

CANADA / JUDGMENT

West Moberly First Nations v. British Columbia

2020 BCSC 1665

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2020 BCSC 1665 West Moberly First Nations v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

West Moberly First Nations v. British Columbia,

2020 BCSC 1665

Date: 20201105

Docket: S195070

Registry: Vancouver

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 Mr. Justice Milman

(via videoconference)

Reasons for Judgment

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I. Introduction

- [1] Before me as the assigned case management judge in this action are six separate applications under Rule 3-7 of the Supreme Court Civil Rules by which each of the parties seeks further and better particulars of their opponents' pleadings.
- [2] The subject matter of and factual background to this action are set out at length in my earlier decision indexed as *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835. In summary, the plaintiffs, West Moberly First Nations and Roland Willson on his own behalf and on behalf of all other members of West Moberly First Nations who are beneficiaries of Treaty 8 (collectively, "West Moberly") seek, among other things, to prohibit the defendant, the British Columbia Hydro and Power Authority ("BC Hydro"), from building a hydroelectric dam and related facilities along the Peace River in northeaster British Columbia, known as the "Site C" project (the "Project") on the grounds, among others, that the Project infringes their rights under Treaty 8.
- [3] In that decision, I refused West Moberly's application for an interlocutory injunction halting the Project. At the same time, I directed the parties to develop a case management plan that would see the trial completed ahead of reservoir inundation, which was then scheduled for fall 2023.
- [4] The case management plan that has since been put into place calls for:
- (a) the trial to begin on March 14, 2022 and to last 120 days;
 - (b) document production to be completed by November 30, 2020; and
 - (c) initial examinations for discovery to be completed by April 16, 2021 and supplemental examinations for discovery by September 30, 2021.
- [5] These applications arise out of the most recent round of amendments to the pleadings. Those amendments began on September 25, 2019, when West Moberly filed an Amended Notice of Civil Claim ("NOCC"). The Amended NOCC advances, among other things, new allegations as to the nature of the infringement of Treaty 8 that is alleged, new allegations of breaches of various duties alleged to be owed by the defendants under the Canadian Charter of Rights and Freedoms [Charter] and the United Nations Declaration on the Rights of Indigenous Peoples. The Amended NOCC also advances new private law causes of action based on alleged breaches of fiduciary duty, trespass, nuisance, riparian rights, unjust enrichment, waiver of tort and the tort of conspiracy. The subject matter of the claim has been expanded to include all development activities in West Moberly's traditional territory, including the previous dams built along the Peace River. The amendments have also expanded the scope of the remedial relief sought, so that West Moberly now seeks, in addition to a prohibitive injunction permanently halting the project, a mandatory injunction to restore the land to its former state and damages, including disgorgement of all revenues that the defendants have received from the operation of the dams from their inception.

- [6] On October 31, 2019, BC Hydro delivered to West Moberly a list of demands for further and better particulars of its newly pleaded claims, listing 57 individual demands. On November 5, 2019, the defendant, Her Majesty the Queen in right of the Province of British Columbia (the "Province") delivered a similar list of demands in which it adopted 20 of BC Hydro's demands and added 30 of its own. On November 8, 2019, the defendant, the Attorney General of Canada ("Canada") followed suit by delivering its own list of demands in which it adopted eight of BC Hydro's and the Province's demands and added 14 of its own.
- [7] West Moberly responded to those demands on December 13, 2019. In April and May, the defendants delivered supplemental demands seeking further and better particulars beyond those provided. West Moberly responded to those supplemental demands in May and June 2020.
- [8] On May 26, 2020, West Moberly delivered its own demands for particulars from each of the three defendants. The defendants responded in June 2020.
- [9] In the meantime, in February and March 2020, the defendants each filed amended responses to the Amended NOCC. West Moberly has not yet filed its replies to the defendants' amended responses, which are due 30 days after resolution of these applications.
- [10] The applications for further and better particulars that are before me now were filed between July and September 2020.
- [11] For the reasons that follow, I am refusing to compel the parties to provide further responses to the outstanding demands for particulars, with a few exceptions. In most cases, that result flows from my conclusion that what is sought is evidence that is more properly explored through discovery.

II. The Applicable Legal Principles

- [12] The fundamental principles of law to be applied in resolving these applications are generally not in dispute. The parties rely on many of the same authorities.
- [13] Those authorities begin with *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369 (C.A.), in which Lambert J.A., writing for the Court, stated as follows at paras. 10- 11:
10. As to the scope of what may properly be requested in a Demand for Particulars we were referred by counsel for the Plaintiff to the decision of this Court in *Anglo Canadian Timber Products Ltd. v. British Columbia Electric Co. Ltd.* (1960) 31 W.W.R., 604; to the decision of this Court in *Big Bay Timber Ltd. vs. Arkinstall Logging Co. Ltd.* (1978) 7 B.C.L.R., 69; and the decision of the English Court of Appeal in *Phillips vs. Phillips* (1878) 4 Q.E.D., 127.

11. Those decisions delineate the difference between what is properly the subject matter of a Demand for Particulars and what is more properly the subject-matter of a Demand for Discovery or material that should be obtained on an Examination for Discovery. At the heart of the distinction between the two lies the question whether the material demanded is intended to, and does, delineate the issues between the parties, or whether it requests material relating to the way in which the issues will be proved.
- [14] Lambert J.A. adopted the following list enumerating the appropriate purposes of particulars, as follows:
- (1) to inform the other side of the nature of the case they have to meet as distinguished from the made 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.
- [15] In *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada*, [1993] B.C.J. No. 1062, Lowry J. (as he then was) summarized the applicable principles as follows, at paras. 6-7:
6. The scope of particulars that may be demanded lies in the answer to the question whether what is sought is intended to, and does, delineate the issues between the parties, or does no more than disclose the way in which the case will be proven: *Cansulex*, at pp. 8-9.
 7. Discovery is not a substitute for particulars. The contention that what is demanded can be obtained, or that it has been obtained, on discovery is no reason to refuse particulars properly sought. Further, the fact that what is sought in a demand for particulars is best known to the party demanding is no reason to refuse. A party is entitled to know what case is made against it when (whether before or after discovery) the other side is in a position to give particulars of the facts it will prove at trial
- [16] This is not the first time that these parties have brought their disagreements as to the sufficiency of the opposing side's pleaded particulars before this Court. BC Hydro and the Province applied in April 2018 for further and better particulars from West Moberly in respect of its original NOCC, prior to the most recent amendments and the hearing of the injunction application before me. Those applications came before Choi J.

- [17] In her decision, indexed at 2018 BCSC 730, she ordered West Moberly to provide many of the contested particulars sought. BC Hydro was not satisfied with some of the particulars provided in response to the order of Choi J. and applied before me, relying on the alleged deficiencies, to strike the associated paragraphs in West Moberly's NOCC. On July 11, 2018, I dismissed that application with reasons indexed at 2018 BCSC 1165.
- [18] In her decision, Choi J. summarised the law applicable on applications such as these for further and better particulars, with reference to the special considerations arising in aboriginal litigation, as follows at para. 31:
- [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).

- [19] While I have found the decision of Choi J. helpful in many respects, I agree with West Moberly that her decision was driven, at least to some degree, by the context in which she made it. The issues before me on these applications are generally new and distinct and I have treated them as such.

III. Summary of the Parties' Arguments

- [20] Although the parties agree on the general principles of law that must inform the Court's analysis, they disagree on their application to the many contentious demands that are in issue here. They join issue in many cases on the question of whether the applicant party is seeking particularisation of the facts that the pleading party intends to prove at trial, as opposed to the evidence that will be called to prove them.
- [21] West Moberly complains more generally about that the nature and sheer quantity of the particulars that the defendants, especially BC Hydro and the Province, have demanded. West Moberly argues that those demands are disproportionate, oppressive and in some cases premature, pending completion of discoveries. West Moberly argues further that the defendants cannot be in need of further and better particulars to plead in response to the Amended NOCC because their amended responses have already been filed. Moreover, West Moberly argues that the defendants are demanding a standard of particularity from them that they have not been willing to meet in their own pleadings.
- [22] The defendants respond that the breadth and number of their demands flow from the dramatic expansion of the issues raised by the amendments that West Moberly made last year to the NOCC. They say that although prolix, the Amended NOCC often pleads summaries or bare legal conclusions bereft of any explanatory detail. They argue that they are entitled to the particulars they seek regardless of their having already pleaded in response, and that discovery is no substitute for particulars. They liken many of the issues that are before me on these applications to those that Choi J. decided in their favour when the matter was before her.

IV. The Defendants' Applications

A. Particulars Sought by BC Hydro

Overview

- [23] BC Hydro has divided its outstanding demands into the following categories:
- (a) spiritual and religious beliefs, practices and activities alleged to be impacted and the sites associated with them (demands #7(a), 19, 20, 40, 41, 42 and 44);
 - (b) land use and resource management rights alleged to be impacted (demands #9, 13(a) and (b), 21(a), 22, 23, 31 and 35); and
 - (c) the civil conspiracy claim (demands #50, 51 and 54).

Demand #7(a)

[24] In Part 1, paras. 48, 66, 67, 69, 72(c), 72(f), 73, 120(o), 130(b), 132, 133, 145(c), and 177 of the Amended NOCC, West Moberly pleads as follows:

48. Hunting, fishing, trapping, gathering, healing, spiritual, and religious practices are integral to the Seasonal Round.
66. Traditional spiritual and religious beliefs of West Moberly have been practiced and transmitted as between generations as a component of the Seasonal Round.
67. West Moberly, including individual West Moberly beneficiaries of Treaty No. 8, sincerely believe that the spiritual practices conducted during, and the beliefs which guide and are transmitted through, the Seasonal Round are based on their sacred connection with the land, all its inhabitants, and the Creator, and that these beliefs and practices have a nexus with religion.
69. The sites where spiritual, religious and healing practices are or have been conducted must maintain a culturally appropriate setting and a culturally appropriate condition in order to remain effective and meaningful.
72. The Harvesting Right, the Oral Terms, and the Incidental Rights relevant to this proceeding guarantee the Plaintiffs continuing rights to meaningfully:
 - c) travel on and along the banks of the Peace as part of the Seasonal Round, including to visit and share knowledge of hunting, fishing, trapping and spiritual and religious practices with other members of West Moberly and other neighbouring Dunne-za peoples
 - f) continue the spiritual and religious practices that form part of the Seasonal Round;
73. In the alternative, if Treaty No. 8 does not guarantee the plaintiffs rights to continue spiritual and religious practices and/or convey knowledge among members, the plaintiffs have existing aboriginal rights to continue these activities that have not been extinguished by Treaty No. 8, and cannot be infringed by the Crown's exercise of the Taking Up Power.
120. Another reservoir will be created upstream of the Site C Dam, extending up to the Peace Canyon Dam. Amongst other impacts, the Site C Dam, related components, and the associated reservoir will:
 - o) destroy plants gathered by West Moberly for spiritual, medicinal, and food purposes;
130. In particular and without limiting the foregoing, West Moberly's ability to continue the Seasonal Round, and consequently their mode of life, will be fundamentally and forcibly interfered with both individually and cumulatively by:
 - b) preventing West Moberly from continuing, or limiting West Moberly's ability to continue, the spiritual and religious practices that form part of the Seasonal Round

132. The plaintiffs, including individual West Moberly beneficiaries of Treaty No. 8, have a right to continue their religious and spiritual connection the practices that is protected by ss. 2(a) and 2(b) of the Canadian Charter of Rights and Freedoms (the "Charter").
133. The Bennett Dam, Peace Canyon Dam and Site C Dam, and the associated reservoirs, and the conduct of the Crown in relation to authorizing and constructing these projects, cumulatively interfere or will interfere in a non-trivial and/or not insubstantial way with the ability of the plaintiffs, including individual West Moberly beneficiaries of Treaty No. 8, to hold and act in accordance with their religious beliefs by causing the permanent loss of sites where spiritual and religious beliefs are taught and practiced.
145. The actions of the defendants in using and conspiring to unlawfully use the Taking Up Power to authorize the Bennett Dam, the Peace Canyon Dam, and the Site C Dam, and associated reservoirs, infrastructure, land holdings, have caused, and will cause ongoing, pecuniary and non-pecuniary loss to the plaintiffs, including but not limited to:
- c) Loss of the ability to engage in religious and spiritual traditions, customs, and practices
177. In the alternative, if Treaty No. 8 does not guarantee the plaintiffs' rights to continue spiritual and religious practices and/or convey knowledge among members, the damming of the Peace and the construction and operation of the Site C Dam infringes West Moberly's existing aboriginal rights to continue these activities.
- [25] In relation to those paragraphs, BC Hydro demanded particulars of "what 'spiritual' and 'spiritual and religious' practices" are being referred to.
- [26] West Moberly has refused to provide the particulars demanded, asserting, among other things, that doing so would require it to plead "a definitive and complete listing of all spiritual and religious practices of the West Moberly" which would be "unreasonable and disproportionate" at this stage.
- [27] I have concluded that West Moberly should be required to respond to this demand, having regard especially to the newly advanced claim in Part 1, para. 132 of the Amended NOCC alleging breaches of ss. 2(a) and (b) of the Charter. I disagree with West Moberly's contention that doing so would require them to describe all of their religious practices. What is missing from West Moberly's pleading is a description of the site-specific spiritual or religious practices that will be or have been interfered with by the Project and its antecedents, as opposed to the more general spiritual or religious practices that may be performed elsewhere or are otherwise unconnected to the affected places. Without that information, the defendants cannot anticipate the case they have to meet, especially the alleged breach of the Charter-protected "right to continue their religious and spiritual practices."

