

CANADA / JUDGMENT

West Moberly First Nations v. British Columbia

2018 BCSC 730

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Supreme Court of British Columbia

DECIDED

24 April 2018

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2018 BCSC 730 West Moberly First Nations v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

West Moberly First Nations v. British Columbia,

2018 BCSC 730

Date: 20180424

Docket: S180247

Registry: Victoria

Between:

West Moberly First Nations, and Roland Willson on His Own Behalf and on Behalf of All Other
West Moberly First Nations Beneficiaries of Treaty No. 8

Plaintiffs

And

Her Majesty the Queen in Right of the Province

of British Columbia, the Attorney General of Canada, and British Columbia Hydro and Power
Authority

Defendants

Before: The Honourable Madam Justice Choi

Oral Reasons for Judgment

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Place and Date of Trial/Hearing:

Victoria, B.C.

April 11-13, 2018

Place and Date of Judgment:

Victoria, B.C.

April 24, 2018

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INTRODUCTION

- [1] The Site C project is a hydroelectric dam and generating facility on the Peace River in northeastern British Columbia. Construction on the project has been ongoing since July 2015. The plaintiffs claim that construction of the facility infringes their treaty rights, and they seek an interlocutory injunction to prevent work on the project pending determination of their claim at trial.
- [2] These reasons address several preliminary applications brought by the defendants in advance of the injunction application to be heard in three months' time. The applications are for further and better particulars of the plaintiffs' notice of civil claim; the striking of several of the plaintiffs' affidavits; and the production of documents relating to the expert reports filed by the plaintiffs.

BACKGROUND

- [3] The plaintiffs in the underlying action are the West Moberly First Nations and West Moberly's elected Chief, Roland Willson. I shall refer to the plaintiffs collectively as "West Moberly". The plaintiffs claim that the Site C dam is an unjustified infringement of their treaty rights. More specifically, they claim that the damming of the Peace River is an unjustified infringement of their rights under Treaty 8. The plaintiffs' ancestors adhered to Treaty 8 in 1914.
- [4] The plaintiffs filed their notice of civil claim on January 15, 2018. Shortly after, on January 31, 2018, they applied for an injunction to stop work on the Site C dam, except to the extent that construction is needed for safety or environmental reasons.
- [5] The injunction application is currently scheduled to be heard in July 2018.
- [6] BC Hydro, the federal Crown, and the provincial Crown have been named as defendants in this action. Each now seeks preliminary orders in advance of the upcoming injunction hearing.
- [7] BC Hydro seeks orders for further and better particulars, the striking of seven of the plaintiffs' affidavits, and the production of documents relating to the plaintiffs' expert reports. British Columbia seeks further and better particulars, and to strike affidavit #1 of Dr. Harry Swain. Canada also seeks to strike portions of the report of Dr. Swain. The defendants say that this relief is necessary to enable them to prepare for the injunction hearing.
- [8] All parties have emphasized the gravity of these proceedings. The defendants say that the Site C dam is likely the largest infrastructure project in British Columbia today. The plaintiffs say that the proposed project will have profound repercussions for their ancestral territory. I accept that the issues are very serious for all parties.
- [9] My decision today relates only to the preliminary applications brought by the defendants. I am not, of course, ruling on the merits of either the underlying action or the injunction application. I will, however, briefly describe the underlying action in order to provide context for my reasons.
- [10] It is common ground between the parties that the Site C project is situated on land included under Treaty 8. As I understand it, Treaty 8 guarantees that the plaintiffs can hunt, fish, and trap on their surrendered traditional territory until it is taken up by the Crown: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew Cree First Nation*] at para. 2. Under Treaty 8, the Crown may legitimately take up land for purposes including hydroelectricity: *Mikisew Cree First Nation* at para. 30; *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 [*Grassy Narrows First Nation*] at paras. 30, 35 and 50.

- [11] The Crown's right to take up lands under Treaty 8 is circumscribed not only by stipulated purposes but also by procedural and substantive limitations. The Crown's procedural duties include meaningful consultation.
- [12] One of the substantive limitations on the Province's right to take up land was referred to by the Supreme Court of Canada in *Mikisew Cree First Nation* at para. 48:
- [48] If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over its traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a Sparrow justification, would be a legitimate First Nation response.

See also *Grassy Narrows First Nation* at para. 52.

- [13] *West Moberly* and another Treaty 8 collective (*Prophet River First Nation*) earlier challenged the Crown's taking up of land for Site C by means of judicial review of administrative decisions allowing the project to proceed: *Prophet River First Nation v. British Columbia (Environment)*, 2015 BCSC 1682; *Prophet River First Nation v. Canada (Attorney General)*, 2015 FC 1030. These judicial review petitions were dismissed. The Courts found that a substantive action, rather than a judicial review of procedure, was the appropriate path by which to pursue a claim for infringement of treaty rights (see, for example, 2015 BCSC 1682 at para. 133).
- [14] The plaintiffs have now done just that. Their notice of civil claim seeks:
- a) Declarations that "in causing and/or permitting the cumulative impacts of the Bennett, Peace Canyon, and Site C Dams" and in "permitting the construction or operation of the Site C Dam", the Crown has breached its obligations to *West Moberly* under Treaty 8, and unjustifiably infringed *West Moberly's* Treaty 8 Rights (notice of civil claim, part 2, paras. 1, 2); and
 - b) Interim, interlocutory and/or permanent injunctions prohibiting Canada and BC from issuing any approvals required for the construction, completion or operation of Site C, and prohibiting BC Hydro from continuing or completing construction of Site C and flooding the Peace River (notice of civil claim, part 2, paras. 3, 4).
- [15] I pause here to highlight the plaintiffs' reference to "cumulative impacts" and their claim that their treaty rights have been infringed by the "cumulative impacts of the Bennett, Peace Canyon, and Site C Dams". I will discuss this reference later on in these reasons. For now, I will simply note that there was some debate during the hearing before me as to whether the idea of a claim based on "cumulative impacts" constitutes a novel legal argument. At this point, I find it sufficient to say that I am aware of no judicial decision in which that argument has been addressed.

[16] In addition to the notice of civil claim, the plaintiffs have also filed an interim injunction application which seeks to:

- (i) stop all work on the Project pending trial, except for works required for safety, to protect the environment and to maintain works in place;
- (ii) in the alternative, on certain conditions, stopping (i) flooding of the reservoir and (ii) work within certain areas called "critical areas" by West Moberly (see map attached to Notice of Application)[.]

[17] A case planning conference was held on February 19, 2018, before Master Bouck, and resulted in a number of orders (set out in reasons indexed as 2018 BCSC 270). The interim injunction application is presently scheduled for 10 days in July 2018. The defendants point out that the plaintiffs' materials for that application consist of about 4,300 pages and include 12 expert reports (supported by 14 experts) and 13 affidavits as to fact. As for the trial, the plaintiffs estimate it will take about 100 days, though the defendants estimate more than that will be required. Master Bouck ordered the defendants to file and serve their responses to the July injunction application by April 30, 2018.

[18] I turn now to consider the applications for particulars advanced by BC Hydro and the Province.

PARTICULARS APPLICATIONS

[19] BC Hydro and the Province apply for further and better particulars under R. 3-7 of the Supreme Court Civil Rules.

[20] In brief compass, these defendants argue that the pleadings define the issues for trial and set parameters for expert evidence. They say, however, that the current pleading is impermissibly vague in many areas, preventing them from ascertaining the plaintiffs' claim, which is at the core of the July injunction application.

[21] West Moberly responds that the defendants are well aware of their claims since they have been interacting with West Moberly for a decade in relation to these issues. For example, the defendants consulted with West Moberly about the impacts of the Site C dam, participated in the environmental review process that considered the impacts of Site C on West Moberly's traditional practices and treaty rights, and were respondents in the judicial review proceedings. Additionally, the plaintiffs argue the pleadings are clear and sufficiently precise, with no need for further particulars.

[22] For ease of reference, I will have West Moberly's notice of civil claim attached as a schedule to these reasons.

Particulars Sought by BC Hydro

[23] BC Hydro provided a demand for particulars to the plaintiffs on January 29, 2018. The plaintiffs responded on February 8, 2018. The plaintiffs' response satisfied BC Hydro with respect to some of the demands. Those remaining, which form the basis of BC Hydro's application, are:

14.

- (a) Demand #2: In relation to paragraph 9 of the Notice of Civil Claim, what are the reciprocal rights and obligations created by Treaty 8 asserted by the Plaintiffs;
- (b) Demand #4(a): In relation to paragraph 14, do the plaintiffs rely on any rights of the plaintiffs arising from Treaty 8 other than those set out in paragraph 14;
- (c) Demand #4(d): In relation to subparagraph 14(c), provide particulars of the resources and places referred to, and their significance to the Plaintiffs' hunting, fishing, and trapping, or other aspects of their mode of life;
- (d) Demand #4(e): In relation to subparagraph 14(d), provide particulars of the boundaries of the Plaintiffs' traditional territory.

