

Date: 2015 04 23  
Docket: CV 2010000033

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SALT RIVER FIRST NATION #195, 4990 NT LTD.  
AND 4993 NT LTD.

Plaintiffs

- and -

5721 NT LTD., 5780 NT LTD., SLFN LAND CORP (NT) LTD., VITI INVESTMENTS LIMITED, RAM MUDALIER, JAMES SCHAEFER, RAYMOND BEAVER, MELVIN WANDERING SPIRIT, DELPHINE BEAULIEU, CHRIS BIRD, TONI HERON, SONNY MACDONALD, MICHAEL BEAVER, BARBARA HERON McARTHUR, BETTY TOURANGEAU, FRED DANIELS, KELERA BEGUM MUDALIER, SUSAN FAY MUDALIER, ALLAN SCHAEFER, ALLAN SCHAEFER carrying on business either as AJ's or as AJ's CONTRACTING, JOHN DOE, JANE DOE, AND ABC CORP.

Defendants

- and -

KEN LAVIOLETTE, CRYSTAL CATHOLIC, GLORIA VILLEBRUN, JOLIENE BEAVER, RON SCHAEFER, JEFF FRASER AND FREDRICK BEAULIEU

Third Parties

MEMORANDUM OF JUDGMENT

[1] This is an application by the Plaintiffs pursuant to Rule 251(4) of the Rules of Court. That Rule requires that a person who is examined for discovery answer, to the best of his or her knowledge, information and belief, any proper question relating to any matter in issue in the action.

[2] The application seeks an order compelling the defendant Ram Mudalier to answer certain questions he objected to at his examination for discovery and to provide further or better responses to certain undertakings he gave. In the latter respect, Rule 261 provides that where a party undertakes at an examination for discovery to obtain information needed to answer a question, the answer shall be provided in a timely manner.

[3] Mr. Mudalier was, at times during the relevant time frame (2002 to 2007), the financial controller of the Plaintiff Salt River First Nation #195 ("Salt River"). Salt River, the Plaintiffs say, is also the beneficial owner of the shares of the Plaintiffs 4990 NT Ltd. ("4990") and 4993 NT Ltd. ("4993"). The Plaintiffs say that Salt River paid funds from a land claim settlement to 4990 and 4993 for Salt River's economic activities and for the benefit of members of the First Nation. They say that funds of more than \$700,000.00 were paid by 4990 and 4993 to various of the Defendants, without any legitimate business reason for those payments.

[4] Among the Defendants to whom funds are alleged to have been paid in that manner or by further transfers to other Defendants are Mr. Mudalier himself and also Viti Investments Limited ("Viti"), a company of which Mr. Mudalier was the sole shareholder and director, SLFN Land Corp (NT) Ltd. ("SLFN") a company of which he was a director, and 5721 NT Ltd., a company of which he was a director. It is alleged that at least some of the money went to Mr. Mudalier's wife Kelera, who is also a Defendant, and his daughter Susan, also a Defendant.

[5] Breach of fiduciary duty and conspiracy to misappropriate funds are also alleged. Ram, Kelera and Susan Mudalier are alleged to be among the co-conspirators.

[6] Essentially the Plaintiffs' case is that many thousands of dollars of Salt River's money was paid by 4990 and 4993 to Viti and other Defendants through the involvement of Mr. Mudalier and others for no legitimate purpose and to the Defendants' benefit. The Plaintiffs have a forensic audit which they say supports their position.

[7] In his statement of defence, Mr. Mudalier denies that he had a fiduciary obligation to the Plaintiffs and denies any wrongdoing or conspiracy.

[8] The questions that the Plaintiffs want Mr. Mudalier to answer have to do largely with financial information and transactions. Mr. Mudalier objects and says that such questions are not relevant prior to judgment as they go to the tracing of his assets, which is inappropriate because he is not a judgment debtor. The Plaintiffs say that the questions are not only relevant to tracing assets after liability is found, but also to establish liability.