Demand #9

- [28] In Part 1, para. 50 of the Amended NOCC, West Moberly pleads as follows:

50. West Moberly's traditional systems of managing the land and resources guided when, where, why, and what hunting, fishing, trapping, and gathering occurred during the Seasonal Round. Pursuant to these traditional systems, community hunters adjusted hunting patterns in order to conserve populations. In that way, the Seasonal Round can be practiced in a manner that conserves the resources for future generations, and practices can be adjusted in a manner that is led by, and consistent with, traditional knowledge.

[29] In relation to that paragraph, BC Hydro sought "particulars of West Moberly's traditional systems of managing the land and resources."

[30] West Moberly responded as follows:

Traditional systems of managing the land and resources guide the selection, deselection, or modification of harvesting locations, seasons, species, and practices, based on traditional ecological knowledge held, collected, and shared. Factors such as past practices, dreams, ceremony, and stories guide traditional knowledge, which also reflects observed behaviour, health, population, distribution, and interactions of species in the environment. West Moberly's traditional systems of managing the land and resources reflect and take into account the purpose of a practice, purposes which may be medicinal, sustenance, economic or ceremonial.

[31] I agree with West Moberly that the response provided is sufficient. Any further details are a matter of evidence more appropriately explored through discovery.

Demand #13(a) and (b)

[32] In Part 1, paras. 56, 72(i) and 145(j) of the Amended NOCC, West Moberly pleads as follows:

56. As part of the Seasonal Round, West Moberly traditionally gathered medicines. Traditional knowledge concerning medicine was passed along as a component of the Seasonal Round, including through ceremonies and dreams. West Moberly traditional protocols require that medicine be collected in areas free of disturbance, such as elevated noise and dust levels.

72. The Harvesting Right, the Oral Terms, and the Incidental Rights relevant to this proceeding guarantee the Plaintiffs continuing rights to meaningfully:

(i) gather food and medicine traditionally harvested by West Moberly and its ancestors

145. The actions of the defendants in using and conspiring to unlawfully use the Taking Up Power to authorize the Bennett Dam, the Peace Canyon Dam, and the Site C Dam, and associated reservoirs, infrastructure, land holdings, have caused, and will cause ongoing, pecuniary and non-pecuniary loss to the plaintiffs, including but not limited to:

(j) Loss of food, clothing, shelter, medicine and other goods or manufactured items acquired through the exercise of mobility, hunting, fishing, trapping, and gathering rights

[33] In relation to those paragraphs, BC Hydro demanded the following particulars:

- (a) are the traditional protocols required in the collection of medicine limited to those listed in paragraph 56? If not, provide a complete list;
- (b) provide particulars of the medicines that West Moberly traditionally gathers.

[34] West Moberly objected to the demand but added the following:

medicine is not simply material, not merely a substance which heals. Rather, medicine encompasses physical, mental, emotional and spiritual components. An experience can be medicine just as a plant or animal part can be medicine; what matters is that medicine is provided by the right people, to the right people, in the right time and in the right manner. What is right varies with the particular reason medicine is needed. Like any field of medicinal knowledge, it not practically possible to completely catalogue West Moberly traditional knowledge of medicine.

[35] I have concluded that West Moberly should not have to respond further to demand #13(a). The other, unspecified means by which West Moberly and its ancestors may have "passed along knowledge of traditional medicine as a component of the Seasonal Round" is not information that needs to be exhaustively particularised in order for the defendants to understand the case they have to meet.

[36] I have reached a different conclusion with respect to demand #13(b), however. Because there is a live issue between the parties as to the extent to which "medicine traditionally harvested by West Moberly and its ancestors" is or was gathered in areas directly affected by the Project or its antecedents as opposed to elsewhere, particularising that information will assist the parties in delineating the issues for trial. The response provided by West Moberly to this demand is not helpful in that regard, insofar as it fails to offer any factual basis to explain West Moberly's pleading in paras. 72 and 145 that the Project and its antecedents have interfered with, among other things, West Moberly's ability to gather medicines.

Demand #19

[37] In Part 1, para. 68 of the Amended NOCC, West Moberly pleads as follows:

68. West Moberly practiced and acted in accordance with these beliefs at sites throughout the Seasonal Round. Sacred sites where beliefs are or have been traditionally practiced include burial sites, graveyards, birthplaces, eagles' nests, sites of vision quests and spiritual journeys, and battle sites.

[38] BC Hydro demanded the following information in relation to that paragraph:

are the sacred sites where beliefs are or have been traditionally practiced limited to those listed in paragraph 68? If not, provide a complete list.

[39] West Moberly has refused to provide that information.

[40] I agree with BC Hydro that West Moberly should comply with this demand. What is sought is a complete list of categories of sacred sites, as opposed to specific places. It would not be overly onerous to comply with it, as West Moberly argues, given the long history of consultation and litigation in relation to these issues to date. Knowing at least the categories in advance of trial will assist in avoiding surprises when it comes to addressing whether particular places in issue can fairly be classified as sacred or not.

Demand #20

[41] In Part 1, para. 69 of the Amended NOCC, West Moberly pleads as follows:

69. The sites where spiritual, religious and healing practices are or have been conducted must maintain a culturally appropriate setting and a culturally appropriate condition in order to remain effective and meaningful.

[42] In relation to that paragraph, BC Hydro demanded the following particulars:

what constitutes "a culturally appropriate setting and a culturally appropriate condition" for sites where spiritual, religious and healing practices are or have been conducted.

[43] Although objecting to the demand on various grounds, West Moberly also responded with the following additional particulars:

without endeavouring to provide a complete cataloguing, to be culturally appropriate such sites should generally be free of pollution, free of excessive noise, and free of uninvited individuals. ...

[44] I agree with West Moberly that the particulars it has provided are sufficient for the defendants to understand what is meant by the terms "a culturally appropriate setting and a culturally appropriate condition." I refuse to order further particulars in relation to this demand.

Demand #21(a)

[45] In Part 1, para. 70 of the Amended NOCC, West Moberly pleads as follows:

70. West Moberly endeavours to maintain the ability to continue to lead a traditional mode of life, including the ability to continue the Seasonal Round. However, West Moberly's ability to continue the practices that make up the Seasonal Round has been significantly limited by disturbances in their territory since the Hudson Hope Adherence, including the Bennett Dam, Peace Canyon Dam, construction of the Site C Dam, and the Other Disturbances (each defined below in this claim).

[46] In relation to that paragraph, BC Hydro demanded the following particulars, among others:

(a) is the Seasonal Round confined to West Moberly's territory? If not, provide particulars of the geographic area for the Seasonal Round

[47] I agree with West Moberly that the description of the "Seasonal Round" already pleaded in paras. 45-69 of the Amended NOCC answers this demand adequately. In para. 49, West Moberly pleads that "[a]s part of the Seasonal Round, West Moberly members traditionally travelled to preferred areas of their territory " [emphasis added]. To the extent there remained any ambiguity in that regard, West Moberly has also clarified the matter in response to the Province's demand #6, stating that "[t]he Seasonal Round was traditionally conducted over West Moberly's traditional territory."

Demand #22

[48] In Part 1, para. 72(j) of the Amended NOCC, West Moberly pleads as follows:

72. The Harvesting Right, the Oral Terms, and the Incidental Rights relevant to this proceeding guarantee the Plaintiffs continuing rights to meaningfully:

(j) manage wildlife resources according to traditional conservation principles

[49] In relation to that paragraph, Hydro demanded particulars of the "traditional conservation principles."

[50] West Moberly responded as follows:

West Moberly's traditional conservation principles are a component of West Moberly's traditional systems of managing the land and resources described more fully above.

[51] I agree that the particulars already provided in response to demand #9 are sufficient.

Demand #23

[52] In Part 1, para. 72 of the Amended NOCC, West Moberly pleads as follows:

72. The Harvesting Right, the Oral Terms, and the Incidental Rights relevant to this proceeding guarantee the Plaintiffs continuing rights to meaningfully:

(k) earn a livelihood from traditionally harvested resources

[53] In relation to that paragraph, Hydro demanded particulars of "the traditionally harvested resources".

[54] West Moberly responded that sufficient particulars are already pleaded in paras. 52-58 of Amended NOCC.

[55] I agree with West Moberly that those particulars are, with the additional particulars to be provided in response to demand #13(b), already pleaded adequately in those paragraphs.

Demands #31 and 35

[56] In Part 1, paras. 88 and 99 of the Amended NOCC, West Moberly pleads as follows:

88. The Bennett Dam, including related components and the Williston Reservoir, destroyed West Moberly traplines.

99. The Peace Canyon Dam, including related components and the Dinosaur Reservoir, destroyed West Moberly traplines.
- [57] BC Hydro has demanded particulars of the traplines referred to in paras. 88 and 99.
- [58] West Moberly has refused to provide those particulars, arguing that it is unable to provide a comprehensive list of destroyed traplines in those areas.
- [59] I agree with West Moberly that the issue is adequately delineated by the existing pleadings and that the evidentiary basis for the allegation is more properly explored through discovery.

Demand #40

- [60] In Part 1, paras. 120(x) and 121(h) of the Amended NOCC, West Moberly pleads as follows:
120. Another reservoir will be created upstream of the Site C Dam, extending up to the Peace Canyon Dam. Amongst other impacts, the Site C Dam, related components, and the associated reservoir will:
- (x) cause the destruction or loss of ancestral belongings and places of rest
121. Without limiting the generality of the foregoing, the Site C Dam will result in the destruction or otherwise interfere with a number of sites of religious significance to West Moberly, and interfere with the ability of members of West Moberly to act in accordance with religious practices or beliefs at and in connection with these sites, including:
- (h) Sites containing ancestral belongings (archaeological sites)
- [61] In relation to those paragraphs, BC Hydro demanded particulars of "the ancestral belongings and places of rest."

[62] West Moberly responded as follows:

In response to demand no. 40, this demand is not needed for BC Hydro to plead in response, requests evidence, and requests a level of detail disproportionate to what is reasonable in the circumstances. It is unlikely that the Plaintiffs could ever with absolute confidence provide a complete accounting of the all locations containing ancestral belongings and all places of rest that will be destroyed or lost as a result of Site C. The archaeological knowledge of all parties can be explored in discovery.

- [63] I agree with West Moberly that the issue in this regard is sufficiently delineated by the Amended NOCC and that any additional information pertaining to the archaeological sites affected by the Project is a matter of evidence.

Demand #41

- [64] In relation to Part 1, para. 121 (reproduced above), BC Hydro also demanded the following particulars:

are the sites of religious significance limited to those listed in paragraph 121? If not, provide a complete list.

[65] West Moberly refused on various grounds to respond to this demand.

[66] I agree with BC Hydro that the particulars demanded in this regard should be provided. This demand is similar to demand #19 and I am ordering that West Moberly respond to this demand on the same grounds.

Demand #42

[67] In Part 1, para. 122 of the Amended NOCC, West Moberly pleads as follows:

122. Without limiting the generality of the foregoing, the Site C Dam will result in the destruction or otherwise interfere with many sites that form part of West Moberly oral history, resulting in the loss or significant impairment of the ability of West Moberly to maintain and transmit that history to new generations.

[68] In relation to that paragraph, Hydro demand particulars of "the many sites that form part of West Moberly oral history" that will allegedly be destroyed.

