Court of Appeal File No: CA 43466
Supreme Court File No: VLC-S-S-121589
Vancouver Supreme Court Registry

COURT OF APPEAL

BETWEEN:

Taseko Mines Limited

Appellant
(Plaintiff)

AND:

Western Canada Wilderness Committee also known as
Wilderness Committee and Sven Biggs

Respondents
(Defendants)

APELLANT'S FACTUM

Appellant/Plaintiff
Taseko Mines Limited

Respondents/Defendants
Western Canada Wilderness Committee also known as Wilderness Committee and Sven Biggs

Counsel for the Appellants
Roger D. McConchie
Alan McConchie
McConchie Law Corporation
Barrister & Solicitors
290 – 889 Harbourside Drive
North Vancouver, B.C. V7P 3S1
Tel: (604) 988-1621
Fax: (604) 988-1610

Counsel for the Respondents
Daniel W. Burnett, Q.C.
Pamela E. Sheppard
Owen Bird Law Corporation
Barristers & Solicitors
29th Floor – 595 Burrard Street
Vancouver, BC V7X 1J5
Tel: (604) 688-0401
Fax: (604) 632-4433

INDEX

CHRONOLOGY OF THE RELEVANT EVENTS IN THE LITIGATION

January 19, 2009	The Minister of the Environment appoints a review panel (the "First Review Panel") under the *Canadian Environmental Assessment Act*, SC 1992, c 37, to conduct a review of the proposed Prosperity Gold-Copper Mine Project (the "Original Prosperity Proposal") of Taseko Mines Limited ("Taseko").
January, 2010	The British Columbia Environmental Assessment Office decides the Original Prosperity Proposal would likely have adverse environmental effects on fish and fish habitat but that the effects were justified in the circumstances.
January 14, 2010	The Province of British Columbia approves the Original Prosperity Proposal.
July 2, 2010	The Report of the First Review Panel with respect to the Original Prosperity Proposal (the "2010 Report") is released. The Report concludes that the Original Prosperity Proposal would result in *inter alia* significant adverse environmental effects on grizzly bears in the South Chilcotin region and on fish and fish habitat. The Report provides recommendations relating to the appropriate procedures for the management of environmental effects should a decision be made to enable the Original Prosperity Proposal to proceed.
November 2, 2010	The Government of Canada announces that the federal government accepts the review panel's conclusions in the 2010 Report and determines that the Original Prosperity Proposal did not justify the adverse environmental effects. The Government of Canada states that Taseko is not precluded from submitting a project proposal that addresses the environmental effects outlined in the 2010 Report.

August 2011	Taseko submits a project description with respect to the New Prosperity Gold-Copper Mine Project (the "New Prosperity Proposal") to the Canadian Environmental Assessment Agency ("CEAA").
November 7 2011	The Minister of the Environment announces that the New Prosperity Proposal will undergo a federal environmental assessment by way of a review panel.
January 2012	The CEAA issues draft Terms of Reference for the review panel concerning the New Prosperity Proposal.
January 23 to February 22, 2012	The draft Terms of Reference are subject to a public comment period.
January 26, 2012	Article entitled "Save Fish Lake (Again)!" ("Article 1") and Article entitled "Write Wild – Fish Lake" ("Article 3") authored by Sven Biggs ("Biggs") are posted to the website of the Western Canada Wilderness Committee ("Wilderness Committee").
February 13, 2012	McMillan LLP, on behalf of Taseko, writes to Biggs and the Wilderness Committee stating that Articles 1 and 3 are defamatory of Taseko.
February 13, 2012	Article entitled "Write Wild – Fish Lake" ("Article 2") authored by Joy Foy ("Foy") is posted to the Wilderness Committee's website. Article 2 is an amended version of Article 1.
March 1, 2012	Notice of Civil Claim filed by Taseko.
March 22, 2012	Response to Civil Claim filed by the Wilderness Committee and Biggs. Article entitled "Wilderness Committee Defends Against Taseko SLAPP Over Fish Lake Fight" ("Article 4") and Article entitled "Help Us Defend Free Speech and Fish!" ("Article 5") authored

