CHIEF VICTOR BUFFALO acting on his own behalf and on behalf of all the other members of the Samson Indian Nation and Band and THE SAMSON INDIAN BAND AND NATION (Plaintiffs) v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA and THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and THE MINISTER OF FINANCE (Defendants); CHIEF JEROME MORIN acting on his own behalf as well as on behalf of all the other MEMBERS OF ENOCH'S BAND OF INDIANS AND THE RESIDENTS THEREOF ON AND OF STONY PLAIN RESERVE NO. 135 (Plaintiffs) v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA (Defendant); CHIEF JOHN ERMINESKIN, LAWRENCE WILDCAT, GORDON LEE, ART LITTLECHILD. MAURICE WOLFE, CURTIS ERMINESKIN, GERRY ERMINESKIN, EARL ERMINESKIN, RICK WOLFE, KEN CUTARM, BRIAN LEE, LESTER FRAYNN, the elected Chief and Councillors of the Ermineskin Indian Band and Nation suing on their own behalf and on behalf of all the other members of the Ermineskin Indian Band and Nation (Plaintiffs) v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA. THE HONORABLE THOMAS R. SIDDON, Minister of Indian Affairs and Northern Development, THE HONOURABLE DONALD MAZANKOWSKI, Minister of Finance (Defendants)

[Indexed as: **Samson Indian Nation and Band v. Canada**]

Federal Court of Canada, Trial Division, MacKay J., March 20, 1996

J.A. O'Reilly, F. Joyal, E.H. Molstad, Q.C., and *J.D. MacLachlan* for the plaintiff Samson Band
L.L. Decore, for the plaintiff Enoch Band
M.O. Maclean, for the plaintiff Ermineskin Band
A.D. Macleod, Q.C., M.E. Comeau, C. Stelmack and *B.S. Ritzen*, for the defendants

In the mid 1940s the three plaintiff bands surrendered mineral resources in reserve lands to the Crown. Subsequently, the plaintiff bands commenced actions against the Crown in relation to the Crown's management and exploitation of surrendered oil and gas resources in reserve lands, the Crown's management of moneys derived from leases and sales of those surrendered resources, and the Crown's funding of programs and services said by the plaintiffs to have been adversely affected because the Crown perceived the plaintiff Bands as having financial resources of their own. The Crown claimed privilege, on solicitor-client basis, for documents included in affidavits of documents filed in the actions. In September 1994 a motions judge ordered that all documents claimed as privileged should be produced, except those arising from solicitor-client communications constituting advice with reference to this particular litigation. The Federal Court of Appeal varied that order (see sub nom. *Buffalo* v. *Canada*, [1995] 3 C.N.L.R. 18). The

parties did not agree on the interpretation or application of the decision of the Court of Appeal. The plaintiffs' interpreted the decision as supporting substantial disclosure in discovery of documents classed as privileged legal advice because of the special trust-like relationship between the Crown and the plaintiffs which the decision recognized. The Crown was of the view that there was no aspect of the relationship between the Crown and the plaintiffs that would warrant an order to produce any documents claimed as privileged. The parties also held different views regarding the onus on the Crown to establish the privilege claimed and on the information to be provided for documents claimed as privileged.

The issue was whether any documents claimed as privileged should be ordered to be produced on the basis that the interests of the Crown and the plaintiff bands, in legal advice sought or received by the Crown, were shared or joint interests, so that documents containing such advice could not be withheld from the plaintiffs as beneficiaries of a trust-like relationship with the Crown.

Held: *The Crown was ordered to produce any document, or parts thereof, constituting or referring to communications in the nature of legal advice that wholly or in part concerned the administration of specific assets, i.e. mineral rights on reserve lands surrendered to Her Majesty, or that concerned the administration and management of royalties derived from leases, sales or production from those assets. The Crown was ordered to produce any document, or parts thereof, relating to programs and services under the aegis of the Crown which documents included reference to the oil and gas mineral assets or financial resources therefrom, resulting from the surrenders.*

The order did not affect generic legal advice not referable specifically to the plaintiff bands or the assets surrendered or revenues derived from those assets.

1. The respective surrenders of mineral rights by the bands to the Crown created a variation of a trust in Indian land. That trust-like arrangement may be taken to provide for the Crown the responsibility to manage the surrendered assets, the mineral rights and derivatives from them, for the benefit of the Bands.

2. Legal advice sought and received by the Crown in the administration and in carrying out its duties as "trustee", was advice in which the plaintiff Bands had a joint interest akin to that of a beneficiary of a private trust. The interest of the plaintiffs as beneficiaries of specific trust-like arrangements with the Crown warranted disclosure of any documents in the nature of legal advice sought or received by the Crown relating to: the administration of the assets, the management of revenues from their exploitation, and decisions on programs and services as they may have been affected by reference to the existence of the assets surrendered and the revenues derived from those assets. Where a document referred only in part to the specific trust-like arrangements, only those parts, severed from the rest of the document, should be produced.

3. However, there was no presumption favouring disclosure of any legal advice sought or received by the Crown arising from the general fiduciary relationship of the Crown to the Indians.

4. The onus of proof is on the party claiming privilege, which onus is generally discharged by that party filing an affidavit that is sufficient in identifying the relevant documents and setting forth, for each document, the particular basis on which the claim of privilege is based, i.e., whether the party claiming privilege relies upon the litigation privilege where the dominant purpose of the document is

related to litigation, actual or contemplated, or upon the legal advice privilege in that it is directly related to the seeking, formulating or giving of legal advice within the continuum of communication in which the solicitor tenders advice. If it is challenged by evidence offered by the other side, the Court must examine the document in question and if there is any doubt it must determine whether the document is privileged on a balance of probabilities. There was no ultimate onus on the defendant claiming privilege to establish, in this case, reasons why a document so claimed was not to be assumed to be disclosed.

5. The affidavit must set forth a sufficient factual basis for the specific claim of privilege for each document. Whether a document is ultimately determined, when questioned, to be privileged must ultimately be resolved by the court on the basis of the evidence before it.

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MACKAY J.: These Reasons concern an order now issued with directions for dealing with the defendants' claims of privilege, on solicitor and client basis, for documents included in affidavits of documents filed in these three actions. The actions are ordered to be heard together, with trial scheduled to commence in the spring of 1997 and pre-trial preparations are coordinated in case management.

