b) all source documents used or consulted or prepared to compile the information that appears in the chain of emails regarding Chance's wells;

c) all draft(s) or version(s) of the Timeline; and

d) all records of communications and discussions regarding the preparation of the Timeline and summary of data regarding Chance's oil and gas wells referred to in the chain of emails at issue.

[219] However, I am not satisfied that the implied waiver extends to records made contemporaneously or that postdate the scheduled April 21, 2017 meeting mentioned in the chain of emails (including records of that meeting), because no agenda, notes or records of discussion of that meeting were disclosed by Yukon. Nonetheless, I find that Yukon shall disclose to Chance all records that relate to discussions and communications regarding the Timeline or further versions of the Timeline that are not subject to privilege as they meet the possible relevance test provided by the Rules.

[220] In light of my finding regarding the scope of Yukon's implied waiver, I am satisfied that two of the documents listed by Chance, over which Yukon has asserted privilege, should be reviewed by me to determine whether the implied waiver applies to them.

Chance's Position

[221] Chance submits that Yukon has selectively waived litigation privilege over two relevant documents (an exchange of emails between public servants and attached Timeline) to which litigation privilege clearly applies while asserting litigation privilege over others that are related to the ones it produced.

[222] Chance submits that Yukon did not provide any explanation for its selective waiver of privilege. Chance submits that Yukon's selective approach to its claims of privilege is potentially misleading.

[223] Chance submits that the type of selective approach taken by Yukon has been recognized by the courts as prejudicial because parties to an action may seek to waive privilege over favourable records while claiming privilege over those that damage their case. Accordingly, Chance submits that Yukon should be deemed to have implicitly waived privilege over all documents that relate to the same subject matter(s) as the two it produced and on the individuals included in the chain of emails.

Yukon's Position

[224] Yukon submits that this is not a case of implied waiver of privilege because the two documents that Chance relies on in support of its position are not subject to litigation privilege.

[225] Yukon submits that Chance has not established that the two documents were created for the dominant purpose of litigation as required by the case law. According to Yukon, even Chance acknowledges that the documents at issue do not meet the dominant purpose test because it argued and concluded in its written submissions that the timeline "appears to have been created, at least to some degree, for the purposes of this litigation". In addition, Yukon points out that Chance added in its written submissions that both documents at issue "…were created, to some extent, in response to and for the purposes of litigation".

[226] Yukon submits that it is clear on the face of the documents that they were not created for the dominant purpose of litigation. Yukon submits that while the documents were created after Chance filed its action against Yukon, there is no strategy discussed, no counsel involved in the exchange of emails, and no indication that the information is

to be transmitted to counsel as part of a plan going forward. According to Yukon, those documents simply show public servants organizing information for public servants.

[227] In the alternative, Yukon submits that there is no risk of misleading the Court by producing and putting these two documents into the record and not others that Chance seeks to have produced. Yukon submits that the documents it produced contain uncontested facts about drilling and permits amongst other things. Yukon adds that the information contained in the two documents can all be verified in the documents (well licences and drilling reports) Chance produced. In addition, Yukon submits that Chance has not shown a connection between the two documents at issue and the specific privileged documents it seeks to access.

Analysis

[228] The first question to answer is whether the chain of emails and the Timeline are subject to litigation privilege.

[229] Litigation privilege has been comprehensively described in the *Law of Privilege in Canada*, Aurora, Ont.: Canada Law Book, 2006 (loose-leaf updated May 2021, release 2021-3) at 12-3 as follows:

> Litigation privilege, also called work product privilege, applies to communications between a lawyer and third parties or a client and third parties, or to communications generated by the lawyer or client for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing. …

[230] In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at 330, Fish J. explained that the object of litigation privilege is:

> … to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be

> left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[231] The two records at issue are: (i) an exchange of emails between territorial public servants that occurred between April 12, 2017, and April 21, 2017, and (ii) an attached Timeline entitled “Northern Cross Yukon Ltd. Timeline of Events”.

[232] The exchange of emails starts by an invitation, sent on behalf of John Fox, the Assistant Deputy Minister, Oil, Gas and Mineral Resources, to reschedule a meeting set for April 12, 2017 to April 21, 2017. The email, entitled “Northern Cross Yukon”, was sent less than a week after Chance filed its originating Statement of Claim in this action. I note that the last event recoded on the Timeline is the filing of Chance’s action on April 6, 2017. A number of public servants, but no counsel, were invited to that meeting.

[233] The content of the following emails and Timeline reveals that the newly filed action prompted public servants to gather information to create a Timeline regarding a number of events, communications or decisions that are directly related to the issues raised by Chance in its Statement of Claim.

[234] As for the Timeline, it specifically focuses on and summarizes a number of events involving Chance’s (Northern Cross Yukon Ltd. at the time) oil and gas operations in the territory, starting in 1994 (when it acquired the majority interest in a number of Special Discovery Licences in Yukon) and ending in 2017 (when Chance filed its lawsuit against Yukon). In addition, the timeline specifically mentions and summarizes a few statements from one of Chance’s representatives and meetings between Yukon and Chance where conventional and unconventional resources, shale gas potential and possible development, fracking, permit groupings, and permit

renewals, among others, were mentioned or discussed. The Timeline also contains references to specific dates involving the Committee and YESAB recommendations. In addition, the Timeline includes references to specific dates regarding the history of hydraulic fracturing starting in the 1940s. Finally, the Timeline tracts the evolution of oil and gas prices between 2000 and 2017.

[235] There is no evidence that litigation counsel were involved in the preparation of the Timeline as no counsel were included in the chain of emails disclosed by Yukon and there is no reference that the collected information was requested by counsel or prepared for counsel. In addition, the documents do not contain or refer to any discussion about litigation strategy.

[236] However, the fact that counsel were not included in the exchange of emails or referred to in those emails is not determinative as litigation privilege may arise even in the absence of the involvement of counsel. Instead, the first question to answer is whether the exchange of emails occurred and if the Timeline was prepared for the dominant purpose of litigation. Based on the timing and content of the emails and the Timeline, I am of the view that the answer to that question is yes.