	by Foy are posted to the Wilderness Committee's website.
April 30, 2012	Amended Notice of Civil Claim is filed.
May 9, 2012	The Minister of the Environment appoints a review panel (the "Second Review Panel") under the *Canadian Environmental Assessment Act* to conduct a review of the proposed New Prosperity Proposal. The Terms of Reference are finalized and issued by the Minister to the Second Review Panel.
July 25, 2012	Amended Response to Civil Claim is filed.
September 2012	Taseko submits an Environmental Impact Statement ("EIS") for the New Prosperity Proposal to the Second Review Panel which addresses, *inter alia,* the environmental effects outlined in the 2010 Report.
April 24, 2013	Second Amended Response to Civil Claim is filed.
July 22 to August 23, 2013	Public hearings before the Second Review Panel with respect to the New Prosperity Proposal are held.
October 31, 2013	The Report of the Second Review Panel with respect to the New Prosperity Proposal (the "2013 Report") is released. The 2013 Report concludes, *inter alia*, that the New Prosperity Proposal would result in several significant adverse environmental effects; the key ones being effects on water quality and fish and fish habitat in Fish Lake (Teztan Biny), and there would be a significant adverse cumulative effect on the South Chilcotin grizzly bear population unless necessary mitigation measures are effectively implemented.
February 19, 2014	Taseko files a Notice of Application for judicial review of the

	2013 Report.
February 25, 2014	The Government of Canada announces its decision that the New Prosperity Proposal is likely to cause significant adverse environmental effects that are not justified in the circumstances.
March 26, 2014	Taseko files a Notice of Application for judicial review of the Government of Canada's decision announced February 25, 2014.
January 14, 2015	The Wilderness Committee and Biggs serve Taseko with the particulars of justification for the Third Amended Response to Civil Claim.
January 20, 2015	Third Amended Response to Civil Claim is filed.
January 19 to 23, 26 to 30, March 31, April 1 and 2, 2015	Trial of the action takes place.
January 25, 2016	Reasons for Judgment released by Mr. Justice Funt.

OPENING STATEMENT

The central question on this appeal is whether the common law of defamation protects the reputation of a corporation in the same manner as it protects the reputation of an individual by applying a long-established objective test to the determination of inferential defamatory meanings. In the instant case, the Trial Judge applied his own unique legal test in arriving at his finding that the words complained of by Taseko Mining Ltd. in the first three of five impugned publications are not defamatory.

In addition, the Court appears to have ruled that any defendant that defames a corporate plaintiff by publicly accusing that plaintiff of wilfully abusing the Court's process will be protected by fair comment if the plaintiff seeks to vindicate its reputation by suing for libel, provided the plaintiff has substantial financial resources and the defence ostensibly has limited financial resources; regardless of the underlying facts concerning the impugned publications.

On January 26, 2012 the West Canada Wilderness Committee published on its website an article (the "Article") by Sven Biggs which, applying the objective test defined in well-established jurisprudence, informed the average, ordinary reader that Taseko proposed: to use Fish Lake as a dump site for toxic tailings under its New Prosperity Proposal; that the Proposal had already been rejected by a federal review panel; and that toxins from the mine's tailings would inevitably pollute the headwaters of a large river network. After the expiry of the public consultation period for the New Prosperity Proposal, the Wilderness Committee quietly changed some of the false statements in the Article after it received a legal complaint from Taseko, but never told the public it had done so, even when it issued a defamatory press release accusing Taseko of a SLAPP suit for commencing an action relating to, *inter alia,* the Article.