These actions include a variety of claims in regard to alleged wrongs by the Crown and its officers, extending over some 50 years, and continuing today. At the risk of oversimplifying the actions, their essential elements may be said to arise from the Crown's management and exploitation of oil and gas resources in reserve lands which the three Bands surrendered to Her Majesty in the mid 1940's, from the Crown's management of moneys derived as royalties or other revenues from leases or sales of oil and gas resources surrendered, and from the Crown's funding of programs and services said by the plaintiffs to have been adversely affected because the plaintiff Bands were perceived as having financial resources of their own.

Document production and claims of privilege

The claims for privilege were first made in initial affidavits of documents filed in accord with court directions on March 3, 1994, relating to money management issues, on March 30, 1994, relating to oil and gas issues, and on June 15, 1994, in relation to programs and services issues.

Thereafter the parties were unable to resolve differences between them about production of documents and issues of privilege, among other issues arising in regard to the affidavits of documents filed by the defendants (hereinafter referred to primarily as the "Crown"). After

hearing counsel for the parties in all three actions, on September 9, 1994 I ordered that, in the circumstances of this case, all documents claimed as privileged should be produced, except those arising from solicitor and client communications constituting advice with reference to this particular litigation.[1]

The Court of Appeal varied that ruling,[2] allowing an appeal by the Crown. In effect, solicitor and client privilege in relation to documents is to be recognized for all communications between solicitor and client, or with third parties, the dominant purpose of which is related to existing or contemplated litigation, under the so-called litigation privilege. It is also to be recognized in relation to solicitor and client communications directly concerned with seeking, formulating or giving legal advice, under the so-called legal advice privilege, with some possible exception in the special circumstances of this case. I say with possible exception in this case because the parties here do not agree on the interpretation or application of the decision of the Court of Appeal, a matter to which we shall return. The order, as varied on appeal, directed the filing of an amended affidavit of documents identifying in separate lists, Schedules IIC and IIE, described as follows:

> Schedule IIC Documents for which solicitor and client privilege is claimed on the ground they were initiated for the dominant purpose of the conduct of litigation. If there is any question or dispute the Court will examine the documents and rule in each case whether it is privileged or is to be produced.
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> Schedule IIE Documents for which the defendants claim solicitor and client privilege on the ground that they are protected by the legal advice privilege. If there is any question or dispute the Court will examine the documents and rule in each case, in light of the unique status of the Crown as "trustee" and in light of the unique relationship between the Crown and the Indians, whether it is privileged or is to be produced.

I complete the description of document production in these actions. The Crown's document production process, which is ongoing, resulted in production of some documents not listed at the time in an affidavit of documents filed in the Court. It also resulted, in accord with orders of the Court, in the filing of additional affidavits. Thus an amended affidavit of documents was filed on October 20, 1994, which, as directed, included only those documents earlier listed, or subsequently produced, and claimed as privileged. The original order directed the documents be listed

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1 *Buffalo* v. *Canada (Minister of Indian Affairs and Northern Development) et al.* (1994), 86 F.T.R. 1

2 *Samson Indian Band and Nation* v. *Canada* (1995), 125 D.L.R. (4th) 294, 184 N.R. 139 [*sub nom. Buffalo* v. *Canada*, [1995] 3 C.N.L.R. 18] (F.C.A.).

in separate schedules, including IIC for documents claimed under the litigation privilege for this litigation, and IIE for documents claimed under the legal advice privilege. The schedules IIC and IIE filed with the affidavit in October 1994 were made prior to the decision of the Court of Appeal, earlier referred to, which amended this Court's order as we have seen. So far as I am aware, no amended Schedules IIC and IIE, as varied by the order of the Court of Appeal, have yet been filed.

One class of documents directed to be separately listed with the affidavit of October 20, 1994, was those claimed as immune from disclosure by virtue of s.39 of the *Canada Evidence Act*[3] and a certificate under that provision was filed December 16, 1994. That certificate has been the subject of a separate motion, argument, and ruling.

Finally, I note that on or about December 15, 1995, further affidavits of documents were filed by all parties in accord with directions of the Court. The schedules of those affidavits, particularly those on behalf of the Crown, are quite voluminous. That did not complete the defendants' document production, which continues.

With the original affidavits filed in May and June, 1994, an estimated 1,000 or more documents were listed as privileged. Most of those, identified by counsel for the Crown as consisting of documents from legal files relating to communications between solicitors in the Department of Justice or elsewhere and officers of the Department of Indian Affairs and Northern Development ("DIAND"), or other departments, were classed as privileged by the Crown without further examination or review. Subsequently, when they were reviewed by counsel for the Crown, it was claimed that many of those originally listed related to matters other than the issues raised in these action, and were thus irrelevant. About half of the documents originally classed as privileged in the original affidavits are so described, that is, they are said to be irrelevant in these actions, in one of the separate schedules with the amended affidavit filed October 20, 1994. That still leaves a substantial number of documents listed by the affidavit of October 20, 1994, as relevant, privileged and not revealed already to the plaintiffs, and not claimed as immune from disclosure under section 39 of the *Canada Evidence Act*. The supplementary affidavit of documents filed in mid-December 1995, by the Crown, includes many more documents claimed as privileged.

This Court has indicated that if there is dispute about the relevance of a document originally listed as privileged and later claimed by the

3 R.S.C., 1985, c. C-5, as amended.

Crown as irrelevant to the issues here, the Court will examine the document and resolve the matter. In the same way the Court recognizes the responsibility noted by the Court of Appeal,[4] as earlier set out by Dickson J., as he then was, in *Solosky* v. *The Queen*,[5] that "privilege can only be claimed document by document". Where there is dispute about a claim of privilege the Court can only recognize the privilege claimed after examining the document or documents in dispute.

There is no real difference in principle between the parties in relation to claims of privilege for documents relating to communications between solicitor and client concerning litigation or contemplated litigation. The only difference may be in regard to the descriptive detail the Crown should be directed to disclose to provide for the plaintiffs a basis for assessing whether a claim of privilege on this ground should be challenged. The descriptive detail may provide the Court some basis for declining to examine documents if any challenge to a claim for litigation privilege appears unwarranted, or if a challenge should warrant examination of a document, then the affidavit setting out the basic claim of litigation privilege is a matter of evidence for the Court's consideration in assessing if the document is to be treated as privileged.[6] Since the range of information to be provided for each document claimed as privileged is a matter of dispute I propose to deal with this after referring to the decision of the Court of Appeal on the matter of privilege in this case.