[237] I note that one of the emails of the chain of emails contains a specific request for "any other information that indicates NYC [as written] was evaluating both conventional and unconventional reservoirs". The nature of that request reveals that Yukon was interested in information that supported a certain narrative with respect to the action. Also, it is clear that the gathering and organizing of information was prompted by the lawsuit Chance had just filed against Yukon.

[238] It is difficult to imagine that it is by pure coincidence that the Assistant Deputy Minister of Oil, Gas and Mineral Resources requested that public servants compile information referring to and addressing issues specifically raised by Chance in its action a week or two after Chance filed its Statement of Claim; and that he did so for a purpose other than informing Yukon's position, or response, to the litigation recently initiated by Chance. On their face, the two documents were prepared for the dominant purpose of litigation and are subject to litigation privilege. As a result, by deciding to disclose and produce these two documents to Chance, Yukon has waived litigation privilege over them and their content.

[239] The question that follows is whether Yukon's waiver of privilege over these two documents constitutes a waiver by implication over a number of other documents over which Yukon has claimed litigation privilege and possibly others that have not been disclosed.

[240] In *Cromb v Bouwmeester*, 2014 ONSC 5318 ("*Cromb*") at para. 48, Chappel J. reviewed the manners in which privilege may be waived:

> … Waiver of litigation privilege may be express, inadvertent or implied. An express waiver occurs where the party claiming the privilege knows of the existence of the privilege and voluntary evinces an intention to waive that privilege. Waiver by implication may arise if fairness and consistency require that the litigation privilege be set aside having regard for the disclosure that the party claiming the privilege has already made (*S. and K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd*., [1983] 4 W.W.R. 762 (B.C.S.C.))

[241] Chappel J. summarized circumstances in which courts have order the disclosure of privileged documents on the basis of implied waiver:

> [49] The courts have in a number of cases resorted to the doctrine of waiver by implication to order production of

> complete documents where there is concern that a party's partial disclosure of the documents could create a misleading picture of the overall evidence, the weight that should be given to the information that has been disclosed or the context surrounding that information. (*Canada v. Chapelstone Developments Inc.* (2004), 191 C.C.C. (3d) 152 (N.B.C.A.); leave to appeal refused (2005), 195 C.C.C. (3d) (note) (S.C.C.)).

[242] In addition, the doctrine of implied waiver: "has been extended to lift privilege respecting other completely separate documents if they relate to the same general subject matter and selective disclosure mislead the other party or the court" (*Cromb* at para. 51).

[243] Chance's application is twofold. First, it seeks disclosure of categories of documents that may or may not be subject to privilege, such as source documents for the Timeline which appear to be missing from Yukon's production of documents. Second, it seeks disclosure of a number of documents listed in Yukon's affidavit of documents that Yukon has refused to produce on the basis of privilege.

[244] Yukon, rightly so, concluded that the chain of emails and the Timeline constitute relevant records that have to be listed in its affidavit of documents.

[245] The chain of emails and Timeline reveal that Yukon collected information it was interested in. Yukon processed the information, summarized it and organized it in a Timeline. The chain of emails also contains a summary of information Yukon collected with respect to Chance's wells.

[246] Whether the chain of emails and the Timeline are subject to privilege or not, once Yukon decided to produce them, it also had the obligation to produce the records it consulted, collected, summarized and referred to in order to prepare the Timeline and the summary of Chance's wells data that appears in the chain of emails, as the source

documents are as relevant as the finish product. In addition, Chance is entitled to see whether Yukon correctly summarized or interpreted the source information it relied on.

[247] I am also of the view that other versions of the Timeline, if there are any, pre-dating the meeting scheduled for April 21, 2017, are relevant and shall be disclosed as they may inform the interpretation of the Timeline that was produced.

[248] In addition, I find that it would be misleading to allow Yukon to produce the last chain of emails containing the wells data and the Timeline without the prior or contemporaneous internal exchanges of its employees about that information or documents. These emails may inform the interpretation of the information contained in the Timeline or lead to other relevant information Yukon chose not to include in the Timeline. The same can be said about the summary of Chance's wells data contained in the chain of emails produced by Yukon.

[249] However, it does not appear that Yukon has produced any agenda or record of discussions for the scheduled April 21, 2017 meeting, or later exchanges regarding the Timeline and the wells data. Considering that the Timeline and the chain of emails refer to already existing information, I am unable to conclude that, it would be misleading to permit Yukon to assert privilege, if applicable, on exchanges or communications regarding the Timeline and the wells data that took place during or after the meeting scheduled for April 21, 2017. Nonetheless, as those records are relevant, they shall be listed in Yukon's affidavit of documents and produced, if privilege is not asserted.

[250] Finally, I am of the view that two of the records listed by Chance that pre-date the April 21, 2017 meeting, and over which Yukon has asserted privilege, are sufficiently connected in time and subject matter with the Timeline and the chain of emails to

warrant that I review them to determine whether Yukon's implied waiver extend to them. They are: GOY00000438, a document created by Tiffany Fraser entitled "Northern Cross Unconventional Interest Dates", dated February 21, 2017; and GOY00000439, a document created by Tiffani Fraser and entitled "NC Unconventional Interest Summary Fraser", dated February 21, 2017. These two documents should be provided to me for my review within 60 days of this decision or an other period of time that may be discussed in case management, if requested.

[251] As for GOY0000300, a document created by Sharon LeGoffe entitled "2016-11-22 NCY unconventional chronology of meetings.docx", upon reviewing the copy of Yukon's affidavit of documents included in the Joint Application Record, I note that it has already been identified as "Not privileged" by Yukon. Consequently, it would already have been fully produced to Chance.

(iii) Are First Nations confidential communications with Yukon pursuant to s. 14 of the *Oil and Gas Act* protected from disclosure under the common law case-by-case privilege?