[9] Counsel filed several cases setting out the scope of questions on examinations for discovery. The recent decision of Justice Charbonneau in *FDA Engineering Ltd. v. Aboriginal Engineering Ltd.*, 2014 NWTSC 27 is helpful as to the general principles. In that case, she pointed out that Rule 251 is designed to ensure full disclosure of all potentially relevant information to all parties, which greatly reduces the risk of the trial process getting derailed. The Court, on application to decide the validity of an objection to a question, must consider the issue from the point of view of relevance, in the context of the pleadings. However, it is not the Court's task at this stage to decide ultimate relevance or the weight that the evidence will carry.

[10] Also of assistance is *Fullowka v. Royal Oak Mines*, unreported, CV05408, March 10, 1998, another decision of this Court, which adopts the principle that a wide latitude should be allowed on discovery so that the fullest inquiry may be made as to all matters that can possibly affect the issues between the parties.

[11] There are also Ontario cases that say that questions should be answered unless they have no semblance of relevance; eg *Kay v. Posluns*, 71 OR (2d) 238, *Air Canada v. McDonnell Douglas Corp. et al* (1995), 22 O.R. (3d) 140 (Masters Chambers).

[12] As stated by the presiding Master in *Air Canada*, questions on discovery are proper if they may lead to a line of inquiry which would uncover admissible evidence.

[13] Admissibility of the evidence elicited by the question is not, however, an issue at this stage of the proceedings.

[14] As to questions about assets, the judgment of Newbould J. in *Waxman v. Waxman* 2013 ONSC 2790 distinguishes tracing issues after judgment from liability issues and points out that often evidence of what happened on a specific

transaction and the tracing of the result can lead to findings of liability. It is often not possible to separate out liability issues and tracing issues, so the Court on this type of application is not bound by a bright line between the two. Some questions may elicit answers that fall into an area that may be relevant to liability even if they are also relevant to tracing assets after judgment. *Waxman* was an inter-family dispute about a company and claims of various family members to its profits, thus it has some similarity to this case in that it involved questions of financial dealings.

[15] In *Waxman*, the chambers judge disagreed with statements made by a Master in *LaFarge Canada Inc. v. McAdoo Auto Parts Ltd.*, [2009] O.J. 298 to the effect that a party who claims a tracing order may not ask questions at discovery that seek a tracing of specific assets prior to establishing liability and a right to tracing. Mr. Mudalier relies on *LaFarge*, however I prefer the reasoning in *Waxman*. The circumstances in *LaFarge* were quite different from both *Waxman* and this case in that *LaFarge* was a claim based on breach of a term in an agreement of purchase and sale. The financial dealings between the parties were not themselves the subject of the litigation.

[16] In argument on this motion, Mr. Mudalier raises issues about the lack of specificity in the pleading of conspiracy. I dealt with that argument when it was made by other Defendants on an application for summary judgment: *Salt River First Nation #195 v. 5721 NT Ltd.*, 2012 NWTSC 62, paragraphs 90 to 92. As I pointed out then, conspiracy can be difficult to prove and the particulars must often be sought on discovery. Accordingly, a wide latitude should be allowed for questions which may elicit relevant evidence or assist in obtaining relevant evidence on the allegation of conspiracy.

[17] Also relevant to this application is the pleading, in paragraph 83 of the Amended Amended Statement of Claim, that one or more of the individual and corporate Defendants fraudulently converted to their own use monies belonging to the Plaintiffs.

[18] Other arguments were raised in objection to some of the questions and undertakings and I will deal with those in connection with individual items. I will go through the list and identifying numbers as set out in Schedules “A” and “B” of the Plaintiffs’ notice of motion filed on February 25, 2015, but have shortened the content of the questions for the sake of brevity in this Memorandum.

## Schedule “A”

[19] Undertaking No. 2 - After he testified on discovery that a new bank account had been set up, Mr. Mudalier was asked to advise what the new bank account number was and include the date the new number was assigned. He responded only with a number, claiming not to know which year the account with that number was set up. He can obtain that information from the bank and I order that he do so.