The issues

The parties raise three basic issues in argument about the implications of the decision of the Court of Appeal. These are, first, whether any documents claimed as privileged by the Crown should be ordered to be produced in light of the special trust-like relationship of the Crown to the plaintiffs; second, where the onus lies in establishing that a document is privileged; and third, what information is to be provided in this case in the list of privileged documents about each one so claimed.

The decision of the Court of Appeal

In its decision the Court of Appeal stated, in part[7]:

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4 *Supra*, note 2, 125 D.L.R. (4th) at 303, 184 N.R. at 147 [[1995] 3 C.N.L.R. at 26].
5 [1980] 1 S.C.R. 821 at p. 837, 105 D.L.R. (3d) 745 at 758, 30 N.R. 380 at 394.
6 See Côté J.A. in *Pocklington Foods Inc.* v. *Alberta (Provincial Treasurer)* (1993), 15 C.P.C. (3d) 331 at 343, [1993] 5 W.W.R. 710 at 721 (Alta. C.A.), quoted in the following text and referred to at note 21, below.
7 *Supra*, note 2, 125 D.L.R. (4th) at 302–304, 184 N.R. at 146–147 [[1995] 3 C.N.L.R. at 24–26].

... before us, the respondents, while obviously supporting the order of the motions judge, did so essentially on the basis of the "trust principle".

In order for the trust principle to apply at the discovery stage of an action for breach of duty in the administration of a trust, two conditions, in our view, must be fulfilled: the alleged trust relationship must be established on a *prima facie* basis, and the documents allegedly belonging to the beneficiaries must be documents obtained or prepared by the trustee in the administration of the trust and in the course of the trustee carrying out his duties as trustee. We have here little concern with respect to the first condition. Our concern is, rather, with the second one.

We are prepared, because of the very special relationship between the Crown and the Indians (see *Guerin* v. *Canada*, (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, 20 E.T.R. 6 [[1985] 1 C.N.L.R. 120]), and because the Crown is to be held to "a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin* v. *The Queen*" (see *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 at p. 409, 56 C.C.C. (3d) 263, [1990] 1 S.C.R. 1075 [[1990] 3 C.N.L.R. 160 at 181]), to accept that whatever may be the precise nature of the relationship between the Crown and the Indians, it would *prima facie* qualify as a trust-type relationship for the purposes of the application of the trust principle at the discovery stage.

That being said, however, it does not necessarily flow that the rules and practices developed with respect to private trusts apply automatically to Crown "trusts" such as those alleged in the present proceedings.

The basis of the trust principle, as appears from Mr. Justice Lederman's reasons in *Ontario (Attorney General)* v. *Ballard Estate*, is the assumption, in cases of private trusts, that legal advice sought by the trustee belongs to the beneficiaries "because the very reason that the solicitor was engaged and advice taken by the trustees was for the due administration of the estate and for the benefit of all beneficiaries who take or may take under the will or trust" (*Ballard Estate supra*, at p. 753).

That assumption cannot be applied to Crown "trusts". The Crown can be no ordinary "trustee". It wears many hats and represents many interests, some of which cannot but be conflicting. It acts not only on behalf or in the interest of the Indians, but it is also accountable to the whole Canadian population. It is engaged in many regards in continuous litigation. It has always to think in terms of present and future legal and constitutional negotiations, be they with the Indians or with the provincial governments, which negotiations, it might be argued, can be equated in these days and ages with continuous litigation. Legal advice may well not have been sought or obtained for the exclusive or dominant benefit of the Indians, let alone that of the three bands involved in these proceedings. Legal advice may well relate to policy decisions in a wide variety of areas which have nothing or little to do with the administration of the "trusts". It is doubtful that payment of the legal opinions given to the Crown is made out of the "private" funds of the "trusts" it administers.

There being many possible "clients" or "beneficiaries", there being many possible reasons for which the Crown sought legal advice, there being many possible effects in a wide variety of areas deriving from the legal advice sought, it is simply not possible at this stage to assume in a general way that

> all documents at issue, in whole and in part, are documents which were obtained or prepared by the Crown in the administration of the specific "trusts" alleged by the respondents and in the course of the Crown carrying out its duties as "trustee" for the respondents.
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> As noted by Dickson J. (as he then was) in *Solosky supra* at p. 758, "privilege can only be claimed document by document". We have not seen the documents at issue; we do not know what argument nor what line of argument, if any, may be developed by the parties with respect to each of the documents and, eventually, to a class of them. Furthermore, we cannot rely on any practical precedent in the case law, for this is an approach to the law of privilege which is peculiar to the yet unsettled relationship between the Crown and the Indians. It is not possible in the abstract to resolve the conflict between the alleged right of the Crown to privilege and the alleged right of the respondents to disclosure otherwise than in the manner suggested by the Supreme Court in *Descôteaux (supra)*, i.e. in favour of protecting privilege.
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> It would be ill-advised for a Court of Appeal, in the circumstances, to blindly order the production by the Crown of the documents listed in class E, albeit in the presence of a confidentiality order. We would rather err on the side of caution, particularly so when one considers that the respondents will have the opportunity before a motions judge to challenge the claim of privilege document by document.

The Court then set out the amended terms for Schedules IIC and IIE of the order earlier issued.

The position of the parties

For the plaintiffs, in reliance upon the first portion of that passage in the decision of the Court, in particular the first four paragraphs, it is urged that the Court of Appeal recognizes the trust-like relationship between the Crown and the plaintiffs as Indian peoples and Bands, and that because of the relationship the Crown is bound by fiduciary duties like those of a trustee when it acts in the administration and discharge of those duties, in the interests of the plaintiffs as beneficiaries. The plaintiffs, it is urged, have a shared or joint interest in legal advice sought by or given to the Crown in the discharge of its fiduciary duties for the benefit of the plaintiffs. Legal advice to the defendants cannot be privileged in these circumstances it is urged.