[69] West Moberly refused to provide those particulars, for the following reasons:

In response to demand no. 42, it is not an appropriate demand for particulars to require a definitive and complete listing of every place that forms part of West Moberly oral history that will be destroyed or otherwise interfered with by the construction of the Site C Dam, related components and the associated reservoir. West Moberly oral history is expansive, both in general and in relation to the area to be destroyed or otherwise interfered with by Site C, and to suggest that this oral history should or can be reduced to writing in a particulars response is inconsistent with the fundamental nature of oral history. Demanding further particularization is unreasonable and disproportionate at this stage, and calls for evidence rather than material fact. Further details are not required for BC Hydro and the Crown Defendants to plead in response, and the issue can be explored in discovery.

[70] I agree with West Moberly that this allegation is already pleaded with adequate particularity when para. 122 is read together with para. 121. The contents of West Moberly's oral history is a matter of evidence that can be explored through discovery.

Demand #44

[71] In Part 1, para. 133 of the Amended NOCC, West Moberly pleads as follows:

133. The Bennett Dam, Peace Canyon Dam and Site C Dam, and the associated reservoirs, and the conduct of the Crown in relation to authorizing and constructing these projects, cumulatively interfere or will interfere in a non-trivial and/or not insubstantial way with the ability of the plaintiffs, including individual West Moberly have beneficiaries of Treaty No. 8, to hold and act in accordance with their religious beliefs by causing the permanent loss of sites where spiritual and religious beliefs are taught and practiced.

[72] In relation to that paragraph, BC Hydro demanded particulars of:

- (a) the spiritual and religious beliefs; and
- (b) each of the sites that the Plaintiffs say will be permanently lost,

including, particulars of whether the loss was caused or will be caused by the Bennett Dam and associated reservoir, the Peace Canyon Dam and associated reservoir, or the Site C Dam and associated reservoir.

[73] West Moberly responded to that demand as follows:

In response to demand no. 44(a), it is not an appropriate demand for particulars to require a definitive and complete accounting of West Moberly spiritual and religious beliefs. Demanding further particularization is unreasonable and disproportionate at this stage, and calls for evidence rather than material fact. Further details are not required for BC Hydro and the Crown Defendants to plead in response, and the issue can be explored in discovery.

In response to demand no. 44(b), it is not an appropriate demand for particulars to require a definitive and complete accounting of sites where West Moberly spiritual and religious beliefs are taught and practiced. The Plaintiffs have made a good faith effort to list sites of religious significance in the pleading that is adequate at this stage of the litigation. Demanding further particularization is unreasonable and disproportionate at this stage, and calls for evidence rather than material fact. Further details are not required for BC Hydro and the Crown Defendants to plead in response, and the issue can be explored in discovery.

[74] With respect to demand #44(a), the precise content of the "spiritual and religious" beliefs that are taught and practiced at the affected sites is not a material fact that need be pleaded with any greater particularity beyond those particulars that I have ordered to be provided in response to demand #7(a).

[75] With respect to demand #44(b), although West Moberly has in para. 121 of the Amended NOCC listed "a number of sites of religious significance" that, it is alleged, the current Project will destroy or otherwise interfere with, it has not provided any particulars of the sites that are alleged to have been destroyed or interfered with by the two earlier dams and their associated infrastructure. Those particulars should be provided, to the extent they are known to West Moberly.

B. Particulars Sought by the Province

Overview

[76] The Province has divided its outstanding demands into the following categories:

- a) West Moberly's Treaty rights and Aboriginal rights to continue their spiritual and religious practices and/or convey knowledge: Province's demands #2, 5, 8, 10, 25, 27, 28; BC Hydro demands #20, 21, 25, 44 (Province's demands #11 and 26);
- b) West Moberly's Charter claim: Province's demands #31 and 40;
- c) international law violations: Province's demand #42;
- d) unjustified infringement of West Moberly's Treaty rights: Province's demands #6, 16, 19, 20, 23; and BC Hydro demands #31, 34, and 35 (Province's demands #17 and 2);
- e) aggravated, exemplary and punitive damages: Province's demand #45(a); and
- f) conspiracy: Province's demands #34, 35, 36 and BC Hydro demands #52, 53, 54 (Province's demands #37, 38 and 39).

Demand #2

[77] In Part 1, para. 18 of the Amended NOCC, West Moberly pleads as follows:

18. The rights provided under Treaty No. 8 include such ancillary and incidental rights as are reasonably or meaningfully related to the Harvesting Right and Oral Terms (the "Incidental Rights").

[78] In relation to that paragraph, the Province demanded "a complete list of the "Incidental Rights".

[79] West Moberly refused on various grounds to provide that information.

[80] I agree with West Moberly that it has already pleaded at para. 72 of the Amended NOCC the specific "Incidental Rights" that it asserts in this action. It is unnecessary for West Moberly to particularise the other incidental rights it might have that it does not assert in this action.

Demand #5

[81] The Province, like BC Hydro, seeks particulars of the "spiritual, and religious practices" that West Moberly alleges in Part 1, para. 48 of the Amended NOCC to be integral to the Seasonal Round.

[82] This demand is subsumed within BC Hydro's request #7(a), to which I am ordering West Moberly to respond.

Demand #6

[83] In Part 1, para. 49 of the Amended NOCC, West Moberly pleads as follows:

49. As part of the Seasonal Round, West Moberly members traditionally travelled to preferred areas of their territory, individually or in family groups, during certain times of the year based on their traditional knowledge of, among other things, behaviour and habitat of species. Location, seasons, and species matter in the Seasonal Round; hunting for one species in one location at one time may not be interchangeable with hunting for another species at another place at another time.

[84] In relation to that paragraph, the Province has demanded the following particulars:

(a) The geographic location of the "preferred areas" referred to in the paragraph:

(i) at the time of first contact with Europeans;

(ii) at the time of the Hudson's Hope Adherence (as defined in paragraph 27 of the Claim); and

(iii) at the time this proceeding was commenced;

(b) the times of year West Moberly members traveled to those locations:

(i) at the time of first contact with Europeans;

(ii) at the time of the Hudson's Hop Adherence; and

(iii) at the time this proceeding was commenced; and

(c) the purpose(s) of which they traveled there.

[85] West Moberly refused on various grounds to respond to the demand, other than by adding that "[t]he Seasonal Round was traditionally conducted over West Moberly traditional territory."

[86] I agree with West Moberly that, insofar as it is not already answered elsewhere in the Amended NOCC, this demand seeks evidence that is more appropriately explored through discovery.

Demand #8

[87] In Part 1, para. 56 of the Amended NOCC, West Moberly pleads as follows:

56. As part of the Seasonal Round, West Moberly traditionally gathered medicines. Traditional knowledge concerning medicine was passed along as a component of the Seasonal Round, including through ceremonies and dreams. West Moberly traditional protocols require that medicine be collected in areas free of disturbance, such as elevated noise and dust levels.

[88] In relation to that paragraph, the Province demanded "particulars of the ceremonies and dreams that conveyed 'traditional knowledge concerning medicines':

(a) at the time of first contact with Europeans;

(b) at the time of the Hudson's Hope Adherence; and

(c) at the time this proceeding was commenced."

[89] West Moberly refused on various grounds to respond directly to this demand, other than by providing the following additional information:

dreams are a source of traditional knowledge of medicine, and ceremony is essential to ensuring that medicine is taught and provided to the right people, by the right people, in the right place, at the right time, and in the right manner. Medicine is not merely a substance which heals; medicine encompasses physical, mental, emotional and spiritual components. An experience can be medicine just as a plant or animal part can be medicine. Like any field of medicinal knowledge, it is impossible to completely catalogue West Moberly traditional knowledge of medicine completely at any point in time, and unreasonable to request such. Rather, dreams happen on an ongoing basis, and knowledge and practice evolve over time.

[90] I agree with the Province that the additional information that West Moberly has provided is not responsive to the demand or otherwise helpful in clarifying this aspect of the claim, which remains obscure. In para. 56 of the Amended NOCC, West Moberly pleads that medicine is something that was traditionally gathered as part of the seasonal round. In response to this demand, however, West Moberly suggests that medicine is not necessarily gathered but may instead be an experience, a plant or an animal, in which case it is not clear how that information relates to the claim being advanced, if it does at all.

[91] Nevertheless, I am not persuaded that the additional particulars sought will assist the defendants in understanding the case they have to meet in this regard, obscure though it is. The "ceremonies and dreams" through which West Moberly's traditional knowledge is alleged to be passed along, to the extent they are material at all, are a matter of evidence best left to be explored through discovery.

Demand #10

[92] In Part 1, para. 65 of the Amended NOCC, West Moberly pleads as follows:

65. The Seasonal Round has always been an integral part of the conveyance of oral history amongst members of West Moberly. The oral history of West Moberly is fundamentally tied to the geography, with many places being identified by the stories that are told about and in relation to those places. When places where the Seasonal Round was previously practiced are flooded or otherwise made unavailable to West Moberly, or when species traditionally harvested by West Moberly are no longer available to them, the transfer of oral history, traditional knowledge and management practices connected to those places and species amongst members of West Moberly and between generations is disrupted and oral history is lost.

[93] In relation to that paragraph, the Province demanded:

particulars of the places that are identified in West Moberly oral history which have been or will be lost as a result of the construction of the Bennett, Peace Canyon, and/or Site C Dam and associated reservoirs.

[94] In its response, West Moberly refused to provide those particulars on the following grounds:

it is not possible to provide an accurate and complete accounting of the oral history that has been lost due to the destruction occasioned by the Bennett and Peace Canyon Dam and associated reservoirs, for the reason that the oral history has been lost as a result of this destruction. What recollections remain of the history that has been lost due to the devastation caused by the dams can be explored in discovery.

[95] This demand is similar to BC Hydro's demand #42 but goes further in seeking historical information pertaining to the other two dams. As with BC Hydro's demand #42, I have concluded that this demand seeks evidence that is more appropriately explored through discovery.

Demand #16

[96] In Part 1, paras. 85 and 96 of the Amended NOCC, West Moberly pleads as follows:

85. The construction of the Bennett Dam, and the flooding to create the Williston Reservoir, has destroyed trails and waterways West Moberly and their ancestors used for travel through the area as part of the Seasonal Round and to exercise their Treaty Rights.
96. The construction of the Peace Canyon Dam, and the flooding to create the Dinosaur Reservoir, has destroyed trails and waterways West Moberly and their ancestors used for travel through the area as part of the Seasonal Round and to exercise their Treaty Rights.

[97] In relation to those paragraphs, the Province demanded:

particulars of the trails and waterways that were destroyed that:

- (a) West Moberly used; and
- (b) West Moberly's Hudson's Hope Ancestors used.

[98] Although it objected to the demand, West Moberly provided the following additional information:

The trail ways destroyed include, but are not limited to, trails along the Three Rivers and Tributaries, and the old trail from Fort Graham to Fort Ware. The waterways destroyed include, but are not limited to, some or all of the Three Rivers and Tributaries, including for example the Opiska River, the streams and rivers near Deserters Canyon that ran out of Pine Lake and Sucker Lake, Russell Creek, Paul River, Big Slough, Chunamon Creek, Coalburn Creek, Davis Creek, Wicked River Falls, the Pack River Rapids, Horseshoe Lake, the Ingenika River, the Bull River and Factor Ross Creek.

[99] I am not persuaded that it is necessary or appropriate to order additional particulars in response to this demand. If there are other "trails and waterways" that West Moberly knows to have been destroyed, that is evidence that is more properly explored through discovery.

Demand #19

[100] In Part 1, para. 90 of the Amended NOCC, West Moberly pleads as follows:

90. As a result of the operation of the Bennett Dam and the existence of the Williston Reservoir, the plaintiffs have suffered the loss of the ability to meaningfully exercise some or all of their Treaty Rights in areas affected by the Bennett Dam and the Williston Reservoir.

[101] In relation to that paragraph, the Province demanded particulars as follows:

In relation to Part 1, paragraph 90, the Province adopts BC Hydro Demand #32. In addition, for each Treaty Right, provide particulars of the specific locations where those Treaty rights were exercised:

- (a) at the time of the Hudson's Hope Adherence; and
- (b) immediately prior to construction of the Bennett Dam.

[102] BC Hydro's demand #32 (which BC Hydro itself is not pressing) was for the following:

In relation to paragraph 90:

- (a) provide a complete list of Treaty Rights the Plaintiffs assert can no longer be meaningfully exercised as a result of the operation of the Bennett Dam and the existence of the Williston Reservoir; and
- (b) provide particulars in regards to impacts on each of the specific Treaty Rights enumerated in paragraph 72.