Another novel issue on appeal is whether information which post-dates a defamatory internet publication by over a year can be relied upon by a defendant to establish its prior state of mind at the time of publication. In the instant case, the Trial Judge penalized Taseko in special costs for its submission that the Wilderness Committee and Biggs were actuated by malice at the time of their publications in early 2012, in the sense discussed in *Smith v Cross*, 2009 BCCA 529, thereby vitiating any potential defences of fair comment and/or qualified privilege on the part of those defendants, and entitling Taseko to punitive damages. This submission was particularly germane to the defendants' SLAPP accusation. The Trial Judge found that Taseko's submission was deserving of rebuke, without distinguishing any of the binding case authorities concerning actual malice, and awarded special costs to the defence for the period following the fall 2013 publication of the federal review panel's report which recommended against approval of the New Prosperity Proposal.

PART 1 – STATEMENT OF FACTS

1. Taseko Mines Limited ("Taseko") is a large Canadian mining company with the shares in its capital publicly listed. It is the 75% owner and operator of the Gibraltar copper-molybdenum mine located approximately 65 kilometres north of Williams Lake, B.C. [RFJ para. 27]

2. The Western Canada Wilderness Committee, also known as the Wilderness Committee ("Wilderness Committee") is a non-profit society which represents itself to the public as a reliable source for environmental news and information. It operates a website on which articles and other information are posted. The website is accessed, downloaded, and read by people in British Columbia, elsewhere in Canada, and the world. [RFJ para. 28]

3. At all material times Sven Biggs (“Biggs”) was an employee of the Wilderness Committee and was one of its directors. [RFJ para. 29] At all material times Joe Foy (”Foy”) was the National Campaign Director of the Wilderness Committee. [RFJ para. 129]

4. Taseko holds the mineral rights related to a large copper and gold deposit, which is located approximately 125 kilometres southwest of Williams Lake. The area of the deposit is wilderness, with forests, lakes, streams, mountains, and valleys. [RFJ para. 30; Exhibit 3, AB 24]

5. Taseko has twice sought the necessary federal and provincial governmental approvals for an open pit mine. [RFJ para. 31]

6. On January 19, 2009 a federal review panel was appointed by the federal Minister of the Environment to assess the environmental effects and to report its conclusions and recommendations with respect to Taseko’s first proposal for such a mine (the "Original Prosperity Proposal"). As part of this review, Taseko prepared an Environmental Impact Statement (“EIS”) which provided the focus for an environmental assessment of the Proposal. [RFJ paras. 34-35]

7. On July 2, 2010, the review panel submitted its report (the “2010 Report”) to the federal Minister of the Environment (and other responsible authorities). The review panel concluded that the Original Prosperity Proposal would result in significant adverse environmental effects. [RFJ para. 37]

8. On November 2, 2010, the Minister of the Environment announced that the federal government accepted the review panel's conclusions and determined that the Original Prosperity Proposal did not justify the adverse environmental effects. The federal government stated that Taseko could submit a further proposal that addressed the environmental impacts considered by the review panel. [RFJ para. 38]

9. In June 2011, Taseko started the process for a new proposal (the "New Prosperity Proposal"). In August 2011, Taseko submitted a project description of the New Prosperity Proposal (the “New Prosperity Project Description”) to the Canadian Environmental Assessment Agency ("CEAA"). [RFJ paras. 39-40]

10. In November 2011, the Minister of the Environment announced that the New Prosperity Proposal would undergo a federal environmental assessment under the *Canadian Environmental Assessment Act*, SC 1992, c 37. A three-member panel was appointed under that Act. [RFJ para. 41; Exhibit 18, AB 2644, 2645]

11. In January 2012 the CEAA issued draft Terms of Reference for the review panel concerning the New Prosperity Proposal. Between January 23 and February 22, 2012 the draft Terms of Reference were subject to a public comment period. [Exhibit 18, AB 2650]