That position is said to be strengthened by the decision of the Supreme Court of Canada rendered in *Apsassin*[8] on the day this matter was argued. In that case Mr. Justice Gonthier, speaking for the majority, with La Forest, L'Heureux-Dubé and Sopinka JJ. concurring, said in

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8 i.e., *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*, Court file 23516, December 14, 1995, (S.C.C.) now reported (1995), 130 D.L.R. (4th) 193 [[1996] 2 C.N.L.R. 25].

part,[9] in relation to a 1945 surrender of Indian reserve lands to the Crown:

> The Band understood that by agreeing to the 1945 surrender, they would be transferring all their rights in I.R. 172 to the Crown in trust, and that the Crown would either sell or lease those rights for the benefit of the Band. ...

He found that mineral rights were included in the surrender and continued, (with the emphasis here, by underlining [italicizing], reproduced from the text published by the Supreme Court on December 14, 1995):

> ... I think that the true nature of the 1945 dealings can best be characterized as a *variation of a trust in Indian land*. In 1940, the Band transferred the mineral rights in I.R. 172 to the Crown in trust, requiring the Crown to lease those rights for the benefit of the Band. The 1945 agreement was also framed as a trust, in which the Band surrendered all of its rights over I.R. 172 to the Crown "to sell or lease". The 1945 agreement subsumed the 1940 agreement, and expanded upon it in two ways: first, while the 1940 surrender concerned mineral rights only, the 1945 surrender covered all rights in I.R. 172, including both mineral rights and surface rights; and second, while the 1940 surrender constituted a trust "for lease", the 1945 surrender gave the Crown, as trustee, the discretion "to sell or lease". This two-pronged variation of the 1940 trust agreement afforded the Crown considerably greater power to act as a fiduciary on behalf of the Band. Of course, under the terms of the trust, and because of the Crown's fiduciary role in the dealings, the DIA was required to exercise its enlarged powers in the best interests of the Band.
>
> I should add that my reasons should not be interpreted to equate a trust in Indian land with a common law trust. I am well aware that this issue was not resolved in *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335 [[1985] 1 C.N.L.R. 120, [1984] 6 W.W.R. 481, 13 D.L.R. (4th) 321, 36 R.P.R. 1, 20 E.T.R. 6], and I do not wish to pronounce upon it in this case. However, this Court did recognize in *Guerin* that "trust-like" obligations and principles would be relevant to the analysis of a surrender of Indian lands. In this case, both the 1940 and 1945 surrenders were framed as trusts, and the parties therefore intended to create a trust-like relationship. Thus, for lack of a better label, I think that it is appropriate to refer to these surrenders as trusts in Indian land.

In *Apsassin*, Madam Justice McLachlin, writing for the minority, did not agree with Mr. Justice Gonthier's characterization of the arrangement there in issue as "a variation of a trust in Indian land" or as a "trust in Indian land", preferring to consider the arrangement in terms of the *sui generis* interest of the Band in light of the provisions of the *Indian Act*, rather than by analogy to another area of law. Nevertheless, she did agree that the Crown, in her view by reason of the 1940 surrender of mineral rights in that case, was under a fiduciary duty to the Band with respect to the mineral rights, which, under the terms of the surrender,

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9 *Id.*, at pp. 7, 9–10, of the Court's publication [pp. 32, 33–34 C.N.L.R.].

were to be leased for the benefit of the Band.[10]

In the view of the plaintiffs now before the Court, the surrenders of oil and gas mineral rights in their reserve lands in these cases are akin to the surrenders of similar rights in *Apsassin* and, as in that case, so in this, the surrenders created trust-like arrangements, which Mr. Justice Gonthier calls variations of a trust in Indian land, or trusts in Indian land. While there is no evidence before me at this stage of the nature of the surrenders in these cases, the pleadings make clear, in my view, the plaintiffs' claims to trust-like arrangements which created fiduciary obligations for the Crown, to manage the rights surrendered for the benefit of the Bands,[11] the basis for the resulting claims of the plaintiffs in these cases. The defence pleaded includes general denials of facts alleged and denies that the Crown's duties were as the plaintiffs allege, and it denies wrongdoing or negligence in discharge of responsibilities of the Crown. As I understand the defence pleaded, the Crown does not dispute that there are responsibilities to be discharged for the benefit of the Bands, though the responsibilities were not as the plaintiffs claim, and it denies any responsibilities owed exclusively to these Bands.

For the Crown the significant portion of the decision of the Court of Appeal earlier quoted is the latter portion, the last four paragraphs quoted above. Thus it is urged that acknowledging a trust-like relationship here does not mean that the principles of the law of private trusts apply, in particular, the principle that legal advice sought by the trustee belongs to the beneficiaries jointly with the trustee, does not apply in this case, as it would if this were a private trust. It is urged that the client here seeking and accepting legal advice is the Crown in one or more of its executive manifestations: the client is not the Band or the Indians. The Crown does not seek that advice, or accept it, simply as trustee for these three Bands, but, wearing its many hats simultaneously, it seeks to discharge its responsibilities in a multitude of ways, for the benefit not merely of the

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10 *Id.*, at pp. 35–36, of the Court's publication [p. 56 C.N.L.R.].

11 Perhaps the most specific statement of claim as amended is that in the action by the Samson Band and Nation (T-2022–89) which sets out, in paragraphs 27A and 28, explicit conditions said to be express and implied under the surrenders of natural resources by the Band in its reserve lands in 1946, which conditions are said to have been accepted by the Crown by Order in Council P.C. 2662–1946 on June 28, 1946. In its defence to the Amended Statement of Claim the Crown generally traverses all allegations in the Amended Statement of Claim. It does not deal specifically with the plaintiffs' paragraphs 27A and 28, but the Crown states that the relationship between it and the Samson Band, and the extent of the duties flowing therefrom, are not as the plaintiffs allege. Further it is claimed the Crown has no obligation to consider the interests of the Samson Band to the exclusion of all other considerations in performing its functions. Nevertheless, the Crown acknowledges the surrender of minerals in 1946, reciting, apparently from the surrender document itself, the Crown's obligation to take and hold the minerals "in trust" on terms the Government of Canada may deem most conducive to the welfare of the people of the Band.

plaintiffs, but of all native people and indeed of the people of Canada. The Crown seeks and accepts legal advice from its own legal advisers in the Department of Justice, or other lawyers retained for particular or continuing purposes, and it seeks and receives that advice in confidence.