18.

- (a) Demand #7(a): In relation to paragraph 40, provide particulars of the traditional practices referred to in subparagraph (f);
- (b) Demand #7(b): In relation to paragraph 40, provide particulars of the fish species preferred by West Moberly that will be extirpated referred to in paragraph (g);
- (c) Demand #7(c): In relation to paragraph 40, provide particulars of the preferred species of fish referred to in subparagraph (h);
- (d) Demand #7(d): In relation to paragraph 40, provide particulars of the practices referred to in subparagraph (i);
- (e) Demand #7(f): In relation to paragraph 40, provide particulars of the critical habitat for caribou that will be destroyed referred to in subparagraph (l);
- (f) Demand #7(j): In relation to paragraph 40, provide particulars of the traditional trails, navigation routes and spring water sources important to West Moberly that will be inundated referred to in subparagraph (p);
- (g) Demand #7(k): In relation to paragraph 40, provide particulars of the preferred species referred to in subparagraph (q);
- (h) Demand #8(a): In relation to paragraph 41, provide particulars of the patterns of activities referred to in subparagraph (d);

- (i) Demand #8(b): In relation to paragraph 41, provide particulars of the preferred means of exercising Treaty Rights referred to in subparagraph (e).

19.

- (a) Demand #4(b): In relation to paragraph 14, are the Crown's solemn promises the same as are set out in paragraph 11, and limited to them? If not, provide particulars;
- (b) Demand #5: In relation to paragraph 15, do the plaintiffs rely on obligations of the defendants arising from Treaty 8 other than those set out in paragraph 15? If so, provide particulars.

[24] In addition, BC Hydro also says that there is a recurring deficiency throughout the plaintiffs' pleadings and responses through the use of the terms "includes" and "including". It seeks clarification when the plaintiffs use the terms "includes" and "including but not limited to" (paras. 1, 3, 4, 5, 6, 8, 10, 12, 15, 19, 21, 22, 24, 25, 26, and 28 of the plaintiffs' reply). BC Hydro argues that the plaintiffs should not be able to leave their pleadings open but must, rather, identify with specificity what they are referring to when they use these terms.

Particulars Sought by the Province

[25] The Province delivered a demand for particulars to the plaintiffs dated February 1, 2018. The plaintiffs delivered their response dated February 13, 2018. The Province argues that the plaintiffs' responses to demands 2, 3(a), 3(b), 3(c), 3(d), 4(b), 5(a), 5(b), 5(c), 8(a), 9(c), 10(a), and 10(b) are insufficient. The Province's demands for particulars largely overlap with those of BC Hydro, described above. I will not repeat the demands of the Province that mirror those of BC Hydro. The demands of the Province that do not overlap with those of BC Hydro are these:

Demand 3(b): Particularize the "context" in which the plaintiffs say they (i.e., the solemn promises) were provided (relates to part 1, para. 14 of the notice of civil claim).

Demand 3(d): Particularize the traditional, cultural, and spiritual activities conducted at or in connection with the Peace referenced in subparagraph (f) (relates to part 1, para. 14 of the notice of civil claim).

Demand 5(a): Particularize who the plaintiffs mean by "their Dunne-za ancestors" (relates to part 1, para. 16 of the notice of civil claim).

Demand 5(b): Particularize how the Peace continued to have a "unique and central significance to the practices and mode of life" of West Moberly after adherence to Treaty 8 (relates to part 1, para. 16 of the notice of civil claim).

Demand 5(c): Particularize how the Peace is "necessary for the meaningful exercise of some or all of the Plaintiffs' Treaty Rights", and if only necessary for "some" of the Plaintiffs' treaty rights, particularize which rights (relates to part 1, para 16 of the notice of civil claim).

Demand 8(a): Particularize what are the "intended purposes of the Treaty" (relates to part 3, para. 4 of the notice of civil claim).

Demand 9(c): Particularize what do the plaintiffs say are the defendants' "constitutional obligations", and which defendants are alleged to have breached such obligations (relates to part 3, para. 5 of the notice of civil claim).

Demand 10(a): Particularize what are the "cumulative impacts" the plaintiffs say have breached Treaty 8, and when did this breach occur (relates to part 3, para. 6 of the notice of civil claim).

Demand 10(b): Particularize what do the plaintiffs say are "constitutional obligations" and which defendants are alleged to have breached such obligations (relates to part 3, para 6 of the notice of civil claim).

The Law of Particulars

[26] The parties are largely in agreement about the applicable law. Their disagreement arises from its application.

[27] Rule 3-1(2)(a) of the Supreme Court Civil Rules provides:

(2) A notice of civil claim must do the following:

(a) set out a concise statement of the material facts giving rise to the claim;

[28] Rules 3-7(18) and (22) provide:

(18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

(22) The court may order a party to serve further and better particulars of a matter stated in a pleading.

[29] The relationship between material facts and particulars was succinctly set out by Mr. Justice Voith in *Sahyoun v. Ho*, 2013 BCSC 1143 at para. 27:

[27] though the distinction can be difficult to apply, material facts are not particulars. In *McLachlin and Taylor* at 3-6, the authors state:

There is a distinction between material facts and particulars. A material fact is one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded. Particulars, on the other hand, are intended to provide the defendant with sufficient detail to inform him or her of the case he or she has to meet. Particulars are provided to disclose what the pleader intends to prove.

[30] Mr. Justice Lambert described some of the purposes of particulars in *Cansulex Ltd. v. Perry*, 1982 CarswellBC 836 (C.A.) [Cansulex] at para. 15:

- (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
- (2) to prevent the other side from being taken by surprise at the trial;
- (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial;
- (4) to limit the generality of the pleadings;
- (5) to limit and decide the issues to be tried, and as to which discovery is required, and
- (6) to tie the hands of the party so that he cannot without leave go into any matters not included.

[31] Madam Justice Power described the legal framework for particulars within the context of an Aboriginal rights case in *Cowichan Tribes v. Canada (Attorney General)*, 2016 BCSC 420 [Cowichan Tribes]. She wrote at para. 14:

[14] The parties agree on the legal test regarding particulars. The court in *GWL Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.* (1993), 79 B.C.L.R. (2d) 126 (S.C.) ("GWL Properties") pointed out that the particulars to be stated must depend upon the facts of each case. I note that Lowry J. distinguished between material fact and evidence, and found that the successful applicants sought "the facts which [the adverse party] must prove" and not "the evidence by which those facts will be proven" (para. 14). Lowry J. described an order for particulars as "primarily one of discretion to be exercised in a judicial manner."

[32] Madam Justice Power wrote further at paras. 15-17:

[15] The court then gave the following context for the importance of particulars: "The length of trials, and what seems to be the increasing length of trials, must be a matter of concern and anything that can be done to bring the real issues between the parties fairly forward without surprise for careful consideration must be encouraged" (para. 16). I note that GWL Properties also linked the use of the court's discretion to the complexity of the action and the expected length of trial (para. 9).

[16] This is apt in the context of aboriginal litigation. Both defendants raised *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 (S.C.C.) ("Lax Kw'alaams SCC"), a decision in which the court focused on clarity in pleadings generally in aboriginal litigation, echoing many of the purposive statements above from GWL Properties. In *Lax Kw'alaams SCC*, at para. 43, the court said:

Pleadings not only serve to define the issues but give the opposing parties fair notice of the case to meet, provide the boundaries and context for effective pre-trial case management, define the extent of disclosure required, and set the parameters of expert opinion. Clear pleadings minimize wasted time and may enhance prospects for settlement.

- [17] The court emphasized the fairness available in civil actions due to civil litigation's procedural safeguards, including pleadings, which are meant to bring about a "full hearing that is fair to all stakeholders" (para. 12).

Positions of the Parties on Particulars

Position of BC Hydro on Particulars

- [33] BC Hydro acknowledges the Supreme Court of Canada's comment in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in Nation*] at para. 20 that

a functional approach should be taken to pleadings in Aboriginal cases. The function of pleadings is to provide the parties and the court with an outline of the material allegations and the relief sought. Where pleadings achieve this aim, minor defects should be overlooked.