12. On January 26, 2012 the Wilderness Committee published on its website two articles authored by Sven Biggs: i) an article entitled “Save Fish Lake (Again)!” (“Article 1”); and ii) an article entitled “Write Wild – Fish Lake” (“Article 3”). [RFJ paras. 44 and 131; Exhibit 1, Tab 3, AB 8-11; Exhibit 2, AB 22-23; Exhibit 7, AB 28; Biggs p 747 ll 35-45; McManus p 42 ll 6-31] Articles 1 and 3 encouraged readers to take action by writing to the review panel. The Wilderness

Committee's website provided a letter writing tool to assist readers wishing to write to the CEAA with copies to the Prime Minister and the Ministers of the Environment, Fisheries and Oceans, and Natural Resources. [RFJ para. 43]

13. On February 13, 2012 McMillan LLP wrote a letter on behalf of Taseko to Biggs and the Wilderness Committee (the “Demand Letter”) claiming that Articles 1 and 3 defamed Taseko, and demanding, *inter alia*, that Biggs and the Wilderness Committee provide Taseko with a retraction and apology for these Articles. [Exhibit 8, Tab 5, AB 39-41]

14. On February 29, 2012 the Wilderness Committee posted to its website an article authored by Foy entitled “Save Fish Lake (Again)!” (“Article 2”). [RFJ paras. 44 and 131; Exhibit 1, Tab 1 and 2, AB 4-7; Foy p 522 ll 33-39]

15. Taseko filed a notice of civil claim on March 1, 2012 against the Wilderness Committee and Biggs alleging, *inter alia*, that it had been defamed by Articles 1 and 3. [Exhibit 8, Tab 34, AB 218-230]

16. On March 22, the Wilderness Committee posted to its website two articles by Foy: i) “Wilderness Committee Defends Against Taseko SLAPP Over Fish Lake Fight” (“Article 4”); and ii) “Help Us Defend Free Speech and Fish!” (“Article 5”). [Exhibit 1, Tabs 4 and 5, AB 12-21; Foy p 526 ll 33-35; p 602 ll 7-19; p 623 ll 41-47; p 624; p 625 ll 1-14]

17. Articles 1, 2 and 3 (the “First Three Articles”) focus on the environmental aspects of the New Prosperity Proposal. [RFJ para. 79] Articles 4 and 5 allege, *inter alia*, that Taseko's action was brought for the improper and abusive purpose of stifling lawful public debate and stopping the Wilderness Committee and Biggs from exercising their right to lawful freedom of expression and was a "SLAPP" or strategic lawsuit against public participation brought for the abusive purpose of suppressing lawful opposition to the New Prosperity Project. [RFJ paras. 46, 86]

18. Article 2 is an amended version of Article 1 which was changed by Foy after the Wilderness Committee received the Demand Letter. [RFJ paras. 131-132, 138; Foy p 565 ll 11-47; p 566-568; p 569 ll 1-13; p 570 ll 41-47; p 571; p 572 ll 1-6; p 573 ll 42-47; p 574; p 575; p 576 ll 1-18; p 584 ll 47; p 585 ll 1-29; Exhibit 8, Tab 5, AB 39]

19. The particulars of the expression complained of in Article 1 are as follows:

> ***Save Fish Lake (Again!)***
>
> [Graphic: Colour photograph of a lake]
>
> *…*
>
> *Taseko's original proposal was to use Fish Lake as their tailings pond, where they would store toxic waste rock produced by mining operations. ... Taseko's engineers offered Little Fish Lake as an alternate site for the tailings pond. However, eventually the toxins from the Little Fish Lake site would make their way downstream to Fish Lake. In fact, the review panel concluded that this "would result in greater long-term environmental risk."*
>
> *Despite this history, the new mine plan that Taseko is seeking approval for proposes turning Little Fish Lake in to* [sic] *a toxic tailings pond.*
>
> *If you are confused as to why the company would return with a proposal that has already been deemed worse than the one that was just rejected, you are not alone.*
>
> *In fact the whole idea of turning a lake, especially a lake called Fish Lake, into a dump site for toxic tailings probably seems like a crazy idea.*
>
> *It's not just that this proposal has already been rejected once; or that it will* ***threaten tens of thousands of fish*** *and pollute the headwaters of a river network that supports the world's largest run of wild salmon; or that the locally blue-listed population of grizzly bears would be threatened by this project; or even that the Tsilhqot'in Nation, the area's First Nations people, are strongly opposed to the project.* ***The craziest thing about this project is that – if people like you and I don't take this opportunity to speak up – there is a good chance that this mine will get built.***

That is why I'm writing you today to ask you to take action. Please go to our website and use our letter writing tool to submit a comment to the Environmental Assessment.