[20] Undertaking No. 5 - Mr. Mudalier was asked to provide tax returns for Viti for the years 2002 to 2008. He provided the return for 2008, but said that the rest had been stolen. On this application, his position is that the returns are not relevant to liability and that he is not obliged to request copies from Canada Revenue Agency. He cites *McAllister v. Calgary (City)*, 2012 ABCA 346 for the proposition that where records are in the control of a third party, they do not have to be produced.

[21] In my view the records are relevant to liability because it is alleged that Salt River money (that is, money that came through 4990 and 4993) flowed to Viti without a legitimate business purpose and that it flowed out of Viti to Mr. Mudalier and members of his family. What the income tax returns reveal about Viti’s reported income compared to how much Salt River money went to Viti may shed light on whether Viti was involved in a fraud or conspiracy in relation to Salt River money.

[22] *McAllister* makes it clear that the test in Alberta is that for a party to have power or control over a record being held by a non-party, the party has to have a specific legal right to access the record or to get copies of it from the non-party. The party with the specific legal right to access must have a corresponding ability to enforce compliance with the request. There is no reason to apply a different test in the Northwest Territories. Rule 218(2) provides that a document is deemed to be in a party’s power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.

[23] Mr. Mudalier, as the sole shareholder and director of Viti, has the right and ability to obtain Viti’s records from Canada Revenue Agency. Therefore copies of the tax returns must be obtained and produced.

[24] Undertaking No. 7 - Mr. Mudalier was asked to advise about the amount of certain mortgage payments made on a house in Fort Smith between 2004 and the end of 2007. He objects that the answer to the question will not help to determine whether he took money he was not entitled to from the Plaintiffs. However, if there is evidence that he took or received the money, and the money can be traced to the mortgage payments, that would be relevant to establish that he received the benefit of the money. Therefore the question is not solely relevant to tracing and must be answered.

[25] Undertaking No. 8 - Mr. Mudalier was asked to advise about payments on a third mortgage taken out on the Fort Smith house in 2006. This question has the same relevance as Undertaking No. 7 and I order that it must be answered.

[26] Undertaking No. 9 - I need not deal with this item as it was withdrawn by the Plaintiffs.

[27] Undertaking No. 11 - Mr. Mudalier was asked to produce his T4 slips from Aurora College for 2002 to 2008. He did not produce them and objects on the ground that they are not relevant and that they are in the possession of Canada Revenue Agency. In my view they are relevant; his employment income is part of a financial picture that may or may not reveal that he received money from other sources, including SRFN money flowing through other Defendants, thus going to liability. He has the right to obtain the T4 slips from Canada Revenue Agency under the *Privacy Act*, R.S.C. 1985, c. P-21. I order that he obtain and produce them.

[28] Undertaking No. 13 - Mr. Mudalier was asked to advise how much money he put into his RRSP between 2002 and 2008. This also is relevant to the tracing of what money he had and used to his own benefit and thus liability. The question must be answered.

[29] Undertaking No. 16 - Mr. Mudalier was asked to obtain copies of SLFN's income tax returns and responded that they were stolen. He says that he should not have to ask Canada Revenue Agency for them as the company no longer exists and he is therefore no longer a director of it. He also says that he was produced for examination in his personal capacity only and therefore is not bound to answer on behalf of SLFN. Counsel were not in agreement on the latter point at the time of the application, but have since clarified by way of a letter to the Court

that Mr. Mudalier was produced both in his personal capacity and on behalf of Viti, but not on behalf of SLFN.

[30] In my view, since Mr. Mudalier was not examined as a representative of SLFN, he cannot be asked to produce that company's documents. If and when he is examined as a representative of SLFN, he can be asked.

[31] Undertaking No. 18 - Mr. Mudalier was asked to produce a copy of his Document 58, which is a page from a bank statement, without portions blacked out as they were when he provided the document to the Plaintiffs. Mr. Mudalier's counsel does not advance a claim of privilege but says that it is up to him as counsel to decide what is or is not relevant and produce only what is relevant. I disagree. The document itself and the answers to questions about it, and any ruling that might be made by the Court, determine what is relevant. It is not the prerogative of counsel to decide what is relevant in a document without the other party or parties having a chance even to see the entries. A bank statement has potential relevance because it is designed to show what monies entered and left the account. A copy of the document without any portions blacked out must be produced.