The affidavit of Bernard Hanssens, counsel with the Department of Justice serving with the Legal Services Unit for the Department of Indian Affairs and Northern Development ("DIAND"), responsible for providing ongoing legal advice to the latter department, describes the duties and advisory functions of himself and others in providing legal advice to DIAND. That advice is said to be sought and received on the understanding and belief that communications between counsel and the Department are confidential. The costs and funding of the advice is from federal government sources, not from the Bands. The affidavit states in part:

> 6. With respect to DIAND, in some cases, the opinion or advice requested of, and provided by, the Department of Justice, specifically relates to the administration of legislation or policy in relation to a particular Indian Band or person and may indeed have been precipitated by an inquiry from such Band or person. In such cases, as in any other case, the Department of Justice will, in the ordinary course of business, receive a request for an opinion from the particular government official or department involved, and will provide an opinion to that person or department who may also consider the opinion in the administration and enforcement of legislation and policy in respect of other Bands and other issues. As in any other case, such opinions are never provided directly by the Department of Justice to the Band or person affected and are never paid for by the Band or person affected. Also, as in any other case, the communications between the Department of Justice lawyers and the interested government official or department are undertaken on the understanding and belief that they will be kept confidential and will not be disclosed to others.

Counsel also referred briefly to policy of DIAND which, from a Policy Directive revised in 1975, makes clear that the text or substance of a legal opinion shall not be communicated to anyone outside the Department. That directive was not formally before the Court as evidence and I note there had been no opportunity for cross-examination by plaintiffs of Mr. Hanssens on his affidavit.

I respect the role and function of legal advisers to Her Majesty. However, the fact that counsel and the operating department concerned may treat correspondence as confidential, and the fact that services to fund advice are paid out of ordinary government funds, are not in themselves determinative of whether legal advice requested or obtained in all circumstances applicable in these cases is privileged and not to be disclosed. Nor am I persuaded, without considering the purpose for which advice flows, that since Her Majesty is the client seeking and

receiving legal advice, all of that advice, here claimed as privileged in a list of relevant documents, is not to be disclosed. If those factors were determinative, which is in essence the position of the Crown, the comments of the Court of Appeal concerning the possibility of disclosure of documents in discovery, in recognition of the special trust-like relationship between the plaintiffs and the Crown in this case, would have no meaning at all.

In part reflecting their different readings of the decision of the Court of Appeal, the parties also have different submissions regarding the onus on the Crown to establish the privilege claimed and they differ also on the detail or information to be provided about each document claimed as privileged. I return to these differences after dealing with the key issue, whether any documents claimed as privileged should here be ordered to be produced, on the principle, by analogy, that the interests of the Crown and the plaintiff Bands, in legal advice sought or received by the Crown, are shared or joint interests, so that documents containing such advice may not be withheld from the plaintiffs as beneficiaries of a trust-like relationship with the Crown.

I sum up the views of the parties in regard to the issue of disclosure of certain documents. The plaintiffs read the decision of the Court of Appeal as supporting substantial disclosure in discovery of documents here classed as privileged legal advice because of the special trust-like relationship between the Crown and the plaintiffs which the decision recognizes. In the Crown's view there is no aspect of the relationship between the Crown and the plaintiffs that would warrant an order to produce any documents claimed as privileged. Both parties avoid defining any special trust-like arrangements here at issue although the plaintiffs urge that the decision in *Apsassin* is a basis for finding trust arrangements arising from the 1946 surrenders. Unless there be some definition of the trust arrangements, the Court has little guidance in determining, either at this stage or in any examination of documents, which, among all the documents claimed as privileged, "in whole and in part, are documents which were obtained or prepared by the Crown in the administration of the specific 'trusts' alleged by the [plaintiffs] and in the course of the Crown carrying out its duties as 'trustee' for the [plaintiffs]", to turn to the words of the Court of Appeal.[12]

The surrenders and a variation of a trust in Indian land

In my opinion, the decision of the Court of Appeal warrants directions by this Court which take into account the "variation of a trust

12 *Supra*, note 2, 125 D.L.R. (4th) at 303, 184 N.R. at 147 [[1995] 3 C.N.L.R. at 26].

in Indian land", to use the description of Mr. Justice Gonthier in *Apsassin*, which the respective surrenders of mineral rights by the plaintiff Bands to Her Majesty created. For purposes of determination of issues relating to discovery, of documents and by examination, that particular trust-like arrangement may be taken to provide for the Crown the responsibility to manage the assets surrendered, the mineral rights, and derivatives from them, for the benefit of the Bands. The Bands and the peoples concerned in each case were in this sense beneficiaries of the Crown's management, and there were no other beneficiaries, at least none others so far claimed or acknowledged. At least in relation to the Crown's discharge of its responsibilities in relation to these trust-like arrangements, legal advice sought and received by the Crown, in the administration and in carrying out its duties as "trustee", was advice in which the plaintiff Bands and peoples have a joint interest, an interest which the Crown, in my opinion, cannot deny, and which no one else could claim, an interest akin to that of a beneficiary of a private trust.

That interest of the plaintiffs as beneficiaries of specific trust-like arrangements with the Crown warrants disclosure of any document in the nature of legal advice sought or received by the Crown in the administration of the assets, the management of revenues from their exploitation, or decisions on programs and services as those may have been affected by reference to the existence of the assets surrendered and the revenues derived from those assets.

For this reason I issue an order directing that the Crown shall produce any document constituting or referring to communications in the nature of legal advice, as defined in the order, that wholly or in part concerns the administration of the specific assets, i.e., mineral rights on reserve lands, surrendered to Her Majesty, or that concerns the administration and management of royalties derived from leases, sales or production from those assets. That order provides for disclosure for purposes of discovery. Rule 448(5) of the Court's Rules provides that disclosure of a document in discovery "shall not be taken as an admission of its authenticity or admissibility in the action".

In addition, the Order directs production of documents relating to programs and services under the aegis of the Crown which documents include reference to the oil and gas mineral assets, or financial resources therefrom, resulting from the surrenders. To the extent that those were factors in considering programs and services for the plaintiff Bands, the legal advice provided concerns the administration of the Crown's trustee responsibilities and is a matter in which the plaintiffs as beneficiaries have a joint interest. In its Statement of Defence to Amended Statement

of Claim in these actions the Crown pleads that it has fulfilled all its treaty, statutory or other obligations owed to the Bands and that "any distinction between the plaintiffs and other Aboriginal peoples with respect to the provision of programs and services, was with respect to the provision of discretionary funding, programs and services. In such cases greater discretionary funding, programs and services were provided to those Aboriginal peoples with the greatest need". In my opinion, the plaintiffs are entitled to access to any legal advice obtained by the Crown in relation to programs and services which advice makes reference to the mineral assets surrendered by these Bands or moneys derived therefrom. The Crown in its role of trustee for the plaintiff Bands had certain responsibilities. Legal advice, if there was any, about meeting those responsibilities, and any possible conflicting responsibilities of the Crown as provider of programs and services under treaty and statute, in my view, should be disclosed to the plaintiffs as beneficiaries of the Crown's trustee responsibilities arising from the 1946 surrenders.