Together, we can save Fish Lake. Again.

Sven Biggs / Outreach Director

Wilderness Committee

[**Bolding** is in the original]

[Exhibit 2, AB 22-23]

20. The changes to Article 1 are underlined in the following extracts in Article 2:

Taseko's original proposal was to drain Fish Lake and the lake basin would be used to store waste rock and overburden produced by mining operations. During the first assessment, the company was told they needed to find an alternative to this, because it would destroy Fish Lake. Taseko's engineers offered Little Fish Lake as part of an alternative site. However, eventually the toxins from the Little Fish Lake site could make their way downstream to Fish Lake. In fact, the review panel concluded that this "would result in greater long-term environmental risk."

Despite this history, the new mine that Taseko is seeking approval for proposes to use the Little Fish Lake basin and surrounding area to build a larger lake for the tailings storage facility.

If you are confused as to why the company would return with a proposal that has already been deemed a worse alternative than the first by Taseko, Environment Canada, and the Environmental Assessment Panel, you are not alone. In fact the whole idea of turning a lake, especially a lake called Fish Lake, into a dump site for toxic tailings probably seems like a crazy idea.

It's not just that this proposal has already been rejected once; or that there is a risk it ***could threaten tens of thousands of fish*** *and lead to pollution of the headwaters of a river network that supports the world's largest run of wild salmon...*

Joe Foy / National Campaign Director

Wilderness Committee

> [**Bolding** is in the original; the underlining does not appear in the original]
>
> [Exhibit 1, Tab 2, AB 4-7]

21. Taseko filed an Amended Notice of Civil Claim on April 1, 2012 claiming it had also been defamed by Articles 3, 4 and 5. [AR 1-21].

22. On May 9, 2012, as part of the federal governmental approval process, a federal review panel was appointed by the Minister of the Environment to assess the environmental effects of the New Prosperity Proposal and to report its conclusions and recommendations. Taseko attended and participated in public hearings before the review panel that were held from July 22, to August 23, 2013. [RFJ paras. 33, 48-51]

23. In the Original Prosperity Proposal, the open pit mine would be located approximately 300 metres northwest of Fish Lake, a lake of approximately 110 hectares. A tailings storage facility ("TSF") would be created upstream and to the southeast of Fish Lake in the area occupied by Little Fish Lake, portions of Fish Creek, and the surrounding wetlands and meadows, and would be used for the storage of tailings and potentially acid generating ("PAG") waste rock. Fish Lake would be drained and used for the storage of non-potentially acid generating ("non-PAG") waste rock, low grade ore, and overburden. A new artificial lake approximately equal in size to Fish Lake ("Prosperity Lake") would be created to the southeast of the TSF to serve as compensation for the fish and fish habitat lost in Fish Lake, Little Fish Lake and Fish Creek. [RFJ paras. 55-58]

24. Waste rock is non ore-bearing rock removed during the mining process. Overburden is unconsolidated material such as soil which overlies the ore deposit and is stripped prior to mining. Tailings are sulphide waste material removed during the ore concentration process. The body of water within a TSF is called a supernatant pond. Metal Leaching ("ML") and Acid Rock Drainage ("ARD") are naturally occurring processes caused when minerals containing metals and sulphur (called sulphides) come into contact with both air and water.