- [34] However, BC Hydro argues that the defects in the plaintiffs' pleadings are not minor, and that they will cause clear prejudice to the defendants.
- [35] BC Hydro maintains that particulars should be ordered to "tie-down" the plaintiffs so that the defendants know the case they need to meet. For example, the plaintiffs say in their notice of civil claim that the defendants' obligations "include" a list of responsibilities. BC Hydro asks that particulars be ordered so that this list is closed and the plaintiffs are not able to argue additional obligations during the injunction hearing or at trial.
- [36] BC Hydro further submits that the plaintiffs must provide particulars with respect to what constitutes their traditional territory. Given that they refer in their pleadings to their right to "hunt, fish, gather, and trap within their traditional territory", it is only fair that the plaintiffs provide particulars as to what that territory is. BC Hydro points to the testimony of Chief Willson in another proceeding, where the Chief was willing to agree to what he considered to be his "preferred territory". BC Hydro suggests that if Chief Willson was prepared and able to define what his preferred territory was in another proceeding, the plaintiffs should likewise be able to provide these particulars now. Specificity to the level of a survey is not necessary, and a more general description will suffice.
- [37] BC Hydro says that this geographic specificity will be important at the injunction hearing, and is therefore something that the defendants are entitled to know.
- [38] BC Hydro emphasizes Binnie J.'s caution, in *Lax Kw'alaams Indian Band v. Canada* (Attorney General), 2011 SCC 56 [*Lax Kw'alaams*], that a trial judge should not adopt a "commission of inquiry" approach when hearing Aboriginal rights claims. In that case, the Supreme Court of Canada held that even in Aboriginal rights litigation (where civil procedure rules may be interpreted generously), pleadings should be crafted with clarity from the outset. To do otherwise, Binnie J. warned, may cause the trial to "resemble a voyage on the Flying Dutchman with a crew condemned to roam the seas interminably with no set destination and no end in sight" (para. 42).

Position of the Province on Particulars

- [39] The Province agrees with much of what BC Hydro says about the need for particulars. It adds that the plaintiffs in other Aboriginal rights cases have been willing to provide maps of their traditional territory: see, for example, *Blueberry River First Nations v. British Columbia*, 2017 BCSC 899.
- [40] The Province also argues that the plaintiffs are advancing a novel legal claim, and that, as a consequence, the need to provide particulars is all the greater so as to allow the defendants to know the case they need to meet.

Position of West Moberly on Particulars

- [41] The plaintiffs dispute the characterization of their action as novel. While acknowledging there is relatively little case law on the kind of claims they are making, they say that the claims are, nevertheless, based on established jurisprudence relating to Aboriginal treaty rights.
- [42] West Moberly argues that they do not have to plead their case the way the defendants would prefer them to plead it. Rather, they have their own theory of their claim, and should not be forced to remake it to meet the desires of the defendants.
- [43] With regard to the issue of territory, the plaintiffs say that their traditional territory cannot be drawn on a map with firm boundaries - such an approach is not consistent with their worldview. They contend that it is not open to the defendants, or the Court, to force them to limit their territory in a way foreign to their culture.
- [44] The plaintiffs acknowledge that it may be appropriate to provide some additional particulars in advance of the trial. However, they maintain that it is still too early to order particulars, and that doing so may unfairly and prematurely narrow the scope of the plaintiffs' claim.
- [45] Regarding the defendants' demand for particulars about the plaintiffs' preferred means of hunting, fishing, and trapping, the plaintiffs say that there is recent authority saying that this is not required. They point to the decision of Power J. in *Cowichan Tribes* at para. 80, where she denied an application for particulars with respect to the plaintiffs' preferred means of exercising their right to fish.
- [46] Regarding the defendants' demands for particulars of the Crown's treaty obligations in historical context (BC Hydro's demand #5 and the Province's demand #4(b)), the plaintiffs rely on *Sam v. British Columbia*, 2014 BCSC 591 [Sam] at para. 21, for the proposition that the historical context of a treaty is not a matter to be demanded through particulars.

Position of Canada on Particulars

- [47] The defendant Canada took no position on these applications, except that it does not oppose the applications, and agrees that particulars would be useful.

Analysis on Particulars

- [48] Ordering further and better particulars is discretionary on the part of the chambers judge. Of course, that discretion must be exercised in a judicial manner, and with a mind to the established case law and appellate guidance: *Cowichan Tribes* at paras. 14-17, and *Cansulex* at para. 15.
- [49] In cases such as this one where an application for particulars is made in the context of an Aboriginal rights or treaty rights claim, special considerations arise. I am cognizant of the guidance from the Supreme Court of Canada that achieving reconciliation requires taking a functional approach, and giving weight to the perspectives of Aboriginal peoples: see *Tsilhqot'in First Nations* at para. 20; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 81-82. In short, because of the profound importance of reconciliation to all the peoples of Canada, it is wrong for this Court to take a picayune and overly technical approach to Aboriginal rights pleadings.
- [50] However, the Supreme Court of Canada has also made clear that Aboriginal rights litigation in Canada by now requires precision on the part of all litigants. As stated by Binnie J. in *Lax Kw'alaams* at para. 12:
- [12] At this point in the evolution of Aboriginal rights litigation, the contending parties are generally well resourced and represented by experienced counsel. Litigation is invariably preceded by extensive historical research, disclosure, and negotiation. If negotiations fail, the rules of pleading and trial practice are well understood. Tactical decisions are made on all sides. It is true, of course, that Aboriginal law has as its fundamental objective the reconciliation of Canada's Aboriginal and non-Aboriginal communities, and that the special relationship that exists between the Crown and Aboriginal peoples has no equivalent to the usual courtroom antagonism of warring commercial entities. Nevertheless, Aboriginal rights litigation is of great importance to non-Aboriginal communities as well as to Aboriginal communities, and to the economic well-being of both. The existence and scope of Aboriginal rights protected as they are under s. 35(1) of the Constitution Act, 1982, must be determined after a full hearing that is fair to all the stakeholders.
- [51] I find this statement to be apposite to the applications before me. The plaintiffs in this case are well represented and, especially in light of the upcoming interim injunction application, the issues are weighty.
- [52] For the reasons that follow, I accept that the deficiencies identified by the defendants are not merely "technical", but rather go to the defendants' ability to know the case they need to meet. I also accept that, because of the fast approaching injunction application, it is not sufficient to order particulars at a later stage in the proceedings. It is critical for the defendants and the Court to know with precision the plaintiffs' claim because of the magnitude of what is at stake on either side. The interim injunction may dispose of the notice of civil claim; indeed, counsel for BC Hydro argued that the case may not actually proceed to trial.

Further Particulars on Plaintiffs' Traditional Territory

- [53] In demand 4(e), BC Hydro seeks particulars of the boundaries of the plaintiffs' traditional territory. This demand mirrors the Province's demand 3(c).
- [54] The plaintiffs argue that they do not conceptualize their traditional territory such that it can be drawn on a map, and that it would be inappropriate for the Court to require it to do so. They also point to Cowichan Tribes at para. 80, where this Court denied an application for particulars going beyond the description of the site of the claimed aboriginal right to fish as "the south (i.e. main) arm of the Fraser River".
- [55] However, as Power J. noted in Cowichan Tribes, "[t]he facts of each case are different" (para. 80). In the present case, I accept that the geographic boundaries of the plaintiffs' rights to hunt, fish, and gather within their traditional territory are likely to be important to the adjudication of the underlying action, and also to the injunction application. As I understand it, the plaintiffs' action hinges in part on the comments in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 48 where the Court quoted Rothstein J.A. (as he then was) from the decision on appeal:
- [48] What Rothstein J.A. actually said at para. 18 is as follows:

With the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt. [Emphasis added.]

The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over its traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a Sparrow justification, would be a legitimate First Nation response.

- [56] The theory of the plaintiffs (at least in part) is that their treaty rights have been infringed because "so much land" has been taken up that an infringement of the treaty has occurred. Consequently, it seems that specificity about the areas the plaintiffs claim as their territory is appropriate. This is so because a comparison between a) the land claimed by the plaintiffs and "taken up", and b) the remaining land claimed by the plaintiffs but not "taken up", will likely be the focus of analysis.
- [57] In its reply during the hearing before me, BC Hydro argued that given the plaintiffs pleaded "traditional territory" in their notice of civil claim, it is only fair that the plaintiffs provide particulars as to what that traditional territory is. I find this argument persuasive.

[58] As a result, I order further particulars in relation to BC Hydro's demand 4(e), and the Province's demand 3(c).

Use of "Includes" and "Including"

[59] The defendants argue that it is impermissibly vague for the plaintiffs to use the terms "including", "includes", and "not limited to" in their pleadings and responses. It contends that the use of these open-ended terms is unfair because it creates uncertainty and risks causing the proceedings to slide into the "commission of inquiry approach" declaimed by Binnie J. in *Lax Kw'alaams* (para. 40). As I understand it, this argument relates to the use of these terms in paras. 1, 3, 4, 5, 6, 8, 10, 12, 15, 19, 21, 22, 24, 25, 26, and 28 of the plaintiffs' reply to the demand for particulars.

[60] The plaintiffs respond that use of the words "includes" and "including" does not prevent the defendants from knowing the case they need to meet, and does not entitle the defendants to particulars.

