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ABORIGINAL & TREATY RIGHTS PRACTICE Macaulay Release No. 1, June 2024
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This release features updates to the case law and commentary in Chapter 1 (Parties) and Chapter 8 (Discovery).

Highlights

- **Parties – Defendant – § 1:22 Interested Parties** – In *Malii v. British Columbia*, 2024 CarswellBC 112, Justice Stephens held that the factors to be considered in an application to add a party as a defendant in section 35 litigation have changed, and that the stricter approach to the addition of defendants taken by the B.C. Court of Appeal in *Kwikwetlem First Nation v. British Columbia*, 2021 CarswellBC 2588 has overtaken the approach previously taken in *Cowichan Tribes v. Canada (Attorney General)*, 2016 CarswellBC 2501. In *Malii v. British Columbia*, the plaintiff, Gitanyow Nation, sought a declaration of Aboriginal rights and title to an area located in the mid-Nass River and Kitwanga River watershed in northwestern British Columbia. The applicant, Nisga’a Nation, sought to be added as a defendant, as the Nisga’a Nation have a Treaty with the Canada and the Province which grants the Nisga’a right over areas that overlap with the geographic area of the Gitanyow Nation’s claim. Justice Stephens held that *Kwikwetlem* had added to the considerations by requiring a court to place weight on proportionality, access to justice and reconciliation considerations, as well as the plaintiff’s choice as to how it chooses to frame its case on the pleadings. Justice Stephens was not satisfied that the Nisga’a Nation had a direct interest in the questions to be decided or that their participation was necessary to properly adjudicate the claim. However, the Court held that, as both Canada’s and the Province’s responses could potentially raise an issue as to the interpretation of the Nisga’a Treaty during the argument phase of the trial, that would statutorily entitle the Nisga’a Nation to be heard as party on the discreet issues they raised.
- **Discovery – Discovery of Documents – Grounds for Resisting Disclosure: Privilege – § 8:16 Case by Case Privilege** – In *Anderson v. Alberta*, 2024 CarswellAlta 216, the Beaver Lake Cree Nation, signatories of Treaty No. 6, sued the Crown for having improperly allowed its lands to be taken up for industrial and resource development, seeking declarations of rights, and injunctions and damages or equitable compensation. In the course of document discovery, the Beaver Lake Cree Nation produced several traditional land use study reports, but they claimed privilege over supporting documents used in the preparation of these reports. The Court found that the relationship between the Beaver Lake Cree Nation members and its leadership in the circumstances in which the communications arose required confidence and trust. The Court found that protecting the confidentiality of traditional knowledge and personal and family information provided by Elders, knowledge holders and other community members was essential to maintaining a relationship of trust between the Beaver Lake Cree Nation leaders and members of the community. On this basis, two of the *Wigmore* criteria were met. The Court also found that the supporting documents for interviewees who would be called as witnesses should be disclosed, and that the Beaver Lake Cree Nation had waived privilege to certain supporting documents already listed and provided to the defendants. Subject to this, the Court found that the interest in protect-

ing the communications from disclosure to significantly outweigh the interest in getting at the truth and disposing correctly of the litigation.