Overview

[252] As part of its document production, Yukon redacted certain documents on the basis that they contain confidential communications from First Nations it consulted pursuant to s. 14 of the *Act*. Yukon later claimed that these communications are protected from disclosure on the basis of case-by-case privilege.

[253] Chance disputes Yukon's claim of privilege over these communications. It submits that the information Yukon seeks to withhold from disclosure is not protected by any privilege and that Yukon should be compelled to disclose to Chance an unredacted

copy of all the documents or portions of documents over which Yukon claims case-by-case privilege.

[254] The communications over which Yukon has asserted privilege meet the first three criteria of the *Wigmore* test for case-by-case privilege. The records of these communications shall be provided to me for my review, but only after a final determination is made on Yukon's application to strike, in order to determine whether they also meet the fourth and final *Wigmore* criterion and are protected from disclosure on the basis of case-by-case privilege in this proceeding.

Chance's Position

[255] Chance submits that Rule 25(4) only permits a party to withhold privileged information from disclosure. It does not permit to withhold confidential information. Chance submits that s. 14 of the *Act* does not state that consultations with Yukon First Nations are privileged; it states that they are confidential.

[256] Chance submits that confidentiality and privilege are two different concepts, and that confidentiality alone is not sufficient to amount to privilege. Chance submits that if the Yukon Legislative Assembly had wanted to protect Yukon's consultations with First Nations under s. 14 of the *Act* from disclosure in court proceedings, it would have specifically stated so. Chance submits that another way the Legislative Assembly could have protected s. 14 consultations from disclosure would have been to provide for a government objection procedure based on confidentiality in court proceedings. However, it did neither.

[257] Chance further submits that the deemed undertaking rule provides sufficient protection to ensure that confidential information disclosed in the context of a court

proceeding is not used for any purposes other than those of the proceeding in which it was obtained. Also, Chance submits that if further protection is required, Yukon may apply for a sealing order to protect the confidential information at issue from disclosure to the public.

[258] In addition, Chance submits that Yukon has not met its burden to demonstrate that the information it seeks to withhold from disclosure meets the *Wigmore* test for case-by-case privilege.

[259] Chance submits that s. 14 consultations are part of a regulatory framework that is distinct from negotiations over treaty rights. Chance further submits that the only evidence Yukon provided regarding the expectations of confidentiality of the First Nations involved in the consultation process constitutes inadmissible hearsay.

[260] Chance submits that it is entitled to disclosure of the redacted information because it appears to be relevant to determining the influence and factors that led Yukon to implement the Moratorium, which is central to its case against Yukon. In addition, Chance submits that Yukon would necessarily have had to consult with Yukon First Nations regarding Chance's oil and gas permits in the Eagle Plain Basin, and that records of these consultations are necessarily relevant. Given that the regulatory process and how it played out is a key issue in this case, Chance submits that the benefit of producing the records outweighs any interest in withholding them.

Yukon's Position

[261] Yukon accepts the general proposition that confidentiality does not necessarily amount to privilege. However, Yukon submits that it properly withheld disclosure of communications that relate to the views expressed by First Nations it consulted

pursuant to s. 14 of the *Act* regarding Chance's oil and gas exploratory permits based on case-by-case privilege. Yukon states that it did not redact what it said or communicated during these consultations. It only redacted the content of the First Nations' communications to Yukon.

[262] Yukon states that not all of its consultations with First Nations are conducted under the promise of confidentiality. However, Yukon submits that the wording of s. 14 confirms the Legislative Assembly's intent that consultations with Yukon First Nations under that section are to be held on a confidential basis. Yukon submits that s. 14 creates an expectation of confidentiality and that Yukon's consultations were held under a promise of confidentiality.

[263] Yukon submits that s. 14 was only added to the *Act* in 2015 and that there has been limited time to make consequential amendments to the Yukon *Evidence Act*, RSY 2002, c. 78, that would have addressed the issue of privilege over these communications.

[264] Yukon states that s. 14 only applies to consultations with Yukon First Nations. However, it acknowledges that some of the consultations it redacted occurred with Non-Yukon First Nations. Yukon submits that consultations with Non-Yukon First Nations were held in tandem and on the same basis as its consultations with Yukon First Nations, and that Non-Yukon First Nations expected the same level of confidentiality.

[265] In addition, Yukon submits that s. 14 conveys the Legislative Assembly's view that confidentiality is essential to the maintenance of Yukon's relationship with Yukon First Nations.

[266] Yukon acknowledges that the affidavit evidence it filed in support of its position contains hearsay. However, Yukon submits that, even if the hearsay evidence it relies on were to be given less weight than if it came directly from a First Nations' representative, when coupled with the wording of s. 14, it clearly meets the first part of the *Wigmore* test that the communications were made under the assurance that they would be kept in confidence.

[267] Yukon submits that the government's obligation to consult Yukon First Nations not only has a statutory dimension but a constitutional one. Yukon submits that the constitutional dimension of the consultation process underlines the importance of the relationship between Yukon and Yukon First Nations, a relationship that ought to be fostered. Yukon submits that I can take judicial notice that Yukon, as the territorial government, must consult with First Nations on an ongoing basis. Yukon submits that, as it has an ongoing relationship with First Nations governments, it is important that when confidentiality is promised or required, First Nations are able to trust that it will be maintained.

[268] Yukon submits that there are few relationships that can be said to be of greater importance to Yukon and other provincial, territorial or federal governments than their relationship with First Nations.

[269] In addition, Yukon submits that all the communications it redacted postdate its decision to impose a Moratorium. As a result, Yukon submits that, considering the marginal utility of any of the redacted information in this proceeding, the balance weighs heavily in favour of non-disclosure.

[270] Finally, Yukon submits that a sealing order would not prevent disclosure of the communications to Chance. According to Yukon, Chance continues to operate in the north; it continues to engage with the First Nations who participated in the consultation process; and Chance has concluded benefits agreements with these First Nations. In that context, Yukon submits that it is important to protect the confidentiality it promised to First Nations in order to allow them to speak freely about corporations, including Chance, who operate on land that is wholly or partly in their traditional territories.