[61] The plaintiffs cite *Canada (Commissioner of Competition) v. Reliance Comfort Limited Partnership*, 2013 FCA 129 at para. 8, where the Federal Court of Appeal upheld Rennie J.'s refusal to order further particulars on the basis of the use of "includes" and "including". Mr. Justice Noël wrote:

[8] Rennie J. also held that these open-ended pleadings did not entitle the appellant to further and better particulars. He did so because he was satisfied that whether additional items should be included as a result of these open-ended pleadings is a matter within the knowledge of the appellant. Thus, the open-ended terminology does not prevent the appellant from knowing the case it has to meet (reasons, para. 46).

[62] The plaintiffs also point to *Manitoba v. Rothmans*, 2014 MBQB 160 [Rothmans] at paras. 51 and 61-62 where the Court made statements to similar effect.

[63] The plaintiffs argue that it is not enough that further particulars be "helpful" or "of assistance", but rather that they must be necessary. West Moberly says that "necessary" is a high standard: *Hoy v. Medtronic, Inc.*, 2004 BCSC 440 at para. 25 and *British Columbia (Director of Civil Forfeiture) v. Vo*, 2012 BCSC 1476 at paras. 30-31.

[64] I accept that there is nothing in the use of the words "includes" or "including" that, in and of itself, entitles the defendants to particulars. Each case is different, and each application for particulars must be scrutinized based on "the particular circumstances of [the] case": *Rothmans* at para. 61.

[65] In this case, I accept that the nature of the litigation requires the plaintiffs to particularize what they mean when they use the terms "include", "including", "included", and "include but not limited to" at this time. As a result, I exercise my discretion to grant the relief sought by the defendants in all the paragraphs sought. The plaintiffs must either close the list or provide the additional information upon which they rely.

[66] I would observe that Mr. Justice Bracken appears to have arrived at a similar conclusion when considering an application for particulars based on the facts before him in Sam at paras. 11-13.

[67] I pause here to note that my decision here applies to numerous additional demands discussed below regarding the use of the word "include" and variants of it. To that extent, there will be some repetition in these reasons.

Particulars Related to Species

[68] BC Hydro seeks an order requiring the plaintiffs to provide particulars admitted in the plaintiffs' application response. These particulars relate to demands 7(b), 7(c), and 7(k), which, in turn, relate to para. 40 of the plaintiffs' notice of civil claim.

[69] Paragraph 40 of the plaintiffs' notice of civil claim refers to fish species preferred by the West Moberly and the ability to hunt and trap preferred species.

[70] In their application response and during the hearing, the plaintiffs took the position that they are not required to particularize species, and that they rely on their right to harvest all species of fish.

[71] In light of this position, I deem it appropriate to exercise my discretion to order the plaintiffs to provide further particulars to confirm that they do not rely on particular species in their claim, but rather rely on all species.

Reciprocal Rights and Obligations

[72] Demand #2 of BC Hydro and demand #2 of the Province both ask for particulars in relation to para. 9 (part 1) of the notice of civil claim, and ask what are the reciprocal rights and obligations created by Treaty 8 asserted by the plaintiffs.

[73] Part of plaintiffs' response to the demand for particulars referred to paras. 11 and 14-15 of the notice of civil claim. However, these paragraphs use the words "include" or "also include", thus leaving their response open-ended.

[74] As discussed above, I order further particulars to the extent that where the plaintiffs use the words "include" and "include but not limited to", the plaintiffs must either close the list or provide the additional information upon which they rely.

[75] This conclusion also applies to demand 4(a) from BC Hydro.

Solemn Promises / Guarantees

[76] BC Hydro (at demand 4(b)) and the Province (at demand 3(a)) seek further particulars in relation to the plaintiffs' reference to "solemn promises" at para. 14 of the notice of civil claim.

- [77] As discussed above, I order further particulars to the extent that where the plaintiffs use the words "include" and "include but not limited to", the plaintiffs must either close the list or provide the additional information upon which they rely.

Obligations

- [78] BC Hydro (at demand 5) and the Province (at demand 4(b)) seek further particulars in relation to the plaintiffs' reference to "obligations" at para. 15 of the notice of civil claim.
- [79] As discussed above, I order further particulars to the extent that where the plaintiffs use the words "include" and "include but not limited to", the plaintiffs must either close the list or provide the additional information upon which they rely.

Resources and Places

- [80] BC Hydro (at demand 4(d)) seeks particulars in relation to the "resources and places which have a unique and central significance" referred to at para. 14(c) of the plaintiffs' notice of civil claim. The plaintiffs' reply to this demand clarified that "[t]he resources and places referred to in subparagraph 14(c) of the notice of civil claim include those within the area defined as the "Peace" in paragraph 12 of the Notice of Civil Claim, and include resources and places along the Parsnip and Finlay Rivers and other tributaries of the Peace River."
- [81] I order further particulars with respect to the boundaries of the area defined as the "Peace", in keeping with the reasons given above for granting the defendants' demand for further particulars of the plaintiffs' traditional territory. I also grant further particulars where the plaintiffs use the words "include" and "include but not limited to"; they must either close the list or provide the additional information upon which they rely.
- [82] Lastly, I grant BC Hydro's application for particulars as it relates to specific resources and places which have a unique and central significance to the plaintiffs, or particulars of their significance to the plaintiffs. The applicants are entitled to know what resources and places are unique and significant to the plaintiffs.

Traditional Practices

- [83] BC Hydro seeks particulars of the "traditional practices" referred to at para. 40(f) of the plaintiffs' notice of civil claim. There, the plaintiffs claim that Site C and the associated reservoir will "pose a risk to health through methylmercury contamination if fish are consumed in accordance with West Moberly's traditional practices".
- [84] One of the plaintiffs' experts, Dr. Annette Muttray, appears to rely on the consumption of fish for use in traditional practices as part of her analysis of the deleterious impacts of mercury from fish consumed by the West Moberly. Because some of the analysis may turn on this issue, I find it necessary to order particulars of the traditional practices mentioned at para. 40(f) of the notice of civil claim.

[85] BC Hydro's demand 7(d) seeks particulars with respect to "practices" as the term is used in para. 40(i) of the notice of civil claim, which states that the impact of Site C will be to "disrupt boat and shore-based river fishing practices". This application for particulars is granted.

Context of Solemn Promises

[86] The Province seeks the plaintiffs to particularize the "context" in which they say the solemn promises referred to in the notice of civil claim were provided (BC's demand 3(b), in relation to part 1, para. 14 of the notice of civil claim).

[87] I decline to order particulars in this regard because, in my view, it calls for evidence, and is unnecessary for the defendants to know the case they need to meet. I agree with the plaintiffs that this request is similar to that under consideration by Bracken J. in Sam at paras. 18-21. In my view, "context" here as in the facts before Bracken J. is very broad and is, thus, inappropriate to particularize.

Identity of the Dunne-za Ancestors

[88] The Province seeks the plaintiffs to provide particulars as to who the plaintiffs mean by "their Dunne-za ancestors" as referred to in the notice of civil claim (BC's demand 5(a), in relation to part 1, para. 16(f) of the notice of civil claim).

[89] In their reply to the Province's demands for further particulars, the plaintiffs write that their Dunne-za ancestors include those who were added to the federal government's Treaty 8 paylists as members of the Hudson's Hope Bay and those who were entitled to take payment under Treaty 8 as part of the Hudson's Hope Band, and also include those who were members of West Moberly First Nations, or entitled to be members of West Moberly First Nations, at and after 1971.

[90] I grant the further particulars sought. I agree that to the extent the plaintiffs use the word "include", they plaintiffs must either close the list or provide the additional information upon which they rely.

The Peace's Unique and Central Significance to Plaintiffs

[91] The Province seeks the plaintiffs to particularize how the Peace continued to have a "unique and central significance to the practices and mode of life" of West Moberly after adherence to Treaty 8 (BC's demand 5(b), in relation to part 1, para. 16 of the notice of civil claim).

[92] I will treat this in conjunction with the next demand below.

Necessity of the Peace for Meaningful Exercise of Treaty Rights

- [93] The Province seeks the plaintiffs to particularize how the Peace is "necessary for the meaningful exercise of some or all of the Plaintiffs' Treaty Rights," and if only necessary for "some" then particularize which treaty rights (BC's demand 5(c), in relation to part 1, para. 16 of the notice of civil claim).
- [94] I agree that the plaintiffs must particularize "some or all" to close the category in the pleading related to demand 5(c), or specify which treaty rights the plaintiffs can no longer meaningfully exercise.
- [95] However, I otherwise deny the Province's application for particulars sought in demands 5(b) and 5(c) because these aspects of the pleadings go to background and context, similar to Bracken J.'s reasoning in Sam at paras. 18-21.