[103] West Moberly responded to those demands as follows:

In response to demand no. 32(a) and (b), the demand for particulars is inappropriate as it does not inquire about what is pleaded at paragraph 90. Specifically, at paragraph 90 there is no plea that any particular treaty right in general can no longer be meaningfully exercised as a result of the operation of the Bennett Dam and the existence of the Williston Reservoir. Rather, at paragraph 90, the Plaintiffs assert that the operation of the Bennett Dam and the existence of the Williston Reservoir have caused the Plaintiffs to suffer the loss of ability to meaningfully exercise some or all of their treaty rights in areas affected by the Bennett Dam and the Williston Reservoir. The treaty rights that can no longer be exercised in areas affected by the Bennett Dam and the Williston Reservoir are the Harvesting Right, the Oral Terms, and the Incidental Rights, as particularized at paragraph 72.

[104] I am satisfied that this aspect of the claim is, as West Moberly argues, already pleaded with sufficient particularity. I am therefore refusing to order any additional particulars in response to these demands.

Demand #20

[105] In Part 1, para. 101 of the Amended NOCC, West Moberly pleads as follows:

101. As a result of the operation of the Peace Canyon Dam and the existence of the Dinosaur Reservoir, the plaintiffs have suffered the loss of the ability to meaningfully exercise some or all of their Treaty Rights in areas affected by the Peace Canyon Dam and the Dinosaur Reservoir.

[106] In relation to that paragraph, the Province sought particulars as follows:

provide particulars of the specific areas affected by the Peace Canyon Dam and/or Dinosaur Reservoir where the plaintiffs say they can no longer meaningfully exercise their Treaty Rights. For each, provide:

- (a) a complete list of Treaty Rights the Plaintiffs assert can no longer be meaningfully exercised;
- (b) particulars regarding impacts on each of the specific Treaty Rights enumerated in paragraph 72; and
- (c) particulars of the specific locations where those Treaty rights were exercised:
 - (i) at the time of the Hudson's Hope Adherence; and
 - (ii) immediately prior to construction of the Peace Canyon Dam.

[107] West Moberly responded as follows:

the specific areas affected by the Peace Canyon Dam and the Dinosaur Reservoir where the Plaintiffs can no longer meaningfully exercise their treaty rights include the dam sites, the reservoirs, and the areas disturbed by development related to these dams. All of the treaty rights listed at paragraph 72 of the Amended Notice of Civil Claim can no longer meaningfully be exercised at those sites. In response to the balance of that demand, this demand is not needed for the Province to plead in response, requests evidence, and requests a level of detail disproportionate to what is reasonable in the circumstances.

[108] I agree with West Moberly that the response provides sufficient information for the defendants to understand the case they have to meet in this regard. Whatever additional information the Province seeks beyond that is evidence that is more properly explored through discovery.

Demand #23

[109] In Part 1, para. 115 of the Amended NOCC, West Moberly pleads as follows:

115. Additional industrial development, settlement, and other human activities reasonably foreseeable at the time of these approvals were expected to add to and compound the effect of the Existing Impacts (collectively, the "Cumulative Impacts").

[110] In relation to that paragraph, the Province demanded particulars as follows:

particulars of the "Additional industrial development, settlement and other human activities" the Plaintiffs say were "reasonably foreseeable."

[111] In its response, West Moberly objected to the demand on various grounds but added the following:

At a minimum, it includes all development which had been approved, was contemplated in official plans, was the subject of proposals, or could reasonably be expected given the Province's knowledge of the resources in the area and development patterns at the time.

[112] I agree with West Moberly that the response provides sufficient information for the Province to understand the case it has to meet in this regard. West Moberly can only be expected to particularize that allegation by referring to categories, as they have done. To require West Moberly to provide further details on the topic would not assist in delineating the issues for trial but would call for evidence.

Demand #25

[113] In this demand, the Province sought the following particulars:

In relation to Part 1, paragraphs 67, 68, 69, 72(c), 72(f), 73, and 121, provide particulars of the Plaintiffs' spiritual and/or religious practices and beliefs:

- (a) at the time of first contact with Europeans;
- (b) at the time of the Hudson's Hope Adherence; and
- (c) at the time this proceeding was commenced,

that the Plaintiffs say will be, or have been, interfered with by the construction of the Bennett Dam, the Peace Canyon Dam, and/or the Site C Dam and their associated reservoirs.

[114] This demand is similar to BC Hydro demand #7(a), except that it refers to fewer paragraphs in the Amended NOCC and adds a new demand for the same information at three different historical moments. The particulars I am ordering West Moberly to provide in response to BC Hydro demand #7(a) will suffice to delineate the issues in this regard. The historical evolution of West Moberly's spiritual or religious practices and beliefs is a matter of evidence that is best left to be explored through discovery.

Demand #27

[115] With this demand, the Province sought the following particulars:

In relation to Part 1, paragraphs 120(x) and 121(h), provide the locations of the "[s]ites containing ancestral belongings (archaeological sites)" and "places of rest".

[116] This demand is similar to BC Hydro demand #40. For the same reasons given above in relation to that demand, I am not satisfied that further particulars are required in response to this one.

Demand #28

[117] With this demand, the Province sought the following particulars:

In relation to Part 1, paragraph 122, provide particulars of the sites that form part of West Moberly's oral history that will be:

- (a) destroyed by the Site C dam; or
- (b) interfered with by the Site C dam, and the manner of that interference.

[118] This demand is similar to BC Hydro demand #42. For the same reasons given above in relation to that demand, I am not satisfied that further particulars are required in response to this one.

Demand #31

[119] In Part 1, paras. 134 and 135 of the Amended NOCC, West Moberly pleads as follows:

- 134. Section 2 (b) of the Charter protects the right of the plaintiffs, including the individual West Moberly beneficiaries of Treaty No. 8, to express themselves by conveying meaning and pursuing self-fulfilment through engaging in traditional practices and participation in intergenerational transfer of traditional knowledge.
- 135. The Bennett Dam, Peace Canyon Dam and Site C Dam and associated reservoirs, and the conduct of the Crown in relation to authorizing, constructing and operating these projects, cumulatively interfere or will interfere with the ability the plaintiffs, including the individual West Moberly beneficiaries of Treaty No. 8, to express and convey meaning through engaging in traditional practices and through participation in inter-generational transfer of knowledge.

[120] In relation to those paragraphs, the Province sought "particulars of the activities which the Plaintiffs say are protected by s. 2(b) of the Charter, and which are, or will be, interfered with by each of the Bennett, Peace Canyon, and Site C dams and associated reservoirs."

[121] West Moberly responded to that demand as follows:

In response to Demand 31, the activities that are protected by 2(b) are the conveying of meaning and the pursuit of self fulfilment through engaging in traditional practices and participation in inter-generational transfer of traditional knowledge. It is beyond the scope of a proper demand for particulars to ask the Plaintiffs to provide a complete accounting of the traditional practices and traditional knowledge of the Plaintiffs. Rather, the Plaintiffs have adequately particularized

their claim, and the demand requests evidence, and a level of detail disproportionate to what is needed for the Crown to plead in response and is not a proper demand for particulars at this time.

[122] I disagree with West Moberly that this demand calls for "a complete accounting of the traditional practices and traditional knowledge of the Plaintiffs." For the reasons set out above in relation to BC Hydro demand #7(a), I am satisfied that West Moberly should be required to respond to this demand.

Demand #40

[123] In Part 3, paras. 169-170 of the Amended NOCC, West Moberly pleads as follows:

169. Treaty No. 8, and the Taking Up Power, do not act to abolish, extinguish, or otherwise limit the Charter protected rights of the plaintiffs.
170. The Taking Up Power cannot be constitutionally invoked in a manner that is inconsistent with Charter protected rights of the plaintiffs, or that deprives the plaintiffs of their ability to enjoy or exercise Charter protected rights, including:
 - a) The right to manifest, express, and teach religious beliefs;
 - b) The right to engage in intergenerational transfer of traditional knowledge; and
 - c) The right to convey meaning, pursue self-realization and pursue self fulfillment through acting in accordance with traditional ecological knowledge and engaging in a traditional mode of life.

[124] In relation to those paragraphs, the Province demanded the following particulars:

identify, by section, the specific Charter rights on which the Plaintiffs rely, and confirm whether the Plaintiffs seek a remedy under section 24(1) of the Charter.

[125] West Moberly responded by asserting that the demand was improper insofar as it sought legal argument rather than facts, citing *James McCallum & Associates Ltd. v. Lohn Caulder LLP*, 2016 BCSC 542. Nevertheless, West Moberly added that they are not seeking a remedy under s. 24(1).

[126] Although there is authority suggesting that a party who pleads a statute may be required to particularize the specific provision relied upon (see *Nesbitt v. Wintemute*, [1978] B.C.J. No. 805), West Moberly has already pleaded in para. 132 of Part 1 the specific sections of the Charter that they rely upon. I have therefore concluded that no further particulars are required in response to this demand.

Demand #42

[127] In Part 3, paragraphs 76 and 178 of the Amended NOCC, West Moberly pleads as follows:

76. Pursuant to Treaty No. 8, the Crown has an obligation to manage and protect the lands designated under the treaty, and adjacent lands, including the waters and ecosystems within those lands, in such a way as to minimize impacts on West Moberly's Treaty Rights, and ensure that the plaintiffs are able to continue meaningfully exercising the Treaty Rights.
178. The damming of the Peace is inconsistent with Canada's international obligations, including, but not limited, to obligations arising under customary international law, including but not limited to the precautionary principle.

[128] In relation to those paragraphs, the Province demanded the following particulars:

a complete list of what the Plaintiffs say are the defendant(s)' international obligations and indicate which defendant(s) the Plaintiffs say is/are bound by each obligation.

[129] West Moberly has refused to respond, arguing that they ought not to be required to particularize their legal arguments. I disagree with West Moberly's premise that this demand calls for West Moberly to provide a legal argument. In her decision, Choi J., required West Moberly to particularize the defendants' alleged "constitutional obligations" (at paras. 99-102). Similarly, West Moberly should identify precisely which "international obligations" are referred to by closing the list and identifying which defendants are alleged to be bound by them so that the defendants can understand the case they have to meet in this regard.

Demand #45(a)

[130] In Part 3, para. 191 of the Amended NOCC, West Moberly pleads as follows:

191. The defendants' conduct was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, in contumelious disregard of the plaintiffs' rights and as such renders the defendants liable to pay aggravated, exemplary and punitive damages.

[131] In relation to that paragraph, the Province sought particulars as follows:

the specific conduct by the Province which the Plaintiffs allege to be "high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, in contumelious disregard for the plaintiffs' rights" and which is asserted to give rise to liability for aggravated, exemplary and punitive damages .

[132] In its response, West Moberly refused to respond to that demand, arguing that what was sought was its legal position, rather than facts. Nevertheless, in para. 333 of their written submissions on these applications, West Moberly has identified the conduct referred to in that paragraph. I have concluded that West Moberly should respond to this demand by providing the information set out in that paragraph.

BC Hydro Demand #25 (adopted by the Province but not pressed by BC Hydro)

[133] In Part 1, paras. 73, 177 and 182 of the Amended NOCC, West Moberly pleads as follows:

73. In the alternative, if Treaty No. 8 does not guarantee the plaintiffs rights to continue spiritual and religious practices and/or convey knowledge among members, the plaintiffs have existing aboriginal rights to continue these activities that have not been extinguished by Treaty No. 8, and cannot be infringed by the Crown's exercise of the Taking Up Power.
177. In the alternative, if Treaty No. 8 does not guarantee the plaintiffs' rights to continue spiritual and religious practices and/or convey knowledge among members, the damming of the Peace and the construction and operation of the Site C Dam infringes West Moberly's existing aboriginal rights to continue these activities.
182. The onus is on the Crown to show that any infringement of Treaty Rights or aboriginal rights occasioned by the damming of the Peace is justified, and the Crown cannot discharge that onus in the circumstances.

[134] In relation to those paragraphs, the Province demanded "particulars of the existing aboriginal rights asserted by the Plaintiffs."

[135] West Moberly responded to that demand as follows:

the Plaintiffs plead that if the treaty does not protect their right to continue spiritual and religious practices, which the Plaintiffs deny, and if the treaty does not protect their right to convey knowledge among members, which the Plaintiffs deny, then an Aboriginal right exists that was never extinguished which allows West Moberly to continue spiritual and religious practices and convey knowledge among members.

[136] I am satisfied that that response sufficed to inform the defendants of the case they have to meet in this regard and therefore that no further particulars are required.