[32] Undertaking No. 19 - Mr. Mudalier was asked to produce copies of his Documents 1 to 27 without portions blacked out. Copies without any portions blacked out must be produced for the reasons given for Undertaking No. 18.

[33] Undertaking No. 20 - This was a request for production of a copy of Mr. Mudalier's Document 104 without portions blacked out. The same ruling applies as with Undertaking 18.

[34] Undertaking No. 21 - The same ruling as with Undertaking 18 applies to Mr. Mudalier's documents 105 to 123, 147 and 148 to 170.

[35] Undertaking No. 22 - Mr. Mudalier was asked to look for, inquire and produce any cheques on his bank account written to Kelera or Susan Mudalier. He refuses to produce cheques for the year 2007 on the grounds that the pleading as to Kelera and Susan Mudalier is insufficient and the documents are not within his control. I have dealt with the issue of sufficiency of the pleading of conspiracy above. Mr. Mudalier has the legal right to obtain copies of cheques written on his account from his bank and therefore has the required control. *Franco v. Hackett*,

2000 ABQB 241, cited by Mr. Mudalier, has no application because the document requested in that case did not exist and the litigant who was asked to produce it had no control over the person with the information necessary to create it. Mr. Mudalier is ordered to produce the cheques.

[36] Undertaking No. 27 - Mr. Mudalier was asked to advise as to the amount of his annual salary from Aurora College in 2005 and 2006. The income tax returns that he produced show only total income and the Plaintiffs want to know if all that income was from the College. Mr. Mudalier says this is tracing only. I disagree. What Mr. Mudalier was paid by the College compared to other money that went into his account may be evidence relevant to liability. He is ordered to provide the information.

[37] Undertaking No. 28 - Mr. Mudalier was asked to advise what an April 8, 2006 payment of \$5,000.00 to GMAC was for. The answer may be relevant to liability on the issue whether he received a benefit from money placed in his account if that money cannot be traced to legitimate sources of income. I order that he answer the question.

[38] Undertaking No. 29 - Mr. Mudalier was asked to provide copies of any cheques written by Viti to Susan Mudalier. He has not provided a clear answer to the question whether there are any such cheques and takes the position that he need not do so because he has an ongoing obligation to disclose. It is unclear to me whether he says he has thoroughly searched and cannot find any such cheques. The ongoing obligation to disclose does not mean that an individual can sit back and not look for documents and only produce them if they happen to appear without any effort on his part. That would defeat the purpose of discovery. I order that Mr. Mudalier look for the cheques and provide an answer to whether he has them, and if he does, produce them, within 60 days of the date of this judgment.

[39] Undertaking No. 30 - Mr. Mudalier was asked to search his records for cheques paying Susan Mudalier from Viti in 2002 and 2006. For the same reasons as the previous undertaking, he is ordered to look for the cheques and provide an answer as to whether he has them within 60 days. If he locates the cheques, he is to produce them within 60 days of the date of this judgment.



[40] Undertaking No. 32 - Mr. Mudalier was asked to produce monthly statements for two of his Visa cards during the relevant time period. This was objected to on the grounds of relevance and that he is not obliged to get documents from third parties. The documents are relevant because his financial situation and what money came to him and what money he spent or distributed during the time in question may assist in proving that Salt River money went to him or others. He has the right to get the documents from his bank or Visa provider. I order that they be produced.

[41] Undertaking No. 33 - Mr. Mudalier was asked to advise which property a particular mortgage was placed on. He argues that this goes to tracing only, however it goes to his financial situation as a whole which may have relevance to liability. I order that he answer the question.

[42] Undertaking No. 34 - Mr. Mudalier was asked the same question about another mortgage and for the same reason I order it be answered.

[43] Undertaking No. 35 - Mr. Mudalier was asked the same question about another mortgage for which some payments were made out of Kelera Mudalier's account. For the same reasons as with the preceding two undertakings and the additional reason that it may show financial dealings between Mr. Mudalier and Ms. Mudalier which may be relevant to the conspiracy claim, I order the question be answered.