Intended Purposes of the Treaty

- [96] The Province seeks the plaintiffs to particularize what are the "intended purposes of the Treaty" (BC's demand 8(a), in relation to part 3, para. 4 of the notice of civil claim).
- [97] I grant further particulars to the extent that where the plaintiffs use the words "include" and "as may be established at trial", the plaintiffs must either close the list or provide the additional information upon which they rely.
- [98] Otherwise, I decline to order particulars. They are unnecessary for the defendants to know the case they need to meet and, in effect, ask for a legal argument. In this regard, they are similar to the context issue discussed by Bracken J. in Sam at paras. 18-21.

Constitutional Obligations

- [99] The Province seeks the plaintiffs to particularize what they say are the defendants' "constitutional obligations", and which defendants are alleged to have breached such obligations (BC's demand 9(c), in relation to part 3, para. 5 of the notice of civil claim).
- [100] I grant further particulars to the extent that where the plaintiffs use the words "include" and "as may be established at trial", the plaintiffs must either close the list or provide the additional information upon which they rely.
- [101] I also grant further particulars with respect to which defendants the plaintiffs refer to in this paragraph.
- [102] This reasoning, likewise, applies to the Province's application for particulars in respect to demand 10(b), referring to part 3, para. 6 of the notice of civil claim.

Cumulative Impacts

- [103] The Province seeks the plaintiffs to particularize what are the "cumulative impacts" the plaintiffs say have breached Treaty 8, and when this breach occurred (BC's demand 10(a), in relation to part 3, para. 6 of the notice of civil claim).
- [104] I grant further particulars where the plaintiffs use the words "including"; they must either close the list or provide the additional information upon which they rely.

Other Demands

- [105] These next four demands are: (a) BC Hydro's demand 7(f) for particulars of the critical habitat for caribou; (b) BC Hydro's demand 7(j) for particulars of the traditional trails, navigation routes, and spring water sources; (c) BC Hydro's demand 8(a) for particulars relating to "patterns of activity"; and (d) BC Hydro's demand 8(b) for particulars relating to the plaintiffs' "preferred means of exercising their Treaty rights".
- [106] These four demands all relate in varying degrees to location. The plaintiffs have put these aspects in issue in their pleadings. I order the particulars sought because, in my view, location will be central to both the underlying action and the July injunction.

Deadline of Orders

- [107] BC Hydro seeks that the plaintiffs provide particulars within 21 days of the Court's order. By contrast, the Province seeks that they be provided within 14 days.
- [108] I am cognizant that, under the timeline laid out in Master Bouck's case planning order, the defendants are to file their responses to the injunction application and responding affidavits by April 30, 2018. Master Bouck's order also contemplated that BC Hydro and the Province would file responses to the plaintiffs' civil claim within 21 days of any further particulars ordered by the Court.
- [109] I therefore order that the plaintiffs provide the further and better particulars no later than 14 days from the date of these reasons.

APPLICATIONS TO STRIKE AFFIDAVITS AND PRODUCTION OF DOCUMENTS

- [110] I now turn to the defendants' applications to strike affidavits and for the production of documents.
- [111] In all, there were four applications made by the defendants with regard to the plaintiffs' evidence:
1. The Province's notice of application dated March 16, 2018, seeking to strike affidavit #1 of Dr. Harry Swain.

2. BC Hydro's notice of application dated March 20, 2018, seeking to strike seven of the plaintiffs' affidavits (Muttray #1, Komers #1, Gutsell #1, Thompson #1, Komers #2, Eliesen #1, and Swain #1).
 3. Canada's notice of application dated March 20, 2018, seeking to strike portions of the report of Dr. Swain, attached as Exhibit A to Dr. Swain's January 31, 2018 affidavit.
 4. BC Hydro's notice of application dated March 29, 2018, seeking production of documents relating to the expert reports filed by the plaintiffs in support of the plaintiffs' interlocutory injunction application.
- [112] Some of the relief sought by the defendants overlaps, and I can deal with the substance of the applications together. However, other relief has been sought by only one defendant, or has been framed differently by one defendant.
- [113] I propose to first address the three applications to strike the plaintiffs' affidavits. I will then address BC Hydro's application for the production of documents relating to the expert reports filed by the plaintiffs.

BC Hydro's Application to Strike Seven Affidavits

- [114] BC Hydro seeks to exclude seven affidavits tendered by the plaintiffs as expert evidence in support of their interlocutory injunction application. It submits that the impugned affidavits do not meet the criteria for admissible expert evidence.
- [115] BC Hydro argues that all the affidavits contain inadmissible opinion evidence and that any probative value is outweighed by the prejudice they will create. It further submits that they all also fail to comply with the procedural requirements of the Supreme Court Civil Rules and the common law. The affidavits, it says, do not meet the criteria set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 and should not pass the proper exercise of the gatekeeping function of the Court. BC Hydro also cites *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [White Burgess]; *R. v. Bingley*, 2017 SCC 12; *R. v. Abbey*, 2009 ONCA 624; and *J.P. v. British Columbia (Director of Children, Family and Community Services)*, 2017 BCCA 308 [J.P.], among other cases, in support of its argument.
- [116] BC Hydro additionally argues that two affidavits should be excluded because the affiant has appended a report authored by another person and adopted the opinions in the report. It says these reports are inadmissible as unsworn hearsay evidence of persons who have not been properly qualified as experts.
- [117] During argument, the plaintiffs submitted that they rely on the affidavits of Dr. Swain and Mr. Eliesen to provide fact evidence, as well as expert evidence. I will analyze these affidavits and reports as expert evidence because that is how the affidavits and notice of applications are framed. Therefore, my analysis only extends to these affidavits insofar as they provide expert opinion evidence.

Affidavit #1 of Dr. Harry Swain

- [118] I will first consider the affidavit of Dr. Harry Swain. Dr. Swain is the former chair of the joint review panel ("JRP") for the Site C project. He was appointed by both the federal and provincial ministers of environment under the Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 52, s. 38, and the British Columbia Environmental Assessment Act, S.B.C. 2002, c. 42, s. 27.
- [119] Dr. Swain was the chair of the Site C JRP throughout the environmental assessment review of the project and co-authored the JRP report that was released in May 2014.
- [120] The JRP had a mandate to conduct a joint environmental assessment of the proposed Site C dam. By having just one joint assessment, the JRP would avoid the duplication of resources that would occur had the federal and provincial governments each undertaken separate environmental assessments. The terms of reference of the JRP contemplated the panel holding public hearings and collecting information sufficient to enable the production of a report submitted to the federal and provincial governments. Under the terms of reference, one of the panel members was appointed by the federal government and one by the provincial government. The third panel member and chair, Dr. Swain, was jointly appointed by both governments.
- [121] The terms of reference also required that the panel members be unbiased and free of any conflict of interest, and that they have knowledge and experience relevant to the project being reviewed.
- [122] Following the release of the JRP report, the provincial government concluded that the significant environmental effects Site C was likely to cause were justified in the circumstances.
- [123] Dr. Swain produced a report dated January 31, 2018, which was put forward as expert evidence by the plaintiffs in support of the injunction application. Affidavit #1 of Dr. Swain attaches and adopts this report. The plaintiffs say they will rely on Dr. Swain's evidence to argue that the infringement of their treaty rights cannot be justified as being in furtherance of a compelling and substantial objective. Dr. Swain's evidence will be used to assess whether the government's choice of proceeding with the Site C dam, instead of other options, reflects a compelling and substantial objective that is furthered by the alleged infringement.

Arguments of BC Hydro and the Province to Strike Swain Affidavit

- [124] The Province and BC Hydro argue that Dr. Swain's evidence does not constitute expert evidence because it largely consists of argument. They submit that argument can be made by counsel for the plaintiffs, and that Dr. Swain's report is therefore not necessary. Because the report is not necessary, it fails the admissibility test for expert evidence laid out in *Mohan* and affirmed in *White Burgess*.

[125] By way of example, BC Hydro points to para. 14 of Dr. Swain's report, which states, "BC Hydro's demand forecasts are persistently and systematically wrong". It also highlights para. 33 where Dr. Swain, referring to what he characterized as the overly restrictive terms of reference given to the JRP, wrote, "[t]his was a poisoned chalice."

Arguments of the Plaintiffs that Swain Affidavit is Appropriate and Necessary

[126] The plaintiffs counter that Dr. Swain's affidavit and report are appropriate and necessary for the injunction application.

[127] As a preliminary matter, the plaintiffs argue that the admissibility applications are premature and ought to be deferred to the judge hearing the injunction application scheduled for July. They submit that admissibility issues ought not to be determined in a vacuum in advance of the hearing because that judge will have a better contextual understanding of the issues.

[128] Responding substantively to BC Hydro and the Province, the plaintiffs agree that Dr. Swain holds strong views. But the plaintiffs say that these views do not render him biased because those steadfast opinions would remain intact regardless of which party retained him. Thus, he passes the "acid test" referred to by Mr. Justice Cromwell at para. 32 in *White Burgess*:

[32] The acid test is whether the expert's opinion would not change regardless of which party retained him or her: These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

[Citations omitted.]