C. Particulars Sought by Canada

Overview

[137] Apart from the conspiracy claim (further particulars of which are sought by all three of the defendants) Canada has only one outstanding demand, which relates to West Moberly's claim pertaining to the defendants' alleged breach of West Moberly's riparian rights.

Demand #13

[138] In Part 1, paras. 72 and 141 of the Amended NOCC, West Moberly pleads as follows:

72. The Harvesting Right, the Oral Terms, and the Incidental Rights relevant to this proceeding guarantee the Plaintiffs continuing rights to meaningfully:
 - (e) exercise a riparian right of access and navigation to and over the Peace

[141] As a result of the defendants' continuing interference with the plaintiffs' riparian rights occasioned by the Bennett Dam and the Peace Canyon Dam, and the flooding to create the Williston and Dinosaur Reservoirs, along with the consequential permanent damage, the plaintiffs have suffered and continue to suffer loss and damage.

[139] In relation to those paragraphs, Canada demanded particulars as follows:

the rivers or streams, and specific portions thereof, over which the Plaintiffs say they hold riparian rights which have been impacted

[140] West Moberly responded as follows:

the Plaintiffs have riparian rights over every stream or river within the lands covered by Treaty 8, including the West Moberly Traditional Territory. These rights have been impacted in a variety of ways, including but not limited to through the creation of the Bennett and Peace Canyon Dams, and the associated reservoirs and development.

[141] I agree with Canada that the response provided did not assist in clarifying the claim advanced in those paragraphs of the Amended NOCC so that the defendants can understand the case they have to meet in that regard, but instead only added to the uncertainty by broadening the apparent ambit of the claim.

[142] In its written submissions for these applications, West Moberly appears to suggest at paras. 359-361 that the riparian rights in question pertain to the portions of the Peace, Parsnip and Finlay rivers affected by the three dams and their associated reservoirs. West Moberly should clarify if that is indeed what is claimed, and if there is more to it than that, what else there is.

D. Particulars of the Conspiracy Claim

[143] All three of the defendants seek further and better particulars of West Moberly's new claim in conspiracy.

[144] In the responses that it delivered to the defendants' applications, West Moberly clarified its position as to the nature of that claim. BC Hydro and the Province have suggested that their outstanding demands in this regard can be satisfied if West Moberly simply responds by providing the particulars set out in its responses. West Moberly has agreed to do so. I am therefore ordering that West Moberly provide the demanded particulars in that manner.

[145] Although Canada argues that the conspiracy claim may still be deficient in failing to disclose a complete cause of action, it can apply to strike the impugned paragraphs of the Amended NOCC on those grounds if it continues to be of that view after the particulars I am ordering have been provided.

V. West Moberly's Applications

A. Overview

- [146] West Moberly summarises the outstanding particulars that it seeks on its applications as falling into two broad categories: clarification of the defendants' pleaded admissions and clarification of the defendants' "understanding" as to the meaning of the "solemn promises" on which West Moberly relies.
- [147] West Moberly's primary position is that only limited particulars are required of the defendants at this stage. Alternatively, West Moberly argues that insofar as the defendants are successful in their applications for particulars, any relief granted in that regard should be granted on a reciprocal basis, so that both sides are held to the same standard.

B. The Particulars Sought from BC Hydro

Demand #1

- [148] In Part 1, para. 8 of its Amended Response, BC Hydro pleads as follows:

The Dunne-za ancestors of the West Moberly moved west to the eastern slopes of the Rocky Mountains of British Columbia in the late eighteenth century displacing the Sekani from areas of the Peace and Smoky Rivers. The Dunne-za ancestors of the West Moberly also mixed with the Sekani at Hudson's Hope, and the Cree who also migrated to the region from the east.

- [149] In relation to that paragraph, West Moberly demanded particulars as follows:

particularize whether the Dunne-za ancestors of the West Moberly that BC Hydro alleges moved west to the eastern slopes of the Rocky Mountains of British Columbia in the late eighteenth century are the same Dunne-za ancestors of other Treaty 8 First Nations with Dunne-za heritage, or does BC Hydro allege that it was only West Moberly's Dunne-za ancestors that moved west to the eastern slopes of the Rocky Mountains in the late eighteenth century?

- [150] BC Hydro responded as follows:

The Dunne-za ancestors of the West Moberly referred to in paragraph 8 are the Beaver referred to in paragraph 172 of *West Moberly First Nations v British Columbia*, 2017 BCSC 1700:

- [172] While Dr. Ridington and John Yerbury (an expert witness qualified to give opinion on anthropology, specifically ethnohistory) seem to agree that the Sekani had been displaced from east of the Rocky Mountains into the Rocky Mountain Trench area by the Beaver ...

- [151] West Moberly complains that BC Hydro has not responded properly to this demand.

- [152] Although BC Hydro has not responded directly to West Moberly's question as to whether any other "Treaty 8 First Nations with Dunne-za heritage" are alleged to have descended from the Dunne-za ancestors who moved west to the eastern slopes of the Rocky Mountains in the late eighteenth century, West Moberly has not explained why they need that information from BC Hydro in order to understand the case they have to meet. BC Hydro has explained that it was referring in that paragraph to the people known as the "Beaver"

and it has pleaded there that they were ancestors of West Moberly. I am not persuaded that any further particulars are required in response to this demand.

Demand #2

[153] In Part 1, para. 16 of its Amended Response, BC Hydro pleads as follows:

BC Hydro admits that Treaty 8 created rights and obligations on both West Moberly and the Crown.

[154] In relation to that paragraph, West Moberly demanded particulars of "the rights and obligations that BC Hydro admits Treaty 8 created."

[155] BC Hydro responded as follows:

The rights and obligations on both West Moberly and the Crown referred to in paragraph 16 are set out in Treaty 8.

[156] West Moberly objects to that response, arguing that is both wrong in law and incoherent.

[157] BC Hydro has already pleaded its interpretation of the relevant rights and obligations created by Treaty 8 in Part 1, paras. 17-20 and Part 3, paras. 2-8 of its Amended Response. I am not persuaded that the need for any further particulars arises from the admission that BC Hydro made in para. 16. Moreover, an admission such as this is not a pleaded fact that is properly the subject of a demand for particulars. If West Moberly seeks to obtain more specific admissions from BC Hydro, the preferable way to do so is by following the procedure set out in Rule 7-7. I am therefore refusing to require BC Hydro to provide any further particulars in response to this demand.

Demand #3

[158] In para. 17 of its Amended Response, BC Hydro pleads that:

BC Hydro relies on the terms of Treaty 8, under which the signatory and adherent First Nations surrendered all their rights to the land covered by the treaty in exchange for rights to hunt, trap and fish, subject to the government's ability to make regulations and saving and excepting tracts that may be required or taken up. The purposes for which the Crown may require or take up land in Treaty 8 are broad, relate to settlement, trade and resource development, and are open-ended.

[159] In relation to that paragraph, West Moberly demanded the following particulars:

A. does BC Hydro allege that the Crown may require or take up land in Treaty 8 for purposes other than settlement, trade and resource development? If yes, provide a complete list of these other purposes;

B. particularize the land uses and activities encompassed by the term "trade".

C. particularize the land uses and activities encompassed by the term "settlement"; and

D. particularize the land uses and activities encompassed by the term "resource development".

[160] BC Hydro responded as follows:

A-D. The Crown may take up land under Treaty 8 for settlement, mining, lumbering, trading or other purposes. One other purpose is the development, conservation and management of sites and facilities for the generation and production of electrical energy. Settlement, mining, lumbering and trading are facilitated by the generation and production of electrical energy.

[161] West Moberly argues that the response is inadequate.

[162] I am not satisfied that this demand was a proper one in the first place. West Moberly appears to be seeking clarification of how BC Hydro intends to argue Treaty 8 should be interpreted. That is not a proper subject for a demand for particulars: *Sam v. British Columbia*, 2014 BCSC 591, at para. 49. I am therefore refusing to order that any further particulars be provided in response to this demand.

Demand #4

[163] In para. 19 of its Amended Response, BC Hydro pleads as follows:

the Treaty Commissioners who negotiated the treaty on behalf of the government prepared a report in 1899 for the Superintendent General of Indian Affairs that recorded verbal promises made to the First Nations. The verbal promises are relevant to the interpretation of Treaty 8, and are related to the hunting, trapping, and fishing rights set out in Treaty 8. Whether or not these verbal promises form part of the treaty is a question of mixed fact and law.

[164] In relation to that paragraph, West Moberly demanded particulars of "the verbal promises BC Hydro says were made by the Treaty Commissioners to the First Nations."

[165] BC Hydro responded as follows:

The verbal promises referred to in the paragraph 19 are recorded in the report of the Treaty Commissioners, dated 1899.

[166] West Moberly argues that the response is inadequate because "[i]t is unclear whether [BC] Hydro pleads that all statements the Treaty Commissioners report making to the First Nations in their report are 'verbal promises,' or says that only a subset of these statements are verbal promises."

[167] I am not satisfied that the additional particulars sought are necessary. BC Hydro has already pleaded in Part 1, paras. 17-20 and Part 3, paras. 2-8 of its Amended Response what promises are alleged to arise from Treaty 8. West Moberly appears to be seeking, in addition, BC Hydro's interpretation of the Treaty Commissioner's report, which is not a fact that is properly the subject of a demand for particulars. I am therefore refusing to order that any further particulars be provided in response to this demand.

Demand #6

[168] In para. 35 of its Amended Response, BC Hydro pleads as follows:

In or around 1988, BC Hydro established the Peace-Williston Fish and Wildlife Compensation Program ("FWCP") in partnership with British Columbia, Fisheries and Oceans Canada, First Nations including West Moberly, and other stakeholders, in order to undertake activities to conserve and enhance fish and wildlife in the Peace River watershed.

[169] In relation to that paragraph, West Moberly sought particulars of the "other stakeholders".

[170] BC Hydro responded as follows:

The "other stakeholders" in paragraph 35 refers to individual members of the public with varying local and regional interests. The current board of the FWCP is available online at <http://fwcp.ca/app/uploads/2019/08/Board-and-Committee-Members-Peace-RegionJune-12-2020.pdf>, and the governance manual is online at <http://fwcp.ca/app/uploads/2018/01/FWCPGovernance-Manual-2014-Rev-2018-FINAL.pdf>.

[171] West Moberly argues that BC Hydro should have to close the list.

[172] West Moberly has offered no explanation as to why it needs that additional information. Its relevance to the issues to be tried, if any, is not apparent. I am therefore not persuaded that any further particulars are necessary in response to this demand.

Demand #13(a)

[173] In para. 89 of its Amended Response, BC Hydro pleads as follows:

The Site C Project is expected to affect wildlife locally, including moose, but regional moose populations are generally stable and are expected to remain stable. The Site C Project is not located in an area of caribou habitat and is not expected to impact caribou.

[174] In relation to that paragraph, West Moberly demanded the following particulars:

[D]oes BC Hydro expect the Site C project to affect wildlife species other than moose locally? If so, identify these species.

[175] BC Hydro responded as follows:

The assessment of effects of Site C on wildlife resources is described in the Site C Environment Impact Statement at Volume 2, Section 14 and Appendix R (Parts 1-7), which is broken down by class or species groups. The Joint Review Panel report, in chapter 6, also describes expected effects of Site C on specific wildlife species.

[176] West Moberly argues that the answer given was not responsive.

[177] In para. 89 of its Amended Response, BC Hydro pleaded the stated expectation in the passive voice. It appears to be a reference to expert opinions held by others. In its demand, however, West Moberly seeks particulars of BC Hydro's own expectations. I have concluded that the pleaded expectation is a matter of evidence, indeed expert evidence. As such, it is not properly the subject of a demand for particulars. I am therefore refusing to order any further particulars in response to this demand.

Demand #10(a) and (b)

[178] In paragraph 46(c) of the Amended Response, Hydro pleads as follows:

the remaining land required for the Site C reservoir are islands and vegetated river bars in the Peace River. Some of these islands and vegetated bars, or portions of them, as well as some of the riverbank, were underwater, permanently or seasonally, prior to the construction of the Bennett and Peace Canyon dams.

[179] West Moberly seeks the following particulars:

A. which islands and vegetated bars, or which portions of them, were underwater permanently prior to construction of the Bennett and Peace Canyon dams;

B. which islands and vegetated bars, or which portions of them, were underwater seasonally prior to the construction of the Bennett and Peace Canyon dams. Identify the specific season and length of time these islands and vegetated bars underwater each season.