[44] Undertaking No. 36 - Mr. Mudalier was asked about the identity of another mortgage and for the same reason, i.e. his financial situation, I order the question be answered.

#### Schedule "B"

[45] Transcript June 9, 2014, page 20 - Mr. Mudalier was asked whether he was supporting Kelera Mudalier between 2002 and 2010. Any financial dealings or arrangements between Mr. Mudalier and Kelera Mudalier may be relevant as showing that she obtained a benefit from Salt River funds that are traced to Mr. Mudalier and may provide evidence as to whether she was involved. I order that the question be answered.

[46] Transcript June 9, 2014, page 134 - The question about how much money Mr. Mudalier put in his RRSP has already been dealt with as Undertaking 13 above.

[47] Transcript June 18, 2014, page 997 - Mr. Mudalier was asked why, when he used SLFN to collect money from the Plaintiff 4990 NT Ltd. for past services rendered by Viti, he did not bill the full amount. Mr. Mudalier had testified that he had made the decision to do this, but objected to answering why he made that decision. Mr. Mudalier says that he was not the controlling mind of SLFN, just one of its directors, and that he is not the proper person to ask and was not, in any event, produced as a representative of SLFN. He was, however, the sole shareholder and director of Viti, so any questions about how Viti collected money due to it have some relevance when the circumstances involve other Defendants and the Plaintiffs. This question cannot be said to be solely a question for SLFN because it crosses over to decisions made by Mr. Mudalier for Viti. The answers may not be binding on SLFN, but that is an issue I need not decide. I order that Mr. Mudalier answer the question.

[48] Transcript June 19, 2014, page 1087 - Mr. Mudalier was asked to say whether a payment referred to in one of his documents is related to a payment referred to in a chart drawn up by Mr. Jacula, the forensic auditor retained by the Plaintiffs. The chart is described by Mr. Jacula in paragraph 5 of his affidavit sworn November 4, 2010 as “a schedule detailing the suspected improper payments from the bank accounts of 4990 and 4993 which were made to 5721, 5780, SLFN Land and Viti...”.

[49] Mr. Mudalier objects to the question on the basis that he should not be asked to comment on the evidence of another witness. In my view his objection has merit. Generally a witness should not be asked to comment directly upon any other person’s knowledge, information and belief, although one witness can be asked the same questions another witness was asked and the questioner can make what he or she wants of the answers: *Chertsey Developments Inc. v. Red Carpet Inns Ltd.* (1990), 74 OR (2d) 665, Master’s Chambers.

[50] The Plaintiffs rely on *Air Canada v. McDonnell Douglas Corp.* (1995), 22 OR (3d) 140 (Master’s Chambers). In that case, a witness was ordered to answer questions about whether he had any reason to challenge a Transport Canada report on an aviation crash. The Master held that although a witness should generally not

be asked to comment on the testimony of another witness, this was different because it was not the evidence of another witness, but rather a document that was relevant and producible and directly addressed the fundamental issue in the action, that being the cause of the crash.

[51] I would distinguish the *Air Canada* case. The Transport Canada report was a report required by the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3. It was not an opinion prepared by a witness retained by a party to litigation. Mr. Jacula is a witness retained by the Plaintiffs and the chart he has prepared reflects his opinion as to certain transactions. In my view asking Mr. Mudalier to comment on the chart is asking him to comment on Mr. Jacula's evidence and on his opinion. He is not obliged to answer the question.

[52] Transcript June 19, 2014, page 1190 - Mr. Mudalier was asked what Kelera Mudalier's job was at a certain hospital. The Plaintiffs say, correctly, that if Ms. Mudalier had a job that met all her needs, that would be relevant to whether they can prove that she must have benefitted from Salt River money. Mr. Mudalier says that they can ask Ms. Mudalier the question. That is correct, however if he has knowledge of the facts, he must answer the question.