Legal Framework for the Admission of Expert Evidence

[129] It is trite, but bears repeating, that expert evidence is an exception to the rule against opinion evidence. The role of an expert is to assist the trier of fact and to be independent, not an advocate.

[130] *Mohan* set out the following criteria for determining the threshold admissibility of expert opinion evidence at para. 17: a) relevance; b) necessity in assisting the trier of fact; c) absence of any exclusionary rule; and, d) a properly qualified expert. The Court further held that even where otherwise admissible, a judge may determine that the probative value of expert evidence is outweighed by its prejudicial effect in a cost-benefit analysis and exclude it on that basis (*Mohan* at para. 18).

- [131] White Burgess subsequently set out an additional criterion: the expert witness owes a duty to the court to be fair, objective, and non-partisan (para. 46). An expert's independence and impartiality is a threshold requirement and does not simply go to weight (para. 34). However, if evidence meets the threshold requirement and is admitted, independence and impartiality can still be considered in relation to weight (para. 45).
- [132] White Burgess adopted a two-step process for admitting expert opinion evidence in which the cost-benefit analysis described in Mohan forms part of the court's overall discretion. At the first stage, the evidence must be considered in light of the four Mohan factors. At the second, the court must weigh the potential risks against the benefits of admitting the evidence. In this latter regard, Mr. Justice Cromwell noted at para. 16 that the jurisprudence since the mid-1990s has added new requirements in order to assure reliability and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.
- [133] The Supreme Court of Canada revisited this framework in Bingley, affirming at para. 13 that "[t]he trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process." To similar effect are the comments of the British Columbia Court of Appeal in J.P. at para. 271 describing the importance of the court's gatekeeping function.
- [134] The Ontario Court of Appeal in Abbey described that in weighing the "benefit" side of the cost-benefit evaluation, the potential probative value of the evidence and the significance of the issue is to be considered. In weighing the "cost" side, the court addresses risks such as consumption of time, prejudice, confusion and the risk that the trier of fact will abdicate its fact-finding role to the expert (paras. 87, 90).

Analysis

- [135] I have determined that I am able to decide the admissibility applications before me, based on the evidence and arguments presented, and I decline to defer them to the injunction application in July.
- [136] I come to this conclusion because the hearing before me on this issue occupied two full days of court time, and I am satisfied that the positions of the parties were well-articulated by experienced counsel. If the admissibility applications are deferred, the parties agree that another two or three days must be added to the injunction hearing. The preparation leading up to that hearing, including responsive reports and the cross-examinations of experts, will be more efficient if admissibility is determined now. Moreover, should this matter be deferred to the injunction application, it is not at all clear to me that the Court would be in a substantially better position to make these determinations than it is today. The common law framework for threshold admissibility of expert opinion evidence is by now well established.

- [137] Further, the injunction application is estimated to take ten days of court time. Looking beyond the injunction application, there are other deadlines relating to the proposed construction of the Site C project that have been referred to by the parties. In my view, it is preferable for this Court to facilitate the timeframes referred to in Master Bouck's order. Therefore, for these reasons, and in the interest of judicial economy, I decline the plaintiffs' invitation to postpone the decision on this issue until the injunction hearing.
- [138] I now turn to the substance of the applications.
- [139] In my view, Dr. Swain's report largely outlines his views as to the frailties of the JRP's report and the BC Utility Commission Inquiry of 2017. His report, in effect, outlines an argument as to why the two reports the government relies on to construct Site C are erroneous.
- [140] I agree with the defendants that Dr. Swain's report is not necessary and not proper expert opinion because it is argument. Arguments are the domain of counsel, not of expert witnesses. Expert reports are tendered because they assist the trier of fact in deciding issues it could not, otherwise, make without the expert's special knowledge.
- [141] Even if I were to have found that Dr. Swain's report meets the threshold criteria at stage one of the analysis, I would nevertheless find that its prejudice far outweighs any probative value, and thus fails the second stage of the White Burgess test.
- [142] While Dr. Swain has certified that he is aware of his duty as an expert witness to assist the Court and not be an advocate for any party, I have a concern whether he is actually able to discharge that duty. Some of his conclusions are set out as follows:
- "In my view, the deputies' letter exhibited prejudice and bias towards completion of Site C" (para. 37);
 - The plaintiffs "did not get a fair hearing" (para. 21); and
 - "The terms of reference of the review were highly restrictive. The Commission had to accept as the basis for its analysis the load forecast of BC Hydro" (para. 32).
- [143] However, these conclusions are not supported by rationale or references on which Dr. Swain bases his report.
- [144] In my view, the majority of the report displays a bias. By this, I do not suggest that Dr. Swain's views would change if he were retained by the defendants. Rather, Dr. Swain is committed to a purpose. This is inconsistent with an expert's obligation to the court to provide an opinion that is impartial, independent and absent of bias (White Burgess at para. 32). While possessing a passionate belief is not in and of itself a basis to exclude Dr. Swain's report, I find that his orientation and opinions are so entrenched that these render him unreliable to the trier of fact.

[145] Accordingly, I would also exclude Dr. Swain's evidence at the second stage of the White Burgess test because it fails to meet the necessary threshold of independence and impartiality. Dr. Swain's affidavit #1 is struck.

Canada's Application to Strike Portions of the Report of Dr. Swain

[146] Although not necessary to address given the outcome above, I would note that Canada also seeks to strike portions of paras. 7, 10, 12, 13, 16, 20, 21, 23, 27, 29, and 30 of Dr. Swain's report, though on a different basis. It claims that that the impugned paragraphs breach deliberative secrecy privilege because they contain internal deliberations of the JRP, as well as conclusions reached by the JRP that were not published in the panel's official report. The Province also filed a notice of application seeking to strike Dr. Swain's evidence on the same basis.

[147] As noted, it is not necessary that I address these applications in the circumstances, and I therefore adjourn them generally.

[148] I now turn to the other affidavits.

Affidavit #1 of Marc Eliesen

[149] Mr. Eliesen was the CEO and President of BC Hydro from 1992 to 1994 when the Board of Directors voted to remove Site C from its list of potential energy projects. He provides a report that opines on the following issues: (a) the 1993 decision not to proceed with Site C; (b) BC Hydro's management of Site C since 2010; (c) the development of similar projects in other jurisdictions; and (d) the cost and schedule of the project.

[150] BC Hydro argues that the Eliesen Report fails to meet all four Mohan criteria and the common law requirements for expert reports codified in R. 11-6(1). It argues that Mr. Eliesen is not a properly qualified expert and that the opinions he proffers are outside the scope of his stated expertise in "strategic business management and public policy advice." Further, BC Hydro submits that his report is "largely a polemic on government policy, his view of treaty rights and the various review processes the project underwent".

[151] The plaintiffs respond that Mr. Eliesen is clearly qualified to give opinion evidence on the subjects covered in the report. They argue the Eliesen report provides both relevant and necessary information, based on his personal experience as President and CEO of BC Hydro, and opinion evidence based on his expertise in the energy sector. Further, they say the report complies with the common law requirements for an expert report, as the assumptions and facts, as well as the documents relied on, are set out at paras. 11-13.

[152] Paragraphs 11-13 state:

11. BCUC examined the methodology and underlying assumptions of BC Hydro's forecast of electricity demand and found them to be unreliable. At page 4 of the report, the Commission stated that "Hydro's forecasts...neither explicitly take energy prices into account nor rely on

statistically significant past patterns of behaviour." The Commission concluded that the project was not needed in the proposed time horizon advanced by BC Hydro and that over-supply of electrical power would have significant negative implications for rate payers and therefore starting construction prematurely needed to be carefully guarded against.

12. BCUC's decision to reject BC Hydro's request for a certificate proved sound. Despite BC Hydro's claim that construction would need to commence in 1984 and that the power from Site C would be needed by October 1990, no further action was undertaken until 1989 when BC Hydro commenced preparations for a possible new application for conditional approval of an Energy Project Certificate as a contingency measure. These preparations are detailed in Exhibit B, the Peace Site C Summary Status Report.
13. I was appointed President, CTO and Member of the BC Hydro Board effective November 1992. As part of the long-term planning and budget process we reviewed our options for future generating power. These included an assessment of Site C.

[153] Mr. Eliesen has not attached a letter of instruction from counsel, but has summarized the instructions from counsel at para. 2 of his affidavit.

[154] Mr. Eliesen affirmed that he was instructed to provide opinions on the following:

- a) The decisions made prior to 2010 not to proceed with the Site C project, and the soundness of the reasoning underlying those decisions.
- b) The relevance of the development of mega-dams or other major projects similar to Site C in other jurisdictions to the current and future state of affairs for Site C with respect to cost and schedule.
- c) The effectiveness of senior management in preparing for and addressing critical project management issues Site C has faced or now faces, and implications for cost and schedule.