[180] BC Hydro responded as follows:

The islands and vegetated bars, or portions thereof, that were underwater either seasonally or permanently prior to the construction of the Bennett and Peace Canyon dams can generally be identified as the areas with younger growth vegetation or gravel bars. Detailed mapping is not available at this time.

With respect to the season and length of time that the islands and vegetated bars were underwater, before Bennett and Peace Canyon dams were built, the river was generally higher in spring and summer during freshet, but the exact dates vary from year to year.

[181] West Moberly argues that the response is inadequate and too vague. BC Hydro responds that the demand is improper insofar as it seeks evidence, which evidence does not even exist yet.

[182] I agree with BC Hydro that these demands seek evidence that is more properly explored through discovery.

Demand #12

[183] In para. 58 of the Amended Response, BC Hydro pleads as follows:

In response to paragraph 107 of the Amended Notice of Civil Claim, BC Hydro began to engage in consultation with Aboriginal groups, and discussions with the public and other interested parties about Site C in 2007. BC Hydro also proceeded with advancing environmental studies, field studies, engineering design and technical work. BC Hydro initially contacted 41 Aboriginal groups including West Moberly. From the outset, consultation with West Moberly was conducted at a deep level.

[184] In relation to that paragraph, West Moberly demanded particulars of the "other interested parties" with whom BC Hydro began consulting in 2007.

[185] BC Hydro responded as follows:

In 2007 to 2009, BC Hydro engaged with Aboriginal groups and organizations, as well as met with landowners, provincial and federal agencies, local and regional governments, and other members of the public regarding the Site C project. A summary of the consultation undertaken by BC Hydro in this time period is described in numerous places, including:

- Pre-Consultation Summary Report, March 15, 2008
- Stage 2 Report Consultation and Technical Review, Fall 2009
- Stage 2 Consideration of Public Consultation Input, December 2009
- Environmental Impact Statement ("EIS"), Volume 1, Section 9 and Appendix G

The consultation reports listed above (except for the EIS) as well as other consultation reports, are available online at <https://www.sitecproject.com/in-thecommunity/consultation>.

[186] West Moberly argues that BC Hydro should have to close that list.

[187] I disagree. West Moberly has offered no explanation as to why it needs that additional information. Its relevance to the issues to be tried, if any, is not apparent. I am therefore not persuaded that any further particulars are necessary in response to this demand.

Demand 14(c)

[188] In para. 90 of its Amended Response, BC Hydro pleads as follows:

BC Hydro is taking steps to mitigate these local effects including setting aside BC Hydro-owned land as ungulate winter range. BC Hydro is also establishing a fund for projects identified by Aboriginal groups to mitigate impacts on their use of land, including West Moberly.

[189] In relation to that paragraph, West Moberly demanded the following particulars:

[I]s BC Hydro taking steps other than "setting aside" BC Hydro owned land as ungulate winter range to mitigate local effects? If yes, particularize these steps.

[190] BC Hydro responded as follows:

Schedule B of the Environmental Assessment Certificate and the federal Decision Statement require BC Hydro to undertake numerous measures that will mitigate the effects of Site C. In accordance with the Environmental Assessment Certificate and Decision Statement, BC Hydro has developed numerous mitigation and monitoring plans that further describe the measures being taken (available at <https://www.sitecproject.com/documentlibrary/environmental-management>). BC Hydro is also complying with conditions set out in its water licences and other permits and approvals that will mitigate effects of the Site C project.

[191] West Moberly argues that the response was inadequate and lacking in detail.

[192] I am refusing to order further particulars in response to this demand, on the basis that it seeks evidence that is more properly explored through discovery.

Demand 15(a) and (b)

[193] In para. 91 of its Amended Response, BC Hydro pleaded as follows:

the Province has implemented, or is implementing, a number of land protection measures over areas located within West Moberly's Traditional Territory, including Klinse-za and the Peace Moberly Tract (described below), identified by West Moberly as important to the exercise of their treaty rights.

[194] In relation to that paragraph, West Moberly demanded the following particulars:

A. particularize the land protection measures that BC Hydro says the Province has implemented or is implementing.

B. particularize the areas located within West Moberly's Traditional Territory where BC Hydro says the Province has implemented, or is implementing land protection measures. Do these areas include areas other than Klinse-za and the Peace Moberly Tract? If yes, particularize these other areas.

[195] BC Hydro responded as follows:

A.-B. The land protection measures that the Province is implementing includes the creation and maintenance of Provincial Parks and Protected Areas, Ecological Reserves, Wildlife Habitat Areas, Ungulate Winter Ranges, Old Growth Management Areas and Visual Landscape Inventories, as well as other measures being negotiated with Aboriginal groups who entered into Tripartite Land Agreements with the Province and BC Hydro in relation to Site C that provide for land protection. Not all of the land protection measures being implemented by the Province are within the knowledge of BC Hydro.

[196] West Moberly argues that BC Hydro should have to close the list.

[197] I disagree. It is sufficient for BC Hydro to provide, as it has, the information that is available to it, which information will necessarily be incomplete given that the demand concerns actions taken by others.

Demand 16(a)-(d)

[198] In para. 92, BC Hydro pleaded as follows:

West Moberly will continue to be able to hunt and trap in the vicinity of the Site C Project, in their Traditional Territory and in the broader Treaty 8 territory. The land required for the Site C Project is less than one-tenth of one percent of West Moberly's Traditional Territory.

[199] In relation to that paragraph, West Moberly demanded the following particulars:

A. the specific locations in the vicinity of the Site C Project that BC Hydro says West Moberly will continue to be able to hunt and trap and which species BC Hydro asserts West Moberly will be able to hunt and trap in this area;

B. the specific locations in their Traditional Territory that BC Hydro says West Moberly will continue to be able to hunt and trap and the species BC Hydro asserts West Moberly will be able to hunt and trap in this area; and

C. the specific locations in the broader Treaty 8 territory that BC Hydro says West Moberly will continue to be able to hunt and trap and the species BC Hydro asserts West Moberly will be able to hunt and trap in this area.

D. what is included in the "land required for the Site C Project" as stated in that paragraph.

[200] BC Hydro responded as follows:

A-C. West Moberly will continue to be able to hunt and trap within the vicinity of the Site C Project, their traditional territory, and Treaty 8 territory in all of the areas where West Moberly currently has the ability to hunt and trap except for any land required for the Site C Project. The Site C Project will not prevent West Moberly members from hunting or trapping any wildlife species that its members currently hunt and trap.

D. The land required for the Site C project is described at paragraph 43 of BC Hydro's Amended Response to Civil Claim.

[201] West Moberly argues that the response is too vague.

[202] I am not persuaded that further particulars are necessary in order to clarify the impugned pleading, which is clear enough. Any further detail is a matter of evidence more properly explored through discovery.

C. The Particulars Sought from the Province

Demand #1(b)

[203] In para. 6 of Part 1 of its Amended Response, the Province pleads as follows:

The Province consulted extensively with the Plaintiffs in relation to the Project, and proposed accommodations, and continues to do so, in recognition of its legal and constitutional obligations and in an effort to further reconciliation. In addition, within a geographic area identified by the

Plaintiffs as their 'consultative area', beyond and including the area of the Project, the Province, through various Ministries, has entered into economic and community development agreements and memoranda of understanding with a view to responding to the Province's legal duties and to implement a new relationship with the Plaintiffs. The Province's approach in these circumstances is to reach agreement if possible.

[204] In relation to that paragraph West Moberly demanded "particulars of the new relationship with the Plaintiffs the Province refers to."

[205] The Province responded as follows:

The new relationship referenced is an initiative with both legal and policy elements that has evolved since at least 2005 with a reconciliatory framework established between the BC government and the First Nations Leadership Council. The new relationship continues to evolve and incorporates principles set out in the following documents:

- New Relationship Agreement and Transformative Change Accord;
- The Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples;
- Cabinet Minister's mandate letters requiring provincial ministries to move forward on the Truth and Reconciliation Commission of Canada's Calls to Action and to review policies, programs and legislation to find ways to bring the principles of the United Nations Declaration on the Rights of Indigenous Peoples into action; and
- Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c. 44.

[206] West Moberly argues that the response is unclear and improperly refers to evidence. They complain of being "left with no understanding of what principles it can rely on the Province to act in accordance with in furtherance of this 'new relationship.'"

[207] West Moberly has not identified any valid purpose for the additional particulars sought. Although particulars can serve various purposes, identifying the "principles" that the party seeking particulars "can rely on" in their dealings with the pleading party is not one of them. I am therefore refusing to require the Province to provide any further particulars in response to this demand.

Demand #2(a)

[208] In para. 21 of Part 1 of its Amended Response, the Province pleads that:

the Province admits that the Treaty Commissioners for the federal Crown made oral promises to the Indigenous signatories to Treaty 8. These promises pertained to hunting and fishing rights and were recorded in the Treaty Commissioners' Reports and in contemporary affidavits and diaries of interpreters and other government officials who participated in the negotiations. The promises made on behalf of the federal Crown at the time the Treaty was concluded are relevant to the Treaty's interpretation.

[209] In relation to that paragraph, West Moberly demanded particulars as follows:

does the Province allege that the oral promises made by the Treaty Commissioners to the Indigenous signatories to Treaty 8 only pertain to hunting and fishing rights?

[210] The Province replied as follows:

No. The oral promises pertained to hunting, trapping and fishing rights and various other subjects such as medical services, education, and annuity payments.

[211] West Moberly argues that the Province should have to close that list.

[212] I disagree. For the reasons given earlier in relation to West Moberly's demands #3 and 4 of BC Hydro, I am refusing to order that any further particulars be provided in response to this demand.

Demand #2(b)

[213] West Moberly has also demanded that the Province "identify the oral promises made by the Treaty Commissioners to the Indigenous signatories to Treaty 8."

[214] I am refusing to order further particulars be provided in response to this demand on the same basis as the previous one.

Demand #3

[215] In para. 22 of Part 1 of its Amended Response, the Province pleads that it "admits that oral representations made on behalf of the federal Crown at the time Treaty 8 was concluded in 1899 are relevant to its interpretation."

[216] In relation to that paragraph, West Moberly demanded particulars as follows:

are the "oral representations" the Province admits were made on behalf of the federal Crown at the time Treaty 8 was concluded the oral promises referred to in paragraph 21? If not, particularize the full list of oral representations.

[217] The Province responded as follows:

The oral promises referred to in paragraph 21 are found in the federal Treaty Commissioners' Report. Evidence concerning oral representations made in relation to Treaty 8 may be found in a number of documents of which the Province is aware, namely:

- the report of the original Treaty Commissioners dated September 22, 1899;
- Through the Mackenzie Basin (Charles Mair, originally published 1908);
- Newspaper accounts of the treaty negotiations (including the Edmonton Bulletin, 1899/06/26); and
- an account by Bishop Jean-Baptiste Grouard who was present at the original treaty negotiations, including translation.

As set out in paragraph 22 of the Amended Response, whether an oral representation made by a representative of the federal Crown constitutes an oral promise is a question of mixed fact and law.

[218] West Moberly argues that the response is inadequate because it is insufficiently clear.

[219] I disagree. To prepare a "full list" of the oral representations that were made at the time, to the extent that such a list would be helpful at all, would involve interpreting the original source documents, which is a matter of evidence and argument. The Province has identified the source documents that it relies upon in this regard in sufficient detail to clarify the meaning of its pleading. I am therefore refusing to order any further particulars be provided in response to this demand.

Demand #4

[220] In para. 24 of Part 1 of its Amended Response, the Province pleads as follows:

the federal Crown sought to open the tract of land now covered by Treaty 8 for "settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet" and to obtain the consent of the Plaintiffs' ancestors and other Indigenous groups so that there would be peace and good will between them and Her Majesty's other subjects.

[221] In relation to that paragraph, West Moberly demanded particulars of "all the 'other purposes' for which the Province says the federal Crown sought to open up the tract of land now covered by Treaty 8."

[222] The Province responded as follows:

The meaning of the term "other purposes" in the text of Treaty 8 is a matter of Treaty interpretation for the courts. The Supreme Court of Canada has previously determined that the phrase "other purposes" should not be read restrictively (Mikisew Cree First Nation, above) and on the facts of that case the court found that the Crown had a treaty right to "take up" surrendered lands for regional transportation purposes. Power generation, such as that provided by hydroelectric power, is required to facilitate the enumerated purposes listed in Treaty 8 of settlement, mining, lumbering, and trading. The Province says that hydroelectric development is one of the "other purposes" for which land may be taken up under Treaty 8.