Analysis

[271] Section 14 of the *Act* provides that:

> If a proposed call for bids or proposed disposition under section 15 or a proposed permit extension under section 31.01 relates to land that is wholly or partly in the traditional territory of a Yukon First Nation, the Minister shall consult the Yukon First Nation on a confidential basis before publishing the call for bids, issuing the disposition or extending the term of the permit, as the case may be.

[272] Section 14 creates an obligation on the Minister to consult with Yukon First Nations on a confidential basis at different stages of the permitting process under the *Act* when it relates to land that is wholly or partly in the traditional territory of these First Nations.

[273] It is not disputed that Chance's permits that are at issue in this case relate to land that is wholly or partly in the traditional territory of a number of Yukon First Nations.

[274] Section 14 was amended in December 2015. However, Yukon's statutory obligation to consult Yukon First Nations with Final Agreements on a confidential basis at different times during the oil and gas permitting process existed, under certain conditions, before then (see the wording of s. 14 prior to the 2015 amendment).

Accordingly, one could presume that confidential consultations under the *Act* may also have been conducted prior the Moratorium. However, according to the affidavit evidence filed by Yukon, the confidential consultations that were identified as relevant are those that took place from 2016 to 2020 inclusively. (Yukon may have to review its conclusion in that regard in light of the broad relevance test applicable to document discovery under the *Rules of Court*.) From 2014 to 2020, Yukon conducted consultations with affected First Nations pursuant to s. 14 every time Chance requested an extension of its permits.

[275] Rule 25 provides that parties to a civil action are required to disclose all records in their possession, control or power regarding any matters in issue subject to a claim of privilege.

[276] The obligation to disclose all relevant records in civil proceedings has long been recognized by the courts. As stated by the Court of Appeal of Saskatchewan in *Saskatchewan Crop Insurance Corporation v Rick Peterson Farms Ltd*, 2019 SKCA 19 ("*Saskatchewan Crop Insurance*"):

> [19] In the context of civil litigation, there is a long-standing duty to disclose all relevant documents in a party's possession, and there is a corresponding duty to produce those documents, subject to privilege or other grounds (*Spencer v Canada (Attorney General)*, 2000 SKCA 96 at paras 13-15, [2001] 7 WWR 476) …

[277] At common law, there are two broad categories of privilege – class privilege, such as solicitor-client privilege, and case-by-case privilege. A party may also rely on privilege conferred by statute (*Saskatchewan Crop Insurance* at paras. 20 to 23).

[278] Yukon does not claim that the communications it seeks to protect from disclosure are covered by a class privilege, nor is Yukon arguing that s. 14 of the *Act* or any other

territorial legislation provides for a statutory privilege. Yukon submits that, in this case, First Nations' communications with Yukon pursuant to the consultation process provided by s. 14 are protected by case-by-case privilege.

[279] I have not found any provision in the *Act* nor was my attention directed to any territorial legislation or regulation that would prevent the application of the common law case-by-case privilege to communications deemed confidential pursuant to s. 14 of the *Act*. I am also of the view that the Legislative Assembly's choice to deem First Nations' communications under s. 14 confidential as opposed to privileged does not prevent me from determining whether all or any of the communications at issue meet the common law test for case-by-case privilege. Neither the wording of s. 14 nor of other provisions of the *Act* could lead to the conclusion that the Legislative Assembly intended to set aside the application of the common law case-by-case privilege when it deemed that Yukon's consultations with First Nations would be confidential. In addition, I do not find that the absence of a statutory procedure to oppose disclosure of s. 14 communications in court proceedings prevents Yukon from claiming privilege over those communications under the *Rules of Court*.

[280] As stated by the Court of Appeal of Saskatchewan in *Saskatchewan Crop Insurance*, at para. 23, communications over which a claim of case-by-case privilege is made "are presumptively admissible and become inadmissible only once the privilege is recognized in the particular case (*National Post* at para. 60; *Lizotte* at para. 32). Claims of case-by-case privilege are resolved in accordance with the *Wigmore* criteria, ..."

[281] The *Wigmore* criteria for case-by-case privilege are as follows:

a) The communications must originate in a *confidence* that they will not be disclosed.

> b) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between the parties.
>
> c) The *relation* must be one which, in the opinion of the community, ought to be sedulously *fostered*.
>
> d) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation. [emphasis already added] (see *R. v. Gruenke*, [1991] 3 SCR 263 at 284)

[282] Confidentiality alone is not sufficient to make a communication privileged. A communication must meet all four *Wigmore* criteria before it can be found privileged. As stated by the Court of Appeal of Ontario in *Straka v Humber River Regional Hospital* (2000), 51 OR (3d) 1 (ONCA) ("*Straka*") at para. 59:

> It has been long established that confidentiality alone, no matter how earnestly desired and clearly expressed, does not make a communication privileged from disclosure: Wigmore at 2286. Something more than confidentiality must exist and this something more must satisfy the Wigmore conditions: *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *R v Gruenke*, [1991] 3 S.C.R. 263; and Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths,1999) at pp. 723-724.

[283] However, in *Gruenke*, at page 290, Lamer C.J., as he then was, writing for the majority, stated that the *Wigmore* criteria are not

> …"carved in stone", but rather … provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court. …

[284] Also, in *M(A) v Ryan,* [1997] 1 SCR 157 at para. 18, the majority of the Supreme Court of Canada, recognized the concept of partial privilege. This concept involves a balancing of interests, which may lead a court to conclude that some communications or

documents are privileged whereas others, emanating from the same relationship, are not.