Where a document heretofore claimed as privileged refers only in part to the specific trust-like arrangements as defined above, this Court would order production of that part, severed from the rest of the document, unless the portion that would be produced is insignificant in the context of the issues raised in these cases.

Counsel for the Crown stresses that most of the documents classed as privileged concern legal advice in generic terms, not specifically related to the Bands in these actions, or to administration of responsibilities of the Crown with particular reference to these Bands or their interests. I note the affidavit of Bernard Hanssens, earlier quoted, refers to the possibility of adapting advice, offered with particular reference to one Band, to the circumstances of another. Generic legal advice, not referable specifically to the plaintiff Bands or the "assets" here surrendered or revenues derived from those assets, and legal advice with reference to some other Band would not be affected by any direction hereby made. Disclosure is ordered only in relation to any document relating to legal advice that refers specifically to administration of the mineral assets surrendered, that is, the oil and gas interests administered for the plaintiff Bands under the respective surrenders, or management of the moneys derived from those assets, or programs and services which are discussed with any reference to the oil and gas interests or the royalties derived therefrom administered for the benefit of the plaintiff Bands under the trusts in Indian land resulting from the surrenders in 1946.

That production will treat the plaintiff Bands and nations much like

beneficiaries of a private trust, entitled to access to legal advice obtained by the Crown as "trustee". This is because, as beneficiaries of a variation of a trust in Indian land, the plaintiffs share an interest in that advice with the Crown, which is responsible for administration and management of the mineral assets and revenues therefrom for the benefit exclusively of the plaintiff Bands and nations.

The plaintiffs urge that the general fiduciary relationship of the Crown to the Indians, in light of its treaty, statutory and contractual responsibilities has trust-like responsibilities that warrant close examination of any claim to privilege of relevant documents. I am not persuaded at this stage that the general relationship of the parties, aside from relations arising out of the specific variation of a trust in Indian land created by the surrenders of natural resources, and derivative responsibilities arising from the surrenders, warrants an order to produce documents on a wider scale than that now outlined.

The onus on the defendants claiming privilege

The plaintiffs urge that the decision of the Court of Appeal accepted that for purposes of examination for discovery the special relationship between the Crown and the plaintiff Bands is a trust relationship. Further, it is urged that in regard to documents said to be relevant by the defendants, the onus is on the Crown to establish that there is not a joint interest in the subject-matter of the communications, and to establish that documents were not obtained or prepared by the Crown in administration of its trustee's duties or in the discharge of its responsibilities to the plaintiffs. Otherwise the documents ought to be ordered to be produced, so it is urged.

It is true that the onus of proof is on the party claiming privilege. But that onus is generally discharged by that party filing an affidavit that is sufficient in identifying the relevant documents and setting forth, for each document, the particular basis on which the claim of privilege rests.[13] That affidavit is evidence before the Court. If it is challenged by any evidence offered by the other side, whether from cross-examination of the affiant of an affidavit of documents or otherwise, the Court must examine the document in question. In doing so it must weigh the evidence and if there is any doubt it must determine whether the document is privileged on a balance of probabilities, and in light of the principles enunciated by Mr. Justice Lamer, as he then was, in

13 *Pocklington Foods Inc., supra*, note 6.

Descôteaux v. *Mierzwinski*.[14] as relied upon by the Court of Appeal.[15] In my view, there is no ultimate onus on the defendant here claiming privilege to establish, in this case, reasons why a document so claimed is not to be assumed to be disclosed. There is no presumption favouring disclosure of any legal advice sought or received by the Crown arising from its general relationship with the plaintiffs. It is otherwise, in my view, for documents I have ordered produced which are related to the special trust-like arrangements arising from the 1946 surrenders.

Information concerning documents claimed as privileged

Also arising from the special relationship between the parties which the plaintiffs urge the Court of Appeal has recognized, they claim that in the circumstances of this case the Crown should be directed to provide somewhat more than the usual detail describing each document claimed as privileged, so that they may have a proper basis on which to assess the privilege claimed and to object to that claim where that would seem appropriate.

The plaintiffs urge that they should be given the following details about each document claimed as privileged. Insofar as the defendants do not agree that the information requested should be provided, that matter on the list is underlined [italicized] as a means of readily identifying matters on which there is not agreement.

1. The date of the document.
2. A description of the document.
3. A detailed description of the claim of privilege including the factual basis upon which the claim for privilege is grounded.
4. *The reason for the request for or the providing of the legal advice.*
5. *The name and status of the person who prepared the document.*
6. The name and status of the person who signed the document.
7. The name and status of the person to whom the document was sent.
8. If the document includes legal advice, the name and status of the person who provided the legal advice.
9. *The reason for requesting or receiving the document or legal advice.*
10. *The general subject matter of the document or legal advice.*
11. *The person or persons for whose benefit the legal advice was obtained.*
12. *Whether the legal advice was obtained by the Crown in relation to the administration of monies, oil and gas properties, or programs and*

14 [1982] 1 S.C.R. 860, at 875, 141 D.L.R. (3d) 590 at 604–5.
15 *Supra*, note 2, 125 D.L.R. (4th) at 299, 303, 184 N.R. at 143, 147 [[1995] 3 C.N.L.R. at 21–22, 24–25].

services in relation to the plaintiff bands or any other Indian Bands.