[155] For the reasons that follow, I conclude that Mr. Eliesen's report does not meet the Mohan criteria and will be struck.

[156] Mr. Eliesen's report makes broad sweeping generalizations. The following are examples:

- a. From para. 36:

BC Hydro has not constructed a large hydro project for many decades The vast majority of staff with utility experience have retired or no longer work for the company. Consequently there is a lack of professional and management expertise at BC Hydro with respect to large scale hydro construction projects.

- b. From para. 85:

BC Hydro's approach to qualifying contactors is an important issue particularly since corporate non-performance can have significant consequences for a major project, the implications of which cascade throughout the project time line and costs. The negative experience with Petrowest, and its effect on project costs and schedules, is evidence that BC Hydro has been derelict in its due diligence duties with respect to contractor vetting.

c. From para. 86:

It is my expert opinion that the financial failure of Petrowest will also continue to have a negative impact on project cost and budget

d. From para. 87:

There are serious and ongoing difficulties between BC Hydro management and the remaining PRHP management

[157] Mr. Eliesen's report is based on unknown facts, and the conclusions drawn are speculative. The bulk of his affidavit is comprised of a review of publically available documents and conclusory statements about them. I agree with BC Hydro that factual evidence does not need to be introduced by an expert witness and that argument is properly the role of counsel.

[158] Consequently, I agree with BC Hydro's submissions at para. 69: "These are not issues on which the court needs assistance from an expert and will distract from the issues to be decided."

[159] Accordingly, I find that Mr. Eliesen's affidavit does not meet the requirements of Mohan. It is largely argument, and fails to provide an opinion that could not be formed by the Court. The affidavit is struck.

Affidavit #1 of Petr Komers, Affidavit #1 of Sheri Gutsell, and Affidavit #1 of Megan Thompson

[160] BC Hydro objects to the admissibility of the affidavits of Drs. Komers, Gutsell and Thompson, three ecologists who authored different sections of an expert report titled "Evaluation of Impacts and Mitigations for Site C Dam Compared to Alternative Energies" (the "Comparison Report"), which is attached to Komers Affidavit #1. The authors were asked to provide an opinion "comparing, at a high-level, the potential environmental impacts of BC Hydro's Site C hydro-electric project relative to the alternative energy projects described in the Alternative Portfolio considered by the BC Utilities Commission in its Site C Inquiry."

- [161] The Comparison Report explains that the authors used the assumptions in the BCUC's report and the JRP's conclusions on Site C's project design and environmental impacts for the purposes of the comparison, while noting that they "do not adopt the JRP findings as" their "evidence for impacts". It also sets out the secondary literature the authors relied on in preparing the report.
- [162] BC Hydro argues that the report does not clearly set out the required instructions, assumed facts, and the basis for the authors' conclusions. It says this deprives the defendants (and the Court) of the opportunity to know the basis for the expert's opinion, to properly prepare for cross-examination, and, if necessary, to obtain a responsive report.
- [163] BC Hydro also objects to the report as largely irrelevant and unnecessary. It proves nothing about what the environmental impacts of alternative energy projects would actually be in BC. As well, the report is irrelevant to both the test for treaty rights infringement and the three-part test for an injunction established in *R.J.R Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Therefore, BC Hydro argues, the report is unnecessary to assist the trier of fact and consequently inadmissible.
- [164] The plaintiffs submit the report would provide useful and relevant information to the Court both at the injunction hearing and at trial. They describe what the report does as follows: it assumes that the impact of Site C described by the JRP would occur, assumes that the alternative energy portfolio put forward by the BCUC would be implemented, and then compares the land use impact of these two different scenarios. It is, in effect, a land use efficiency study of two different energy projects, Site C and an alternative set of energy projects. Its conclusion that the same amount of power could be obtained from alternative sources to Site C with less impact was reached on the basis of expertise that the Court does not have on its own, and is very important to probative issues at the injunction hearing and the trial.
- [165] In my view, while the report has limitations which are acknowledged by the authors, those can be better addressed by determining the weight to be attributed to the report at the hearing or trial. BC Hydro's contention that the report is based on an "undefined, unidentified collection of wind energy projects" is an argument that goes to the weight of the report rather than its admissibility. The issues raised by BC Hydro can be addressed through cross-examination on the report.
- [166] Overall, however, I am satisfied that the report is necessary in that it provides expertise and analysis on a relevant issue which cannot be provided to the Court by counsel or lay witnesses.
- [167] I conclude the Comparison Report meets the requirements for admissibility set out in *Mohan* and *White Burgess*. Accordingly, BC Hydro's application to strike these three affidavits is dismissed.

Affidavit #1 of Dr. Annette Muttray

[168] Dr. Muttray is a Senior Consultant at ERM Consultants Canada Ltd. ("ERM"). A report prepared by ERM for the West Moberly First Nations, dated March 2015 and titled "Crooked River Report", is appended to her affidavit. At para. 3, Dr. Muttray deposes:

My understanding is that the Crooked River Report was written by Bruce Muir and Dr. Leslie Shelley, with statistical analysis by Dr. Kerry Marchinko, and that it was technically reviewed by Sharon Quiring, with Bruce Muir as the project manager and Dr. Kent Gustavson as the Partner-in-Charge (collectively, the "ERM Project Team").

[169] In subsequent paragraphs, Dr. Muttray deposes that her "understanding" is that the authors of the report, Bruce Muir and Dr. Shelley, have left ERM, and that Dr. Shelly has declined to be deposed regarding the report because her new employer is engaged by BC Hydro on the Site C project. Based on her review of the report and discussions with members of the ERM Project Team, Dr. Muttray adopts the Crooked River Report as her expert opinion.

[170] BC Hydro argues that the primary reason for striking this affidavit and the appended report is that an expert cannot tender, as evidence for its truth, a report authored by another person. It says the report is inadmissible notwithstanding its purported adoption by the affiant. BC Hydro cites *Lindholm v. Vankouehnett*, [1998] B.C.J. No. 3092 (S.C.) at para. 17:

for a report to be admissible under Rule 40A, it must embody the opinion of an expert which is based, at least partly, on his own inquiries or examination. The report must add value in some fashion to other evidence in the action. A report which does no more than marshal and summarize the expert opinions of other experts giving evidence in the case is not admissible. That is the job of counsel. A report which, having marshalled and summarized those opinions, does no more than express the opinion of the author that the views of one group of experts are to be preferred over those of another group is also inadmissible. [Emphasis added.]

[171] BC Hydro also cites the following cases for the principle that expert opinion must belong to the individual expert who tenders the report: *Heidebrecht v. Fraser-Burrard Hospital Society*, [1995] B.C.J. No. 2996 (S.C.) at para. 11; *Zhang v. Kan*, [2003] B.C.J. No. 164 (S.C.) at para. 85; and *Jones v. Ma*, 2010 BCSC 867. These cases involved "joint" or "corporate reports" with multiple authors. In both *Heidebrecht* and *Jones*, the Court found that for a report to be admissible, it must be clear on its face that the opinions contained within it are those of the expert who prepared and signed the document.

[172] BC Hydro submits that if the report is admitted, the defendants will be prejudiced in their ability to cross-examine Dr. Muttray because she does not know the fundamental facts that formed the basis of the report.

[173] BC Hydro further says that the report contains internal limitations on its use. For example, the executive summary on page nine states that the report assesses risk to human health due to the consumption of bull trout from the Crooked River system. Thus, BC Hydro submits it is obvious that the Crooked River Report was never intended by its authors to be

used for litigation purposes, such that it would be fundamentally wrong to admit it into evidence. Similarly, on page eight, the report explicitly states that it was prepared for "the sole and exclusive benefit of, and use by, the West Moberly First Nations" and disclaims reliance upon the report by a third party. Further, page 13 sets out a number of people who produced the report who were not given credit as authors by Dr. Muttray.