> A third preliminary issue concerns the distinction between absolute or blanket privilege, on the one hand, and partial privilege on the other. While the traditional common law categories conceived privilege as an absolute, all-or-nothing proposition, more recent jurisprudence recognizes the appropriateness in many situations of partial privilege. The degree of protection conferred by the privilege may be absolute or partial, depending on what is required to strike the proper balance between the interest in protecting the communication from disclosure and the interest in proper disposition of the litigation. Partial privilege may signify that only some of the documents in a given class must be produced. Documents should be considered individually or by sub-groups on a "case-by-case" basis.

[285] Therefore, the question I must answer is not whether the views and opinions that First Nations communicated to Yukon in the context of s. 14 consultations should always be considered privileged, but whether, on a case-by-case basis, privilege should attach to any, some or all of those specific communications Yukon seeks to withhold from disclosure in the circumstances of the case before me (*Talisman Energy Inc v Flo-Dynamics Systems Inc,* 2015 ABQB 561 ("*Talisman*") at para. 24).

[286] Also, the onus is on the party claiming case-by-case privilege, in this case Yukon, to adduce sufficient evidence to meet the four components of the *Wigmore* test (*Talisman* at paras. 31 and 32; *Saskatchewan Crop Insurance* at para. 54).

[287] In addition, while, as pointed out by Chance, the matter before me is not an Indigenous rights and treaty case, I note that the communications at issue arose in the context of Yukon's statutory and constitutional duty to consult with affected First Nations. As a result, there is "a need to apply the criteria in a manner sensitive to the

unique legal and constitutional context of the duty to consult" (*Cowichan Tribes v Canada (Attorney General*), 2020 BCSC 1507 at para. 85).

[288] I now turn to the application of the *Wigmore* criteria to the communications at issue in this case.

a) The communications must originate in confidence that they will not be disclosed

[289] Section 14 of the *Act* states that consultations held with Yukon First Nations regarding oil and gas calls for bids, dispositions or permits extensions that relate to land that is wholly or partly, in their traditional territory will be held in confidence. I note that there is nothing in the wording of s. 14 that qualifies Yukon's obligation to keep First Nations communications confidential.

[290] It is therefore reasonable to conclude, based on the wording of s. 14, that Yukon First Nations who engaged in the consultation process did so with the understanding that Yukon would keep their views and opinions confidential and not disclose them to the public in general and Chance.

[291] I note that in *Straka*, the respondent, the Humber River Regional Hospital, refused to disclose reference questionnaires and appended letters regarding the appellant (that the hospital selection committee had relied on to deny him an associate position in the Department of Anesthesia) on the basis that they were protected by case-by-case privilege. The Court of Appeal of Ontario noted that the appellant had correctly conceded that the first *Wigmore* criterion had been met based on the specific language found in the questionnaires, which stated that the comments provided "would be held in the strictest confidence" (*Straka* at para. 60).

[292] This is in contrast with the communications at issue in *Talisman*, where the court concluded that the plaintiff had not provided a sufficient evidentiary basis to substantiate its claim of case-by-case privilege regarding communications between the plaintiff and a "whistleblower", who had alerted the company of a possible situation of conflict of interests involving one of the company's management superintendent and one of its consultants. The situation led to the civil action before the court. The court found that the company's policies did not guarantee confidentiality, but instead stated that anonymity of the reporter would be maintained as permissible by law, and as requested by the reporter (*Talisman* at paras. 28-31 and 32).

[293] I recognize that *Straka* and *Talisman* involved private clauses agreed to by private parties as opposed to a statutory provision enacted by a legislature that could have deemed the communications privileged instead of confidential. However, I find these two decisions useful because in both cases the wording of the confidentiality clause played an essential part in the court's analysis in the absence of evidence from the authors of the communications regarding their expectations of confidentiality.

[294] In this case however, there is hearsay evidence regarding the expectations of confidentiality of the First Nations involved in the consultation process. The evidence comes from a Yukon representative, Derek Fraser (Director of Oil and Gas Resources for the Department of Energy Mines and Resources of Yukon since 2018, and Manager of Rights and Royalties at the Oil and Gas Resources Branch from 2014 until late 2016), who dealt directly with First Nations representatives during the consultation process. Considering the explicit wording of s.14, and Mr. Fraser's first-hand involvement in the consultation process, I am prepared to give some weight to the

hearsay contained in his affidavit referring specifically to a conversation he had with a representative of a Yukon First Nation regarding her concerns that the confidentiality of a communication sent on behalf of three Yukon First Nations under s. 14 had not been maintained by Yukon. However, Mr. Fraser was able to satisfy her that the communication in question had been kept confidential by Yukon.

[295] As a result, I am satisfied that the evidence before me is sufficient to conclude that the communications Yukon First Nations had with Yukon as part of the consultations held pursuant to s.14 originated in confidence that they would not be disclosed.

[296] However, Yukon also claims case-by-case privilege on communications it had with two affected First Nations who are not included in the list of Yukon First Nations under the Umbrella Final Agreement (Non-Yukon First Nation). Yukon states that those consultations are not covered by its statutory obligation to consult pursuant to s. 14 of the *Act*. However, Yukon recognizes that it has a constitutional obligation to consult these First Nations on any activity that may affect their aboriginal rights.

[297] I was not asked in this case to determine whether Yukon's position regarding the extent of its statutory obligation to consult pursuant to s. 14 is legally correct. Therefore, I am prepared to review Yukon's claim of privilege on the basis that its consultations with the Gwich'in Tribal Council and the Tetlit Gwich'in Band Council were not conducted pursuant to its s. 14 obligation, but pursuant to the Crown's constitutional duty to consult.

[298] The affidavit evidence reveals that Yukon's consultations with these two First Nations were conducted in tandem with its s. 14 consultations and on the same basis.

[299] In addition, Mr. Fraser states in his affidavit that, based on the discussions he had with representatives of these two First Nations, he understood that both expected the consultations to be confidential. This, again, constitutes hearsay evidence regarding the expectations of confidentiality of the authors of the communications.