13. *Whether the legal advice was obtained by the Crown in its role as trustee or fiduciary to the plaintiff bands or any other Indian Bands. If not, what was the role of the Crown in obtaining legal advice.*

14. *Whether the plaintiff bands had or have a joint interest with the Crown in the subject matter of the communication.*

15. *Whether the legal advice was obtained by the Crown in the course of its carrying out its duties as trustee or fiduciary related to the plaintiff bands or any other Indian Bands.*

16. Whether the legal advice was given in relation to or in contemplation of litigation and *if so, a description of the litigation.*

17. *Particulars as to when the document was being prepared it was intended that it remain in confidence or whether it was intended to be given either in part or in whole to any of the plaintiff bands or any other Indian Bands.*

18. *Whether the document or any information in the document was given to any of the plaintiff bands or any other Indian Bands.*

The defendants say that items 4, 9, 10, 11, 12, 13, 14, and 15 would provide information considered to be privileged, or in some cases would call for a judgment or conclusion without standards or definition; for item 3 the Crown would provide an "adequate" description; item 5 might be impossible to determine where the preparer and the signatory, as sought in item 6, are different; item 16 so far as it seeks a description of litigation is privileged information in relation to any contemplated litigation; items 17 and 18 may be impossible to determine, they seek privileged information and to the extent documents or information in them was provided to the plaintiff Bands the latter are in the best position to know.

I note that in accord with the directions of the order issued herewith, some of the information sought by plaintiffs, in items 12, 13, 14, 15, would be produced, insofar as the legal advice sought or received relates to the administration of the trusts in Indian land created by the surrenders of 1946, the resources derived therefrom or programs and services affected by those assets or resources. Insofar as the plaintiffs seek under any of those items legal advice in relation to any other Indian Bands, unless part of the advice relates specifically to the plaintiffs, the advice would be generic and beyond the terms of the order.

The Crown, indicating the information it is supplying in relation to privileged documents, submits that, in providing information about those, it has complied with the requirements set by jurisprudence, numbering the document, describing its nature or type, the maker and recipient of the document and the basis of the claim for privilege. It points to the

affidavit of Mr. Hanssens as indicating that documents claimed under the legal advice privilege are documents relating to the provision of legal advice in the ongoing relations of solicitors to the Crown and it points also to the then draft (now filed) affidavit of Lynda J. Sturney, a research consultant responsible for review and production of the Crown's documents, who describes the process followed, the departments searched, and the measure of completion of document production from DIAND. In accord with this Court's Rule 448, her affidavit includes a schedule II listing relevant documents claimed as privileged, *inter alia*, by either the litigation privilege or a legal advice privilege. All of the legal opinions described in that schedule are said to have been obtained by the Crown from Department of Justice lawyers who gave the opinions in the ordinary course of their duties.

For the Crown it is said a list of counsel in the Department of Justice advising DIAND or others has been provided to counsel for the plaintiffs in identifying at least those counsel involved whose names appear in Schedule II. I understand the Crown has no objection to providing the name, and status or office, of any person sending or receiving the documents listed. For the defendants, however, giving of further information beyond that now provided is resisted on the ground that this would provide information from privileged documents, matters not to be disclosed unless the Court determines the document in issue is not to be privileged. In sample listings, the Crown indicates for each document claimed as privileged – a date, a file name, a locator number, a one or two word description (e.g. memoranda, legal opinions, letter), to whom the document was sent, and from whom.

Obviously, some descriptions relate to more than one document. Bundles of similar documents may be listed as a single document under a general description, provided "the documents are all of the same nature and the bundle is described in sufficient detail to enable another party to clearly understand its contents".[16] A description of "Legal Opinions" all classed under file name "Signing authority – Delegation of Authorities", a description included in the sample list provided by the Crown, may meet that requirement. I note that in *Creaser* v. *Warren et al.*[17] the Nova Scotia Court of Appeal affirmed that a listing of bundled documents does not fully meet the requirement, under the rules there applicable, for listing each document.

On the basis of the jurisprudence referred to by counsel and

16 *Federal Court Rules*, rule 448(3).
17 (1987), 36 D.L.R. (4th) 147, 77 N.S.R. (2d) 429 (N.S.C.A.).

examined by the Court,[18] I am persuaded that the information here provided by the Crown about documents claimed to be privileged meets the normal requirements with the possible exception of setting out the basis for the claim of privilege for each document. If that has not yet been done in regard to documents claimed as privileged in the first affidavits filed in the spring of 1994 or in that filed in December 1995, it should be done forthwith, in accord with rule 448(2)(b).

Does the special relationship of the Crown to the plaintiffs here warrant the disclosure of additional information? The plaintiffs argue that it does, that they should be put in a position to argue, document by document, if appropriate, that those claimed as privileged should not be so recognized. They submit that the Court of Appeal's decision in effect means that privilege should not be determined in a general way but only on a document by document basis. I accept that submission, at least for any document claimed as privileged which is questioned by plaintiffs. This does not mean, in my opinion, that detailed information here sought by plaintiffs should be provided for all documents claimed as privileged.

An affidavit of documents, or related affidavits, must provide sufficient factual basis for the specific claim of privilege, for each document,[19] i.e., whether the party claiming privilege relies upon the litigation privilege where the dominant purpose of the document is related to litigation, actual or contemplated, or upon the legal advice privilege in that it is directly related to the seeking, formulating or giving of legal advice within the continuum of communication in which the solicitor tenders advice. It is in the latter context that the affidavit of Mr. Hanssens, describing the role of counsel in advising DIAND, is here adduced.

If the factual basis for the claim of privilege is adequately set out by affidavit, it may be contested, as any other affidavit evidence, on the basis of evidence adduced by the plaintiffs, either evidence that has come to their attention by some other means or evidence of the deponent on cross-examination that may call into question what is set out in his or her affidavit. Obviously the plaintiffs in this case will be at some disadvantage in arguing against the privilege claimed. Whether a document is ultimately determined, when questioned, to be privileged must ultimately be resolved by the Court on the basis of the evidence before it. The affidavit should set forth "a sufficient statement of facts so

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18 See: *Roy* v. *Krilow* (1995), 29 Alta L.R. (3d) 272, 36 C.P.C. (3d) 58, [1995] W.W.R. 130 (Alta. Q.B.); *Visa International Service Assn.* v. *Block Brothers Realty Ltd.* (1983), 64 B.C.L.R. (2d) 390 (B.C.C.A.); *Woreta* v. *Chang* (1994), 156 A.R. 49, 26 C.P.C. (3d) 249 (Alta. Q.B.).