- [174] BC Hydro also alleges deficiencies in the body of the affidavit. It submits that Dr. Muttray's statements that various facts are based on her "understanding" indicate that this information is not within her own knowledge. While hearsay evidence is allowed on interlocutory applications, Dr. Muttray does not state the source of this information. Further, the wording of the affidavit raises uncertainty as to which members of the ERM Project Team discussed the report with Dr. Muttray.
- [175] The plaintiffs argue that an expert can adopt the opinion of another expert in the same field. They draw a distinction between reporting on or marshalling the evidence of other experts and adopting the opinion proffered in a report authored by another expert. They say that cases regarding "corporate records" are distinguishable from the present case because the affiants in those cases did not adopt the opinions of the other authors of the report.
- [176] In *Sovani v. Jin*, 2005 BCSC 1852, the expert sought to include in a larger report an educational DVD of the anatomy of the brain. This is akin to relying on information on common practices or treatises in an expert report and not similar to any of the reports at issue today.
- [177] I have found some support for the plaintiffs' position in two cases from other jurisdictions. In *White v. Merck Frosst Canada*, 2004 CarswellOnt 659 (S.C.J.) at para. 4, the Court stated:
- It is this trite law that if a party intends to rely on an expert opinion on a motion, that party must file an affidavit sworn by the expert, or another expert adopting that opinion as his or her own. A party to a motion cannot rely on an expert report appended to the affidavit of a non-expert. See: *Ewaskiw v. Zellers Inc.* (1998), 40 O.R. 3d 795 and *Rex v. Anderson* (1914), 16 D.L.R.203 (Alta.S.C.).
- [178] However, on the facts of that case, the objection was to an affidavit from an expert who attached an article he had authored.
- [179] In *Unifor, Local 707A v. Suncor Energy Inc.*, 2017 ABQB 752, aff'd 2018 ABCA 75, an expert appended a report by another individual in an injunction application and agreed with the opinion expressed in the report. It appears that there were no objections to the admissibility of this evidence. There is little discussion in the decisions regarding the admissibility of such evidence.

- [180] BC Hydro submits that although experts may rely on the opinion and reports of other experts to gird their own analysis, this evidence is hearsay and admitted only for the limited purpose of evaluating the expert's own opinion: *Mazur v. Lucas*, 2010 BCCA 473 at paras. 40, 44. The plaintiffs argue that if expert evidence relies on hearsay that is not proven by admissible evidence, the extent of the reliance goes to weight not admissibility: *R. v. Lavallee*, [1990] 1 S.C.R. 852.
- [181] In my view, there is difficulty with admitting expert evidence that does nothing more than adopt the opinions expressed in another report, if that report is only admissible as hearsay evidence. Since the two opinions (the expert's and the opinion in the report) are identical, it would be practically impossible to use one opinion to evaluate the other.
- [182] The distinction between relying on reports authored by another person for a limited purpose and relying on those reports for the truth of their contents was discussed in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2008 BCSC 1263. In that action, Microsoft sought to prevent the plaintiff from relying on a number of affidavits in a certification hearing. Some of the affidavits were impugned because they referred to the opinions of experts from similar litigation in the U.S.
- [183] In that case, Professor Netz provided evidence that the approach of experts at the U.S. certification hearing was preferable. The Court determined that the appended reports of U.S. experts were tendered for the truth of their contents in order to support that position. These reports were found to be inadmissible. While it is unclear whether Professor Netz "adopted" the opinions embodied in the reports of other experts, I do not believe that this would have changed the finding.
- [184] In my opinion, the thrust of the case law supports the proposition that while an expert may rely on other experts' reports for limited purposes (for example, to situate their own opinion within a body of specialized knowledge or to refer to commonly accepted treaties/practices), another expert's report cannot be tendered for the truth of its content. An expert's opinion must be the result of independent analysis. Another expert's opinion cannot simply be adopted. This practice does not allow the opposing party or the trier of fact to adequately assess the opinion.
- [185] Dr. Muttray purports to adopt the Crooked River Report and, therefore, tender the report for the truth of its contents. For this reason, Dr. Muttray's affidavit and the report are inadmissible.
- [186] However, there are other reasons for striking the entire affidavit. The report itself is corporate in origin. From the face of the document, it is not clear which author was originally responsible for the individual opinion expressed in it. As per Heidebrecht, Zhang, and Jones, this is ground for finding a report inadmissible, as it makes examination on the document inherently difficult. I do not think the underlying problem is solved simply because Dr. Muttray has adopted the entire opinion as her own.

[187] Further, there are inherent difficulties in relying on the report itself. On its face, the report limits its own use - it provides educational material for the West Moberly First Nation. The report was clearly not intended to assist the Court in its fact-finding mission. For this reason, the authors could not have had their duty to the Court foremost in mind, or in their minds at all. Therefore, the information contained is not useful to the Court as expert opinion. It could, of course, situate the opinion of another expert, who has performed an independent analysis based on known facts and assumptions, in order to assist the Court.

Affidavit of Dr. Peter Komers #2

[188] Dr. Komers is an ecologist. His affidavit #2 attaches a report dated November 25, 2013, authored by Dr. Scott McNay. BC Hydro levels the same argument against this report as against Dr. Muttray's affidavit. For the reasons set out above respecting Dr. Muttray's affidavit, I grant the application to strike Dr. Komer's affidavit #2.

BC Hydro's Application for the Production of Documents

[189] The relief sought by BC Hydro in its March 29, 2018 notice of application is as follows:

1. An order that the following documents relating to the expert reports filed by the Plaintiffs in support of their application for an interlocutory injunction (filed January 31, 2018, served February 2, 2018) listed on Schedule A to this Notice of Application (the "Reports" or "Report") be produced to the defendants within two days of the date of this order:
 - (a) All retainer letters and instructing letters to the experts referred to in Schedule A (the "Expert" or "Experts");
 - (b) a list of every document relied on by the Expert in forming his or her opinion;
 - (c) all written statement or statements of facts on which the Experts' opinion is based;
 - (d) all records of any independent observations made by the Expert in relation to the report; and
 - (e) all data compiled by (or relied on by) the Expert in relation to the report.
2. Specifically with respect to the Report of Rachel Olson and Steve DeRoy, and without limiting the above, an order that the following documents are to be produced within two days of the date of this order:
 - (a) all interview notes, recordings and transcripts of:
 - (i) the oral history interviews referred to in Section 1.2.1 (page 10);
 - (ii) the interviews with three West Moberly members undertaken from January 15-19, 2018, referred to in Section 1.2.2 (page 11)
 - (iii) all other Traditional Land Use interviews reviewed or undertaken for the Report, including but not limited to the 2011 interviews (see, e.g., page 17).

3. Specifically with respect to the Report of Bruce Muir and Lesley Shelley, attached to the affidavit of Annette Muttray, and without limiting the above, an order that the following documents are to be produced within two days of the date of this order:

- (a) interview notes,
- (b) transcripts,
- (c) recordings and other data

collected as part of the Traditional Knowledge interviews undertaken for the assessment (described at section 2.1.1 and used in section 3, and specifically referred to at page 29 as "Traditional knowledge data collected during interviews with participants from West Moberly").

4. With respect to paragraphs 2 and 3 above, an order that the identity of the interviewees be included in the documents produced or otherwise provided to the defendants.
5. An order that the remainder of the Expert's files concerning the Reports be produced to the defendants by May 9, 2018 (including, for example, correspondence with counsel, previous drafts of the Report, and documents reviewed but not relied on by the Expert).

[190] In light of my decisions on the admissibility of some of the plaintiffs' affidavits, this issue is moot to a certain extent. However, the relief BC Hydro seeks remains relevant to other affidavits put forward by the plaintiffs that are not objected to on other grounds.

[191] R. 11-6 of the Supreme Court Civil Rules sets out the requirements for tendering an expert report. While the rule applies specifically to trials, BC Hydro submits that it is a codification of the common law. Therefore, BC Hydro argues the essential components of R. 11-6 must also be complied with in interlocutory applications in order for expert reports to be admissible.

[192] While it appears that there is some uncertainty in the law about whether the requirements of R. 11-6 apply to expert evidence proffered in interlocutory applications, I am satisfied that the Court retains an inherent discretion to control the evidence, both at trial and in interlocutory injunctions. Without purporting to offer a comprehensive review of the case law on the application of R. 11-6 to interlocutory applications, I find it sufficient to say that ordering the relief sought by BC Hydro is appropriate in this case.

[193] I wish to be clear that this ruling should not be read as support for the proposition that all of the requirements of R. 11-6 must be applied in every interlocutory application involving expert evidence; for example, applying the 84-day deadline for the service of a report would not make sense in every case. However, in this case, I am satisfied that the common law requirements for the admission of expert evidence support ordering the relief sought by the defendant BC Hydro. As noted by Madam Justice Saunders in *Healey v. Chung*, 2015 BCCA 38 at para. 20:

the essential components of qualifications, education, experience, information and assumptions on which the opinion is based, the instructions given, and the research, must be included to justify receipt of the report as an exception to the hearsay rule.

[194] Although she made these comments in the context of a discussion of Rule 11-6, subsequent cases such as *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 at para. 181 have interpreted them as reflecting the common law.

[195] In the result, I order the relief sought by BC Hydro in its March 29, 2018 notice of application, to the extent that such relief has not been rendered moot by the other decisions in my ruling today, or by the voluntary disclosure of documents already made by the plaintiffs, respecting item 1(a-e) of the notice of application and item 5. Item 2 respecting the report of Rachel Olson and Steve DeRoy were not referred to in submissions, so that item is adjourned generally.

Costs

[196] The defendants are entitled to costs, in the cause, at Scale B.

"Choi J."

Schedule A: Notice of Civil Claim

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Prepared on 29 October 2026 · Esheria