[300] However, based on my previous findings regarding Mr. Fraser's knowledge and involvement in the consultation process, as well as his evidence that the consultations with the Gwich'in Tribal Council and the Tetlit Gwich'in Band Council were held in tandem and on the same basis as the s. 14 consultations, I am prepared to give some weight to the hearsay evidence professed by Yukon with respect to these two First Nations' expectations of confidentiality.

[301] As a result, I find that the evidence filed by Yukon is sufficient to establish that the communications of all the First Nations consulted by Yukon about Chance's applications to extend its oil and gas permits originated in confidence that they would not be disclosed thereby fulfilling the first *Wigmore* criterion.

b) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.

[302] I am prepared to take judicial notice of the fact that Yukon and First Nations governments have an ongoing relationship. I am also prepared to accept that not all of Yukon's consultations with First Nations are conducted on a confidential basis. Again, I am mindful of the constitutional dimension of the consultation process held by Yukon with First Nations that led to the communications at issue.

[303] In that context, when confidentiality is promised, it should be kept, as much as legally permissible, in order to maintain trust and ensure openness between the parties on an ongoing basis.

[304] This, in my view, is sufficient to meet the second *Wigmore* criterion.

c) The relation must be one which, in the opinion of the community, ought to be sedulously fostered

[305] There is no doubt that the relationship between Yukon and First Nations is of great importance and that it ought to be encouraged and protected.

[306] Meaningful and good faith consultations between the Crown, in this case Yukon, and First Nations is one of the means of furthering reconciliation, and a much preferable route than litigation as it relates to use of land that is wholly or partly in the traditional territory of a First Nation in Yukon (*Cowichan Tribes* at para. 91).

[307] As a result, I find that the third *Wigmore* criterion is met.

d) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation

[308] As stated by the Court of Appeal of Saskatchewan in *Saskatchewan Crop Insurance* at para. 55: “When considering the fourth criterion, a court will “weigh up the evidence on both sides (supplemented by judicial notice, common sense, good judgement…)” (*National Post* at para 64), in order to “balance one alternative against the other” (*Ryan* at para. 32) … ”.

[309] I agree that, on the one hand, there is a strong public interest in ensuring that meaningful, frank and honest consultations continue to take place between Yukon and First Nations regarding oil and gas permitting activities on land that is partly or wholly in their traditional territory.

[310] In addition, the existence of a statutory promise of confidentiality strongly support non-production (*Saskatchewan Crop Insurance* at para. 59).

[311] I note that the communications at issue took place after Yukon imposed the Moratorium in 2015. Also, the communications relate to views and opinions expressed by third parties in the context of consultations that were prompted by Chance's applications to extend its oil and gas permits in the Eagle Plain Basin, not its intent to pursue hydraulic fracturing, if permitted. Therefore, it is unclear whether the probative value of the communications at issue outweighs the strong public interest that favours non-disclosure.

[312] On the other hand, I must also ensure that I have all the information that is required to determine whether disclosure is necessary to ensure a fair trial.

[313] As a result, I conclude that I have to review the records of the communications over which Yukon has asserted case-by-case privilege in order to fully balance the competing interests at play under the fourth criterion. However, as the relevance and value of the communications at issue will depend on all of Chance's causes of action and Yukon's defence to those causes of action, I find that it would be premature to undertake to review the communications at this stage of the proceeding considering Yukon's appeal of my decision on its application to strike a number of Chance's causes of action. The review should take place after a final determination on Yukon's application to strike has been made. The timing of the transmission of the documents for my review may be discussed further in case management after the Court of Appeal's decision.

[314] I now turn to Yukon's application.

3. Is Chance's affidavit of documents defective?

i) Has Chance overproduced? If so, should Chance's affidavit of documents be struck and Chance compelled to provide a more limited affidavit of documents?

Overview

[315] Yukon's application to strike Chance's affidavit of documents is essentially based on a narrower view of the test applicable to document discovery between parties to an action from the one provided by Rule 25(3) and an overly broad view of the scope of its own admissions. In that context, the large number of documents produced by Chance is not in itself evidence of overproduction considering Chance's claims, the factual matrix underlying its claims and the amounts at stake. As a result, Yukon's application to strike Chance's affidavit of documents and have Chance redo its production based on a list of issues that does not include all matters in issue in this case is dismissed.

[316] However, I find that Yukon has demonstrated - with supporting examples - that Chance's affidavit of documents does contain an unacceptable number of clearly irrelevant documents. As a result, Chance shall conduct a meaningful manual review of the approximately 34,000 documents it has already produced in order to remove, as much as is reasonable, clearly irrelevant documents from its production. In doing so, Chance shall ensure that its production contains documents that can reasonably be said to relate to the matters in issue in this case. The cost and burden of performing a meaningful manual relevance review of the documents Chance has already produced is not disproportionate.

Yukon's Position

[317] Yukon seeks an order striking Chance's affidavit of documents. It also seeks an order directing Chance to confine its production to records relating to the following issues, which, Yukon submits, are the only matters at issue in this case:

a) The nature of CNOOC's investment in Chance

b) If Chance presented a plan to Yukon on June 30, 2011, to focus on evaluating unconventional resources based on CNOOC's objectives;

c) If Yukon stated or represented that Chance enjoyed a profit-à-prendre, or had rights to produce oil and gas;

d) If wells are drilled to a depth of 3,5000 metres for the purpose of identifying unconventional resources only, and if Yukon knew this;

e) If the position and sequencing of wells drilled by Chance were clearly and obviously directed at unconventional resources only;

f) If Yukon extended tenure on Permits 0005-0011, 0012, 0017, and 0020 because it recognized that the Moratorium stripped Chance of its subsurface rights.

g) If Yukon made oral or written representations to Chance that its dispositions gave Chance rights to oil and gas, or that hydraulic fracturing would be permitted;

h) If Chance relied on any representations or regulatory framework in expending $140 million exploring for unconventional resources;

i) If it was necessary for Chance to use hydraulic fracturing to exercise the rights granted to it, and if Yukon knew this;

j) The quantum of Chance's reliance damages;

k) If the Moratorium impaired Chance's ability to meaningfully exercise its rights, and if Yukon knew this; and

l) The quantum of Chance's damages.