[53] Transcript June 20, 2014, page 1247 - Mr. Mudalier was asked whether he recalls Viti making a \$4000.00 payment to the Defendant Raymond Beaver. Mr. Mudalier objected on the basis that he was not examined on behalf of Viti, however it is now confirmed that he was. He also objected on the basis that this question in some way asks him to comment on Mr. Jacula's evidence, however so long as the question is not phrased in such a way to refer to Mr. Jacula's evidence or opinion, it is simply a question of fact that should be within Mr. Mudalier's knowledge. On that basis, I order that he answer the question.

[54] Transcript June 20, 2014, page 1277 - Mr. Mudalier was asked about why he made withdrawals of \$962.00 as described in the Jacula affidavit. The only problem with this question is that it asks Mr. Mudalier to comment on the Jacula affidavit. The question would be a proper one if it is rephrased without reference to the affidavit, or if Mr. Mudalier is asked about documents other than the Jacula affidavit which demonstrate the payment, or if he is simply asked whether he recalls making withdrawals in that amount of money.

[55] Transcript June 20, 2014, page 1303 - Mr. Mudalier was asked about the source of certain deposits to Viti's bank accounts, again as described in the Jacula affidavit. For the reasons already referred to, I rule that it is not proper to ask Mr. Mudalier to comment on Mr. Jacula's evidence. The question would be a proper one if it is worded in such a way that it does not ask for comment on the affidavit.

[56] Transcript June 20, 2014, page 1305 - Mr. Mudalier was asked to say who Viti's clients were between 2003 and 2006. He objects on the basis that the question is invasive, has no semblance of relevance and goes only to tracing. In my view the question is relevant because it goes to Viti's sources of income which may be separated out from any other money flowing to Viti, which may in turn be traced back to the Plaintiffs' funds. I rule that the question must be answered.

[57] Transcript June 20, 2014, page 1308 - Mr. Mudalier was asked whether Viti bought a vehicle in 2004. This has a semblance of relevance in that it goes to whether Viti obtained a benefit from funds diverted from the Plaintiffs to Viti. It may therefore be relevant to liability and is a question that must be answered.

[58] Transcript June 20, 2014, page 1308 - Mr. Mudalier was asked whether he insured his vehicle or homes using a specific insurer. This also goes to the question of whether Mr. Mudalier benefitted and so has a semblance of relevance; the question is to be answered.

[59] Accordingly, I order that Mr. Mudalier answer the undertakings requested in Schedule "A" as ordered. As to Schedule "B", I order that he re-attend for examinations for discovery at his own cost to answer the questions I have indicated must be answered.

[60] As the Plaintiffs were overwhelmingly successful on this application I order that they receive their costs taxed on a party and party basis.

V.A. Schuler  
J.S.C.

Dated at Yellowknife, NT, this  
23<sup>rd</sup> day of April 2015

Counsel for the Plaintiffs: Mr. David C. Rolf and Ms. K. Colleen Verville.

Counsel for the Defendants : Mr. Steven L. Cooper, except for SLFN Land Corp (NT) Ltd., Delphine Beaulieu, Fred Daniels, Melvin Wandering Spirit, Kelera Begum Mudalier and Susan Fay Mudalier.

Counsel for the Third Parties: No one

IN THE SUPREME COURT OF THE  
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Plaintiffs

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LTD., VITI INVESTMENTS LIMITED, RAM MUDALIER,  
JAMES SCHAEFER, RAYMOND BEAVER, MELVIN  
WANDERING SPIRIT, DELPHINE BEAULIEU, CHRIS  
BIRD, TONI HERON, SONNY MACDONALD, MICHAEL  
BEAVER, BARBARA HERON McARTHUR, BETTY  
TOURANGEAU, FRED DANIELS, KELERA BEGUM  
MUDALIER, SUSAN FAY MUDALIER, ALLAN  
SCHAEFER, ALLAN SCHAEFER carrying on business either  
as AJ's or as AJ's CONTRACTING, JOHN DOE, JANE DOE,  
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Defendants

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Third Parties

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MEMORANDUM OF JUDGMENT OF  
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