19 *Delta Electric Co. Ltd.* v. *Aetna Casualty Company of Canada* (1984), 53 N.B.R. (2d) 406 at 410 (Q.B.); *Stamper* v. *Finnigan* (1984), 1 C.P.C. (2d) 175 at 184 (N.B.Q.B.)

that a judge may say that, if the facts are true, then as a matter of law the documents are privileged".[20] As in all other matters where the Court depends upon affidavit evidence it relies on the due diligence of counsel, as an officer of the Court, advising the client upon documents to be listed in full disclosure and upon which ones and for what grounds a claim of privilege may be advanced in an affidavit of documents.

In *Pocklington Foods Inc.*,[21] a case concerned with privilege claimed for cabinet documents of Alberta, not with solicitor and client privilege, Mr. Justice Côté commented:

> ... the law does not call on the Chambers judge to inspect on the theory that he must then answer *without more*. For example, many documents contain no clue whatever as to when or why they were created. By themselves, they do nothing to prove or disprove privilege. That is why the law has always called for affidavits of documents, or affidavits or certificates by Ministers, giving the *facts* founding privilege. That is why the more modern law allows the party resisting privilege to cross-examine and to lead evidence of his own. The document itself never need proclaim, let alone prove, its own privilege. Where there is not enough outside evidence of privilege, the court does not even get to inspection. Inspection only arises where there is already enough proof of privilege, by an adequate affidavit or certificate by a Minister. The onus of proof is on the party claiming privilege. So if she does not file a sufficient affidavit or certificate, no inspection is necessary. The document is simply producible for want of evidence that it is not.
>
> Why do judges sometimes inspect the documents? Only to guard against the possibility that the affidavit or other evidence for privilege is not accurate, whether because of clerical error, dishonesty, or misunderstanding of the law. For example, suppose that the Crown claimed privilege (immunity) for Cabinet minutes and high-level policy papers leading to them; but among them the Chambers judge found a month's weighscale records from one branch office of the highway patrol. Then almost certainly something would be wrong. The new evidence yielded by inspection would strongly contradict the affidavit or certificate.
>
> But often the wording of a document itself offers no real guidance as to privilege. The result then is not a mystery. It simply means that the judge ruling on privilege must rely upon the affidavit or certificate claiming privilege, and on any other outside evidence by either side. The judge's inspection is like an external physical examination by a physician. It is a useful check. But it is not a substitute for a careful history or lab test, and the external sights and sounds will often by [*sic*] inconclusive.

In my view the cases make clear that the affidavit of documents which includes a claim for privilege must set out the factual basis for that

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20 Per Goodridge J. (as he then was) in *Walsh-Can. Construction Company Limited* v. *Churchill Falls (Labrador) Corp. (No. 1)* (1979), 23 Nfld. & P.E.I.R. 34, 61 A.P.R. 34, 9 C.P.C. 229 (Nfld. T.D.).

21 *Supra*, note 6.

claim with respect to each document claimed. The primary purpose of that aspect of the affidavit is to provide the Court with evidence to assess the claim for privilege if the claim is challenged. The plaintiffs and the Court ultimately rely on the proper preparation of the affidavit on the advice of the solicitor of the Crown as an officer of the Court, in the same way that the Crown and the Court must do in relation to the affidavit produced by the plaintiffs.

Conclusions

The plaintiffs submit the process would be expedited by directing that the particulars they seek be provided for each document claimed as privileged. I am persuaded that to do so would undermine the Crown's claim to privilege by directing that information properly protected from disclosure as privileged be divulged.

If that course is not directed plaintiffs say that there are two possible courses to progress in resolving issues concerning privileged documents. First the Court could examine all the documents claimed as privileged which are questioned by plaintiffs, or second, it could do so in relation to documents questioned by plaintiffs after they have examined the deponents of affidavits here filed by the Crown. Of course, the plaintiffs may examine the deponents of affidavits. It may be that course is likely to yield little evidence, presuming the deponent may object to answering questions about privileged documents where the questioner seeks information beyond that provided in the affidavit of documents. There may be greater likelihood of progress in an examination of the questioned documents by the Court and determination as to which documents, or parts of documents are to be considered privileged.

That task may be lesser in extent if the directions now issued to defendants to produce certain documents are accepted, or are upheld if appealed. Moreover, the task of examining documents claimed as privileged, in my view, arises only where the claim is questioned by the plaintiffs. If it is not questioned, then, as in the usual case, the Court has no responsibility to conduct a review of documents on its own initiative. It is true that *Solosky*[22] indicates privilege can only be claimed document by document, and that the Court of Appeal in *Procter & Gamble Co. v. Nabisco Brands Ltd.*,[23] in reliance on *Solosky*, held that in that case a claim of privilege could not be upheld where the Court did not first examine the document in which privilege was claimed. In both cases the claim to privilege was questioned. If the plaintiffs here question the

22 *Supra*, note 5.
23 (1989), 24 C.P.R. (3d) 570 (F.C.A.).

privilege claimed for any document, the Court would examine it in light of the evidence, including the affidavits of documents or other supporting affidavits.

In order that progress may be made even pending consideration by the parties of an appeal in relation to the order now issued, directions are also issued that the parties consult with the Court in continuing pre-trial discussions about the following:

> 1) whether the defendants should be instructed to prepare a separate list, comparable to Schedule IIC as discussed and directed by the Court of Appeal, to include all documents claimed to be privileged under the litigation privilege, such list to be filed at a date to be fixed. Any objection to privilege for any or all such documents could be determined by examination by the Court at its early convenience;
>
> 2) whether the defendants should be instructed to prepare a separate list for documents thus far claimed under the legal advice privilege which would be produced to plaintiffs if the order for production now made is accepted or upheld on appeal. If there be no appeal by defendants, that list would be filed after expiry of the appeal period and the documents so listed would be produced to the plaintiffs forthwith. If that separate list were prepared the balance of documents claimed as privileged, i.e., the rest of the documents that would be classed within Schedule IIE as that was discussed by the Court of Appeal, should also be listed by the defendants, and examination by the Court of any on this list that are questioned by the plaintiffs might begin as soon as that list is filed following the period fixed for an appeal of the order now issued;
>
> 3) whether the plaintiffs question the classification of documents by the Crown as irrelevant, upon review by the Crown of the claims for privilege made with original affidavits of documents, which documents are included in a list as Schedule IID to the affidavit of Gregor MacIntosh, filed October 20, 1994.

The order now issued includes directions consistent with these Reasons.

Order accordingly.