[318] Yukon submits that Chance has failed to meet its document discovery obligations under the *Rules of Court* by overproducing irrelevant documents.

[319] Yukon submits that Chance's overproduction is the result of Chance applying an unconstrained and overly broad test to its document production and of Chance's lack of meaningful manual review.

[320] Yukon submits that Chance has failed to confine its production to records that are relevant to matters that are actually in issue in this case and has therefore failed to meet its document discovery obligations under the *Rules of Court*. Yukon submits that the factual matrix and the legal issues raised in this case are not complex and the total number of documents produced by Chance is evidence that Chance has failed to conduct a proper relevance review. This even after Chance agreed to conduct a proper manual review.

[321] In addition, Yukon submits that Chance's document discovery obligations under the *Rules of Court* include an obligation to conduct an effective manual review of its records to determine which ones could reasonably be viewed as relating to a matter in issue.

[322] Yukon submits that a cursory examination of Chance's affidavit of documents reveals a large number of records that contain information that is obviously entirely immaterial and irrelevant.

[323] Yukon submits that it is not challenging the process followed by Chance to identify, collect and produce its documents; it is challenging the product.

[324] Yukon submits that overproduction of irrelevant documents is just as damaging to the litigation process as underproduction. Yukon further submits that overproduction offends the principle of proportionality found in Rule 1(6) of the *Rules of Court*.

[325] Yukon submits that it is Chance's responsibility to remove its irrelevant documents from its affidavit of documents not Yukon's responsibility. Yukon further submits that the principle of proportionality requires that Chance puts the requisite efforts in its production as the cost and burden of conducting a close review does not justify overproduction. Yukon further submits that Chance has not provided any evidence that the cost and burden of conducting a closer manual review justifies its overproduction of irrelevant documents.

[326] Yukon submits Chance's sizeable overproduction requires an order striking Chance's affidavit of document as it clearly fails to comply with the *Rules of Court*.

[327] Finally, Yukon submits that Chance should be ordered to redo its document discovery pursuant to a specific issue list, preferably the one submitted by Yukon, as Chance has been unable to articulate the specific issues for which it produced documents or wants production.

Chance's position

[328] Chance submits that Yukon has not met its burden on this application because it has offered no specific authorities with respect to the remedy it seeks, and no more than vague references to Chance's existing production and matters in issue. Chance further

submits that the orders sought by Yukon regarding its affidavit of documents are severe and extraordinary.

[329] Chance submits that Yukon seeks to impose the same narrow and exclusionary constraints on Chance's production of documents that it has applied to its own. Chance contends that, in doing so, Yukon improperly seeks to prohibit Chance from producing records at the document discovery stage that are relevant, material, and that Chance views as necessary to prove its case. Chance submits that, considering the complexity of this litigation and the amount of damages at stake, the large number of records it produced is not, in itself, determinative of whether an overproduction has occurred.

[330] Chance agrees that the matters in issue are defined by the pleadings. However, Chance submits that matters in issue does not mean matters actually in dispute as contended by Yukon. Chance submits that parties have the right to discover any document that may directly, or indirectly, enable them to make their case, subject to privilege.

[331] In addition, Chance submits that Yukon's position that once a party is in agreement with a high-level statement made by the other party, it does not have the obligation to produce any documents on that point runs contrary to its document discovery obligations. Chance submits that Yukon's admissions are not as broad as it claims, and that production of records is therefore warranted on many issues that Yukon claims are no longer in dispute.

[332] Chance submits that questions of admissibility, which are different from producibility, are within the purview of the trial judge, and that it would not be appropriate for this Court to usurp that power and apply strict admissibility parameters

to greatly limit document production at this early stage of the proceedings, as suggested by Yukon. Chance submits that an admissibility ruling would severely limit the evidence Chance is able to include in its affidavit of documents to prove its own case, that it would cause extreme prejudice to Chance, and would improperly favour Yukon.

[333] Chance submits that it has conducted a proper and thorough collection of documents. Chance also submits that it has conducted a proper and extensive relevance review of its records, that it has complied with its document discovery obligations and that no overproduction has occurred. Chance submits that, in that context, the principle of proportionality clearly weighs against ordering Chance to redo its production of documents.

[334] However, Chance recognizes that, due to the large number of documents at play in this case, there may still be a number of irrelevant documents that inadvertently slipped through its manual review. As such, Chance is prepared to review, once again, its production to remove clearly irrelevant documents. However, Chance submits that there will inevitably be irrelevant documents that find their way in any e-discovery process involving a large number of documents.

Analysis

[335] Chance's collection and production of documents proceeded as follows:

a) Chance identified, collected and provided to its counsel 23 boxes of hard copy documents and a hard drive containing approximately 404,000 electronic records in relation to this matter.

b) Counsel identified 528 relevant hard copy documents out of the 23 boxes provided by Chance.

c) 111,630 records (out of the approximately 404,000 electronic records and the 528 paper records found to be relevant) were identified as duplicates and removed from Chance's production of documents.

d) A list of search terms was applied to narrow down the list of documents for further review to 164,962 records.

e) A team comprised of five lawyers and articling students, eight paralegals as well as one document clerk conducted a manual review of those documents. The review team identified 34,557 producible documents. In addition, the team identified 1,410 records as privileged. The review team spent a total of 640 hours reviewing documents.

[336] After Yukon raised concerns over the volume and the number of clearly irrelevant records in Chance's production, Chance agreed to conduct a further review that led to the deletion of 561 non-privileged documents from its affidavit of documents. Chance's review team spent approximately 10 hours on that further manual review.

[337] It is not disputed that the Court has the power to strike an affidavit of documents that fails to comply with the *Rules of Court*, and may order a party to file a new affidavit of documents in accordance with the Court's directions. What is disputed is whether such an order is appropriate in this case.