[223] West Moberly argues that the Province should be required to close that list.

[224] I disagree. To the extent that purposes beyond those identified by the Province may be relevant in this case at all, identifying them calls for the Province's interpretation of the Treaty or associated source documents, which is a matter of evidence and argument and not a proper subject for a demand for particulars.

Demand #5

[225] In para. 35 of Part 1 of its Amended Response, the Province pleads as follows:

The Province asserts that the Plaintiffs exercise, and continue to exercise, their Treaty rights in various locations throughout their traditional territory which are not affected by the Bennett, Peace Canyon, or Site C dams.

[226] In relation to that paragraph, West Moberly demanded particulars as follows:

identify the "various locations" the Province asserts that the Plaintiffs exercise and continue to exercise their Treaty rights and which are not affected by the Bennett, Peace Canyon or Site C dams.

[227] The Province responded as follows:

The Province says that the Plaintiffs bear the onus of proving the extent of their traditional territory surrendered under the Treaty within which they exercise Treaty rights. The Plaintiffs' have made factual allegations at paragraphs 45 to 70 of their Amended Notice of Civil Claim to the effect that they utilize "different areas" and "preferred areas" for the exercise of Treaty 8 rights. The locations at which the Plaintiffs exercise Treaty rights is uniquely within the Plaintiffs' knowledge. The Province has pled that the Plaintiffs have insufficiently particularized the locations within their asserted traditional territory where they exercise Treaty rights (Amended Response, para. 30) and sought particulars in respect of the same (Province's Demand for Particulars dated November 5, 2019, Demand #6(a)). The Plaintiffs have thus far refused to provide the requested particulars (see Plaintiffs' Reply dated December 13, 2019).

[228] This demand, which is similar to the Province's demand #6(a), calls for evidence that is more appropriately explored through discovery.

Demand #8

[229] In para. 47 of Part 1 of its Amended Response, the Province pleads that:

BC Hydro was established in 1962. In the 1960's and 1970's, BC Hydro undertook significant hydroelectric infrastructure projects on the Peace and Columbia rivers pursuant to the Province's "Two Rivers" policy. These facilities were constructed to support the development of the Province's economy and natural resources (such as forestry, and mining); hydroelectric power; the building of infrastructure; and to address unemployment.

[230] In relation to that paragraph, West Moberly demanded particulars as follows:

A. identity the complete list of natural resources these projects were undertaken to support;

B. identify the infrastructure that these hydroelectric infrastructure projects were constructed to support;

C. provide particulars of the unemployment the Province undertook these hydroelectric infrastructure projects to address; and

D. identify whether these hydroelectric infrastructure projects undertaken for any other reasons. If so, provide particulars of these other reasons

[231] The Province responded as follows:

The Province's research and document discovery process, including archival research, is ongoing. The Province provides the following information which reflects its understanding at this time:

Province's Response to #8A

The Province's present understanding is that the development of hydroelectric facilities was intended in the 1960s and 1970s to facilitate economic development of BC, in particular of the northern interior, primarily in forestry, mining, and agriculture.

Province's Response to #8B

The Province's present understanding is that the projects were intended to support public and private infrastructure including residential settlement and development, schools, hospitals, mines, pulp mills and other industrial facilities that require electricity in order to operate.

Province's Response to #8C

The Province's present understanding is that the projects were intended to support stable employment opportunities within the Province generally including through the development of the natural resource sectors described in #8A.

Province's Response to #8D

The Province's present understanding is that the projects were generally undertaken for the purpose of building and transforming the Province's economy. Additionally, the Bennett administration's "Two Rivers policy" was designed to achieve and maintain Provincial jurisdiction and control over the development of hydroelectric power within the Province, and to improve the Province's strategic position vis-a-vis Canada and the United States in relation to hydro development on the Columbia River and negotiation of the Columbia River Treaty.

[232] West Moberly argues that the response is lacking in sufficient detail.

[233] I have concluded that the additional information sought beyond the response provided, to the extent it would add anything, is in the nature of evidence that should more properly be explored through discovery.

Demand #9

[234] In para. 52 of Part 1 of its Amended Response, the Province pleads that:

the Bennett and Peace Canyon dams and their associated reservoirs were authorized by valid statutory authority. The Province admits that it granted various approvals to BC Hydro in relation to the construction of the Bennett and Peace Canyon dams and further says that its actions in relation to the construction of the Bennett and Peace Canyon dams were undertaken prior to the enactment of s. 35 of the Constitution Act, 1982 and the development of the law relation to the Crown's legal duty to consult.

[235] In relation to that paragraph, West Moberly demanded particulars of:

each "valid statutory authority" that is said to have authorized the Bennett and Peace Canyon dams. In addition, provide the full list of "various approvals" the Province admits that it granted to BC Hydro in relation to the construction of Bennett and Peace Canyon dams.

[236] The Province responded as follows:

The Province's document discovery process is ongoing, which includes conducting additional research to determine the full extent of the enabling legislation and authorizations concerning the Bennett and Peace Canyon Dams. The Province provides the following information which is within its present knowledge:

The following legislation was engaged in authorizing construction of the Bennett and Peace Canyon Dams:

- Hydro and Power Authority Act, SBC 1962, c. 8;
- Land Act, RSBC, 1948, c. 175; and
- Water Act, RSBC 1960, c. 405.

The original water licences for the W.A.C. Bennett Dam and Williston Reservoir (Conditional Water Licences 27721 and 27722, respectively) and for the Peace Canyon Dam (Conditional Water Licence 42203) have subsequently been subject to administrative orders in respect of additional construction, mitigation studies and programs for aquatic habitat, managing flow levels, and increasing reservoir capacity and dam safety.

- For the Bennett Dam these include decisions:

-by the Water Comptroller pursuant to the Water Act on or about February 27, 1963; July 15, 1968; November 15, 1968; March 30, 1972; June 30, 1992; August 9, 2007; and April 6, 2011; and

-under the Land Act on April 26, 1974; November 22, 1974; February 10, 1978.

- For the Peace Canyon Dam:

-Water Act authorizations were issued for construction in 1974 and 1978. They include Conditional Licence 43431 on November 22, 1974 and Conditional Licence 49679 on February 10, 1978.

-Further administrative orders were made pursuant to the Water Act on May 8, 1980 and August 9, 2007 regarding protection and enhancement of habitat and dam safety. And,

-Conditional Licence 42203 was replaced by CL 123025 on April 4, 2008.

The original water licences were also administratively reviewed in 2007 in the course of preparing BC Hydro's Peace River Water Use Plan, which was developed in consultation with First Nations and others. The Peace River Water Use Plan was implemented under section 88 of the Water Act, RSBC 1996, c. 483.

[237] West Moberly argues that the Province should have to close the list now.

[238] I disagree. It is sufficient that the Province has provided the statutes and approvals of which it is currently aware: Rule 3-7(20).

Demand #10

[239] In para. 53 of Part 1 of its Amended Response, the Province pleads that "its ongoing regulation of the Bennett and Peace Canyon dams include mitigation measures."

[240] In relation to that paragraph, West Moberly demanded particulars of "each of the specific mitigation measures the Province relies on in this paragraph."

[241] The Province responded as follows:

Although the Province's research and document discovery process is ongoing, the Province provides the following information which is within its present knowledge: Mitigation measures are reflected in the following documents and initiatives:

- remedial and conservation measures that exist as terms of the original Water Licences and associated administrative orders detailed above;
- Water Use Plan 2007;
- the Williston Reservoir Management Plan;
- the Peace River Management Plan; and
- the Fish and Wildlife Compensation Program (with ongoing and evolving commitments).

[242] West Moberly argues that the response is lacking in sufficient detail and that the Province should be required to close the list.

[243] I have concluded that this demand seeks evidence that is more properly explored through discovery.

Demand 11(a), (b) and (c)

[244] In para. 72 of Part 1 of its Amended Response, the Province pleads that it:

recognizes that the construction and operation of Site C will result in adverse impacts to the exercise of the Plaintiff's Treaty rights in the environs of the dam site and reservoir. The Province has consulted with Treaty 8 First Nations including West Moberly in accordance with its legal and constitutional obligations, throughout the development and permitting for Site C and prior to the government's December 2017 decision to complete construction of Site C. Throughout that process the Province has sought to mitigate adverse impacts, including through the negotiation of Impact Benefits Agreements, and Tripartite Land Agreements, proposed accommodation measures as well as through ongoing consultation processes.

[245] In relation to that paragraph, West Moberly demanded particulars as follows:

A. identify the specific locations, and provide the geographic extent of these locations, where the Province recognizes that the operation of Site C will result in adverse impacts to the exercise of the Plaintiffs' treaty rights;

B. identify all accommodation measures, and provide particulars as to what impacts the accommodation was offered in relation to; and

C. provide particulars of all ongoing consultation processes, including who is involved in each of these processes.

[246] The Province responded as follows:

A. The specific locations utilized by the Plaintiffs for the exercise of Treaty rights in the vicinity of Site C is a matter uniquely within the Plaintiffs' knowledge. As the Plaintiffs consulted under the umbrella of the Treaty 8 Tribal Association (T8T A), the potential adverse impacts to Treaty rights were aggregated among the participant nations. The Province has recognized potential adverse impacts to the Plaintiffs' practice of Treaty rights as set out in the Federal/Provincial Consultation and Accommodation Report: Site C Clean Energy Project, Appendix A28, dated September 14, 2014, and in a letter to the Plaintiffs from the Province and BC Hydro dated July 22, 2014 regarding adverse effects of the Project on First Nations represented by T8TA.

B. The accommodation measures proposed to the Plaintiffs by BC Hydro and the Province were responsive to the potential adverse impacts to their Treaty rights identified by the Treaty 8 Tribal Association during consultation in the environmental assessment process, as well as on Site C statutory permitting decisions, including issuance of the Conditional Water Licences and authorizations under various statutes such as the Land Act, Water Act, Forest Act and Wildlife Act. The accommodations implemented and proposed for Site C include both financial compensation and mitigation measures designed to avoid or minimize environmental impacts and impacts upon the exercise of Treaty rights. These are reflected in the offer made to the Plaintiffs by BC Hydro and the Province in 2014, the conditions imposed on BC Hydro under the provincial and federal environmental assessment certificates, and by various statutory decision

makers in relation to authorizations for Site C construction activities.

C. The particulars sought in relation to ongoing consultation processes is known to the Plaintiffs as participants in those processes. Nonetheless, the Province understands that as of the date of preparing this document there are:

- approximately 15 consultation processes presently ongoing between the Province and the Plaintiffs led by the Ministry of Forests, Lands, Natural Resource Operations & Rural Development which relate to four Licences of Occupation (Land Act), two Occupant Licences to Cut (Forest Act), a Fish Collection Permit (Wildlife Act); a Temporary Fish Collection Facility Permit (Wildlife Act), five Water Use Permits (Water Sustainability Act), a Water Diversion Permit (Water Sustainability Act); and a Beaver Telemetry Monitoring Licence (Wildlife Act); and
- consultation with respect to amendments to the Site C Environmental Assessment Certificate with the Environmental Assessment Office.

[247] West Moberly argues that the response is inadequate because:

- (a) it is insufficiently clear as to the scope of the admission that was made;
- (b) the list should be closed; and
- (c) it should not be qualified merely because the responsive information is more readily available to other parties.

[248] Although I agree with West Moberly that the response fails to answer the questions posed and improperly directs the reader to evidence, I am not persuaded that the demand itself was proper either.

[249] First, West Moberly seeks further particulars as to the scope of an admission. If West Moberly seeks to obtain different or more specific admissions from the Province, the preferable way to do so is by following the procedure set out in Rule 7-7. Second, the demand calls for evidence that is more appropriately explored through discovery.

Demand 13

[250] In para. 74 of Part 1 of its Amended Response, the Province pleads that:

West Moberly are parties to a number of agreements with the Province that provide for economic benefits and consultation protocols for development activities within a prescribed geographic area. This [includes] an Amended Economic Benefits Agreement (the "EBA"), a Strategic Land and Resource Planning Agreement, a Heritage Conservation Memorandum of Understanding a Long Term Oil and Gas Agreement, and a 2015 Economic and Community Development Agreement for coal projects.

[251] In relation to that paragraph, West Moberly demanded particulars as follows:

does the Province rely on any agreements between West Moberly and the Province as providing economic benefits and consultation protocols other than those listed in paragraph 74? If yes, provide particulars of these agreements.