[338] Courts have recognized that overproduction of irrelevant documents is as damaging to the litigation process as an incomplete production. It has also been recognized that overproduction runs contrary to the principle of proportionality (*LTS Infrastructure Services* at paras. 22 to 24 citing *Demb v Valhalla Group Ltd*, 2014 ABQB 554 ("*Demb*") at para. 92).

[339] In addition, the *Rules of Court* require parties to an action to conduct a meaningful review of their documents to ensure they meet the relevance threshold established by the rules before including them in their affidavit of documents (*LTS Infrastructure Services* at para. 25).

[340] However, in this case, Yukon's assertion that Chance has overproduced and that Chance's production should be constrained by a very limited list of issues rests essentially on Yukon's position that Chance has applied a much broader relevance test than the one advocated by Yukon. Yukon points out to the considerable number of documents that Chance listed in its affidavit of documents as evidence of Chance's failure to apply the proper relevance test to its production of documents.

[341] While Yukon may consider Chance's production to be overly large, considering the conclusion I reached regarding the broad relevance test applicable at the document discovery stage under the *Rules of Court*, the underlying factual matrix, and the issues raised by Chance's causes of action, I am unable to conclude that the number of records produced by Chance is, in and of itself, evidence that Chance has grossly overproduced.

[342] In addition, considering my conclusion that Yukon's admissions are not as broad and as far reaching as contended by Yukon, I am of the view that the issues list put forward by Yukon (based on the narrower test for relevance that Yukon proposed and that I rejected) to constrain Chance's production of document is too narrow.

[343] Nonetheless, I am of the view that Yukon has demonstrated - with supporting examples - that Chance's affidavit of documents contains an unacceptable number of clearly irrelevant documents. This raises concerns regarding the thoroughness of

Chance's manual relevance review, despite Chance's evidence to the effect that its review team spent 650 hours on relevance review as well as an additional 10 hours after Yukon's first raised concerns with Chance's production of documents.

[344] In addition, Chance did not provide any details regarding the manner in which it conducted its second manual review apart from indicating that they spent an additional 10 hours reviewing documents.

[345] While, it is expected that a certain number of irrelevant documents will find their way in an otherwise proper production, I am of the view that Yukon has found a disproportionate number of clearly irrelevant documents in Chance's production. One should not expect to find over 25 clearly irrelevant documents (some of them being 30 pages long) about jokes, family updates, or things happening in other parts of the country, as counsel for Yukon did when she briefly scanned through 30 to 40 pages of over 2,600 pages of Chance's affidavit of documents. I note that counsel conducted her cursory search after Chance had already performed a further review at Yukon's request and removed 561 non-privileged documents from its production. Clearly, spending 10 additional hours to review 34,000 documents was not sufficient to cull clearly irrelevant documents from Chance production. The fact that a high proportion of clearly irrelevant documents remained in Chance's document production after its further review raises questions about the relevance criteria applied by Chance during its manual review process.

[346] In addition, Yukon's position and concerns regarding the over broadness of Chance's production cannot be completely dismissed considering the very broad positions asserted by Chance either in its submissions or in the written exchanges it had

with Yukon regarding the scope of document discovery required in this case, which were part of the record filed in support of these applications.

[347] For example, Chance's expressed views that its claims relate to decades of misrepresentations is overly broad and does not align with its own pleadings. While Chance may have conducted oil and gas operations in Yukon since 1994, the relationship and representations that are at issue here are those that specifically relate to the scope of Chance's alleged rights and activities under the exploratory permits it acquired in 2006 and in 2009-2010, the representations made by Yukon regarding those alleged oil and gas rights and permitted activities (hydraulic fracturing) in light of Yukon's decision to impose a Moratorium in 2015 and its impact on Chance's exploratory permits. The communications and representations at issue must therefore be sufficiently connected in time with Chance's decision to bid on its permits, to pursue exploratory work and to incur expenses in relation to those permits.

[348] In addition, Chance's submission regarding the possible relevance of every document in Yukon's possession that simply mentions the name of the wells it drilled on the lands covered by its exploratory permits without anything more tying those documents to the issues raised in Chance's AFSOC raise the same concerns. It is one thing to argue that the names of its wells and their variations have to be included in a list of key words applied to narrow down Yukon's collection of electronic records, it is another, as pointed out by Yukon, to argue that the presence of a specific keyword in a document automatically renders that document possibly relevant.

[349] Having said that, I acknowledge that Chance's review team has already spent hundreds of hours manually reviewing its documents. Therefore, the situation here is

distinguishable from the cases provided by Yukon where there was evidence that the respondent had failed to conduct a manual review of its records (*Air Canada v WestJet Airlines Ltd*, [2006] OJ No 1798 (ONSC); *Demb* and *LTS Infrastructure Services*). It would therefore be disproportionate to strike Chance's affidavit of documents and order Chance to redo its production based solely on the proportion of clearly irrelevant documents found by Yukon in Chance's affidavit of documents and the concerns raised by the overly broad positions asserted by Chance in this application.

[350] As a result, I find that Chance shall conduct a meaningful manual review of its production of documents to determine which records could reasonably be viewed as relating to a matter in issue in order to remove clearly irrelevant documents from its production. Having said that, I acknowledge that Chance's understanding of the February 20, 2020 CMC Order was that it had to produce its documents in relation to all of its causes of action notwithstanding the result of Yukon's anticipated application to strike. As a result, my decision does not require Chance to review its production based only on the causes of action that will remain after a final determination is made on Yukon's application to strike. On that basis, I am of the view that the cost and time required to perform that review are not unreasonable or disproportionate considering the nature of Chance' claims, the amounts at stake, as well as the work that Yukon counsel would have to put in to cull clearly irrelevant documents from Chance's affidavit of documents.

[351] If counsel cannot agree on a timeline for Chance to review its production based on my finding and provide a reviewed affidavit of documents, they may bring this issue in case management for resolution.

Costs

[352] As both parties were partially successful on their respective applications, they shall each bear their own costs with respect to both applications.

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CAMPBELL J.