[252] The Province responded by referring to its response to demand #6, which was as follows:

The Crown's constitutional obligations to the Plaintiffs are grounded in the honour of the Crown which gives rise to different duties in different circumstances. With respect to the management of habitat and wildlife within the Plaintiffs' asserted traditional territory, the Province has a constitutional obligation to consult with the Plaintiffs and, if appropriate, accommodate their interests before taking action which has the potential to adversely impact the exercise of their Treaty rights.

[253] I agree with West Moberly that the response did not answer the question posed, which was a proper demand for particulars. I am therefore ordering the Province to respond to it.

Demand #14

[254] In para. 76 of Part 1 of its Amended Response, the Province pleads that:

- a. The Province receives revenue as a result of BC Hydro's operation of the Bennett and Peace Canyon dams and their associated reservoirs and generating stations and from BC Hydro's constructions of Site C. Such revenues include amounts collected in relation to water rentals, permits over Crown land, taxes on transmission and distribution assets, provincial sales tax paid by BC Hydro on goods required for the operation of the dams, motor fuel tax, and other fees, licenses, and permits.
- b. All such revenues are received pursuant to valid statutory authority, contract, or other agreement
- c. All such revenue form part of the Provincial Consolidated Revenue Fund. These revenues are used to help essential provincial services such as health care, education, housing, social programs, and infrastructure for the benefit of all British Columbians, including the Plaintiffs.
- d. As part of the Province's decision to proceed with Site C, the Province intends that a portion of the revenues received from Site C incremental water rentals will be used to support local area programs in affected areas, including an agriculture fund, a regionally based legacy fund, and an Indigenous power procurement initiative.
- e. A portion of water rental revenues may be dedicated to the First Nations Clean Energy Business Fund, to support participation in the clean energy sector.

[255] In relation to that paragraph, West Moberly demanded particulars as follows:

A. provide a full list of the valid statutory authority, contracts and other agreements that the Province relies on in paragraph 76(b);

B. provide the amount of the revenues received from Site C that the Province says it intends to use to support local area programs in affected areas; and

C. provide the full list of local area programs the Province says it intends to support with a portion of the revenues received from Site C.

[256] The Province responded as follows:

Although the Province's research and document discovery process is ongoing, the Province provides the following information within its present knowledge in relation to paragraph 76(b) concerning particulars of the statutory authority, contracts and agreements referenced:

- Water licencing and rentals are paid pursuant to the Water Sustainability Act, SBC 2014, c. 15 and associated regulations;
- stumpage on harvested timber is paid pursuant to the Forest Act, RSBC 1996, c. 157 and associated regulations;
- application fees, rents, and royalties for tenures under various Crown Land Use Policies, such as Industrial and Aggregates, are paid pursuant to the Land Act, RSBC 1996, c. 245 and associated regulations;
- at various times, revenues have been received by the Province from BC Hydro pursuant to orders of the BC Utilities Commission pursuant to the Utilities Commission Act, RSBC 1996, c. 473; and
- BC Hydro may be required to pay grants in lieu of property taxes to municipalities, regional districts or to the Province for rural areas under the authority of the Hydro and Power Authority Act and Orders in Council established from time to time.

[257] West Moberly has not explained why it seeks further particulars beyond those provided. I am satisfied that the particulars already provided are sufficient.

D. The Particulars Sought from Canada

Demand #1

[258] In para. 43 of Part 1 of its Amended Response, Canada pleads as follows:

Canada denies that the federal Crown issued an authorization in respect of the construction of the W.A.C. Bennett dam at the time of construction pursuant to the Navigational Waters Protection Act. Canada is not yet in a position to say what authorizations, if any, may have been issued by federal departments in respect of the construction of the W.A.C. Bennett dam.

[259] In relation to that paragraph, West Moberly demanded particulars of "the authorizations that Canada says were issued or may have been issued by the Federal Crown in respect of the construction of W.A.C. Bennett dam."

[260] Canada responded as follows:

[Canada] has been unable to locate any authorizations provided by the federal Crown in respect of the construction of the W.A.C. Bennett dam. Research to date indicates that the federal Crown did not issue an authorization pursuant to the Navigable Waters Protection Act, and may not have provided any authorizations for this dam. Canada is conducting ongoing historic archival research to confirm if any authorizations were issued by federal departments in respect to the construction of the W.A.C. Bennett dam.

[261] West Moberly argues that the response is inadequate and improper insofar as it merely describes the efforts being made to locate a response, rather than answering the question directly.

[262] I am not persuaded that further particulars are required. It is sufficient that Canada has explained that it continues to be unaware of any such authorizations having been issued: Rule 3-7(20).

Demands #3(b) and (c)

[263] In para. 16 of Part 1 of its Amended Response, Canada pleads that "the terms of Treaty 8 built on or followed terms used in Treaties 1 through 7."

[264] In relation to that paragraph, West Moberly demanded particulars as follows:

- (b) Identify the terms in Treaty 8 that built on terms used in Treaties 1 through 7 and identify the original terms in Treaties 1 through 7; and
- (c) Identify the terms in Treaty 8 that followed terms used in Treaties 1 through 7 and identify the original terms in Treaties 1 through 7.

[265] Canada responded as follows:

In response to Demands #3(b) and (c), the terms of the Numbered Treaties are a matter of evidence. Nevertheless, in response to Demands #3(b) and (c), Canada says that Treaty 8 did not stand in isolation. It was part of a series of similar treaties made between the Crown and the First Nations of western Canada. Some of the terms were similar from treaty to treaty. Of relevance to this proceeding, the hunting, fishing, trapping and taking up paragraph first appeared in Treaty 3 and then appeared, with variations in Treaties 4 through 11. One of the considerations often referred to by the Crown's representatives during the negotiation of the Numbered Treaties was the need to ensure fairness by dealing with the First Nations on terms similar to those agreed upon in earlier treaties.

[266] I agree with Canada that the demand is improper inasmuch as it calls for a combination of evidence and an interpretation of Treaty 8, which is not a proper subject for a demand for particulars.

Demands #4(a)-(e)

[267] In para. 19 of Part 1 of its Amended Response, Canada pleads as follows:

Canada says that any rights of the Indigenous Treaty Parties' under Treaty 8, whether express or acquired through oral representations, and any implied, ancillary, or incidental rights arising from Treaty 8, are subject to government regulation and the taking up provision in Treaty 8, which permits "tracts of land to be taken up for settlement, mining, lumbering, trading or other purposes".

[268] In relation to that paragraph, West Moberly demanded "particulars on the nature of the activities encompassed by the following terms:

- (a) Trade;
- (b) Settlement;
- (c) Mining;
- (d) Lumbering; and
- (e) Other purposes."

[269] Canada responded as follows:

The nature of the activities encompassed by the terms used in Treaty 8 and set out in Demands #4(a) through 4(e) is a matter of treaty interpretation.

Canada takes the position that hydro-electric development falls within "settlement" and "other purposes" and certain components of such development may also fall within the nature of activities encompassed by "trade", "mining" and "lumbering." The Supreme Court of Canada in *Mikisew Cree First Nation v. Canada* has noted that the "other purposes" would be at least as broad as the purposes listed in the recital - that is settlement, immigration, trade, travel, mining, lumbering and such other purposes as Her Majesty may seem meet.

[270] West Moberly argues that the response is inadequate.

[271] I disagree. Canada has adequately explained the purposes that it relies upon in its defence to this action, which is sufficient in this context. The additional information that West Moberly seeks is not a proper subject for particulars but merely calls for Canada's broader interpretation of the Treaty.

Demand #5

[272] In para. 35 of Part 1 of its Amended Response, Canada pleads that it "admits that the honour of the Crown requires that the Crown act in a way that accomplishes the intended purpose of Treaty 8."

[273] In relation to that paragraph, West Moberly demanded particulars of "what Canada says is 'the intended purpose of Treaty 8' "

[274] Canada responded as follows:

The intended purpose of Treaty 8 is a matter of treaty interpretation. The Supreme Court of Canada in *R. v. Badger* found that the objective of the Numbered Treaties was to facilitate the settlement of the west and that they were designed to open up the Canadian west and northwest to settlement and development. From a First Nations' perspective, the guarantee that hunting, fishing and trapping rights would continue was an essential element, which led to their signing the treaties.

[275] West Moberly argues that the response is inadequate.

[276] I am not persuaded that the demand was proper in the first place, inasmuch as it called for Canada to provide its interpretation of the "intended purpose of Treaty 8," which is not a fact that is properly the subject of a demand for particulars.

Demand #6

[277] In para. 42 of Part 1 of its Amended Response, Canada pleads as follows:

Canada admits that the construction of the W.A.C. Bennett dam created the Williston Reservoir, the largest reservoir in British Columbia, which resulted in changes to the environment. To date, the extent to which construction of the W.A.C. Bennett dam and creation of the Williston Reservoir may have impacted West Moberly's ability to exercise their treaty rights is a question of mixed fact and law for which no determination has been made.

[278] In relation to that paragraph, West Moberly demanded particulars as follows:

identify and describe each of the changes to the environment Canada admits were caused by the W.A.C. Bennett Dam and Williston Reservoir.

[279] In response, Canada objected that the demand called for evidence, but added this:

The changes to the environment in the impounded reservoir are those changes that typically occur when a riverine environment transitions to a lacustrine environment. Downstream of the dam, the environmental changes are those associated with changes in the river's water flow.

[280] West Moberly argues that the response is inadequate.

[281] I agree with Canada that the demand improperly seeks evidence. For that reason, I am refusing to order any further particulars be provided in response to it.

Demand #8

[282] In para. 48 of Part 1 of its Amended Response, Canada pleads as follows:

Canada has limited knowledge as to the extent to which the construction of the W.A.C. Bennett dam and the Williston Reservoir caused fish that are fished within West Moberly's territory to become less safe or unsafe to eat as a result of increased levels of methylmercury.

[283] In relation to that paragraph, West Moberly demanded particulars as follows:

provide particulars regarding the "limited knowledge" that Canada has about the extent to which the construction of the W.A.C. Bennett dam and the Williston Reservoir caused fish that are fished within West Moberly's territory to become less safe or unsafe to eat as a result of increased levels of methylmercury.

[284] Canada responded as follows:

Canada's limited knowledge about the extent to which the construction of the W.A.C. Bennett dam and the Williston Reservoir caused increased levels of methylmercury in fish includes knowledge of the materials filed and accepted by the Joint Review Panel and through the Fisheries and Ocean Canada's involvement in the Peace-Williston Fish and Wildlife Compensation Program. As a participant before the Joint Review Panel and a member of the Peace-Williston Fish and Wildlife Compensation Program, this information would also be accessible to West Moberly First Nation.

Health Canada has general information about methylmercury and its impact on human health, which information is not specific to the W.A.C. Bennett dam and Williston Reservoir.

[285] West Moberly argues that the response was inadequate.

[286] I disagree. What is sought is evidence. I am therefore refusing to order any further particulars in response to this demand.

Demand #9

[287] In para. 64 of Part 1 of its Amended Response, Canada pleads that it "admits that between 2001 and 2006, BC Hydro undertook several studies regarding the development of the hydroelectric potential of the Peace River between the Peace Canyon dam and Site C."

[288] In relation to that paragraph, West Moberly demanded particulars as follows:

identify the "several studies" Canada says BC Hydro undertook regarding the development of hydro-electric potential on the Peace River between the Peace Canyon Dam and Site C.

[289] Canada responded as follows:

This fact is set out at page 9 of the Joint Review Panel Report on the Site C Clean Energy Project. [BC Hydro] is better placed to identify the specific studies it undertook relating to the development of hydro-electric potential of the Peace River between the Peace Canyon and Site C dams. BC Hydro identifies feasibility studies undertaken starting in 2004, at para. 57 of its Amended Response to Civil Claim.

[290] West Moberly argues that the response is inadequate.

[291] I am not persuaded that the demand itself was proper. The specific studies that BC Hydro undertook in those years is a matter of evidence. I am therefore refusing to order Canada to provide any further particulars in response to it.

VI. Summary and Conclusions

[292] Within 21 days, West Moberly must provide further and better particulars in response to the following demands:

- (a) BC Hydro demands: #7(a), 13(b), 19, 41, 44(b);
- (b) the Province's demands: #31, 42, 45(a);
- (c) Canada's demand: #13; and
- (d) in relation to the conspiracy claim, by confirming the particulars of that claim as set out in its responses to the defendants' applications.

[293] Within 21 days, the Province must provide further and better particulars in response to West Moberly's demand #13.

[294] The applications are otherwise refused.

[295] As success was divided, the costs of the applications will be payable in the cause.

"Milman J."

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