When sulphides are exposed to water and oxygen from air, they rust or oxidize. Oxidation of sulphides can also produce acid. If this acid is carried by streams it is called ARD. [Jones p 156 ll 30-41; p 157 ll 29-40; p 164 ll 23-30; McManus p 80 ll 9-44]

25. Under the Original Prosperity Proposal waste rock would be classified during the mining operations as either PAG or non-PAG waste rock. PAG waste rock would be stored in the TSF and non-PAG waste rock would be stored in the drained basin of Fish Lake. [McManus p 110 ll 22-45]

26. The same classification process would be undertaken under the New Prosperity Proposal. Under both proposals PAG waste rock would be stored underwater in the TSF and accordingly, not exposed to air. [RFJ para. 62]

27. Under the New Prosperity Proposal, non-PAG waste rock would be placed in a dedicated non-PAG waste rock pile just northeast of the open pit mine. Taseko expected that some PAG waste rock would be misclassified as non-PAG waste rock and accidentally be placed in the non-PAG pile, and estimated that the misclassification would be about 3%. [RFJ para. 62]

28. Under the Original Prosperity Proposal the small quantity of misclassified PAG waste rock would accidently be placed in the area of the drained Fish Lake with the properly classified non-PAG waste rock. [RFJ para. 62]

29. Under both proposals Taseko expected the non-PAG waste rock to buffer the effects of the misclassified PAG rock. Accordingly, adverse environmental effects in the form of ARD or ML were not anticipated by Taseko. [RFJ para. 62]

30. The key difference in design between the Proposals was that Fish Lake would not be drained under the New Prosperity Proposal and the TSF would be located 2.5 kilometres from Fish Lake, and therefore, no replacement lake would be created. [Exhibit 5, AB 26; Exhibit 6, AB 27; McManus p 37 ll 5-47; p 38-40]

31. On October 31, 2013, the review panel issued its report on the New Prosperity Proposal (the "2013 Report") which concluded that, *inter alia*, the Proposal would result in significant adverse environmental effects on water quality, fish and fish habitat in Fish Lake and on the South Chilcotin grizzly bear population. [RFJ para. 52]

32. On February 19, 2014 Taseko applied to the Federal Court seeking judicial review of the 2013 Report. These proceedings were still under way as of trial. [RFJ para. 53; McManus p 65 ll 26-47; p 66; p 67; p 68 ll 1-32; Exhibits 11, 12, 13, AB 293-448]

33. On January 25, 2016 the Trial Judge issued his reasons for judgment, dismissing Taseko's claims and awarding the Wilderness Committee and Biggs their respective costs, including special costs for those costs incurred on or after December 1, 2013. [RFJ para. 5]

PART 2 –ISSUES ON APPEAL

I. The Trial Judge erred in finding that the words complained of in the First Three Articles are not defamatory.

II. The Trial Judge erred in finding that the Articles are protected by the defence of fair comment.

III. The Trial Judge erred in finding that Articles 4 and 5 are protected by the defence of qualified privilege.

IV. The Trial Judge erred in finding the Respondents were not actuated by express malice.

V. The Trial Judge erred in awarding the Respondents special costs for their respective costs incurred on or after December 1, 2013.

PART 3 – ARGUMENT

I. The words complained of in the First Three Articles are defamatory

Incorrect Legal Test Applied

34. The Appellant respectfully submits that the Trial Judge erred in law by applying an incorrect legal test to determine whether the words complained of in the First Three Articles conveyed the defamatory inferential meanings pleaded by Taseko.

35. In its amended notice of civil claim, Taseko pleaded that the First Three Articles conveyed certain "natural and ordinary inferential meanings", including, *inter alia*, that: i) Taseko has a “callous disregard for the environment”; ii) Taseko “knows or is indifferent to the fact that its New Prosperity Project threatens” the environment; and iii) “[t]he New Prosperity Project is an abusive second attempt by the Plaintiff Taseko to obtain government approval for the use of Little Fish Lake as a dump site for toxic tailings.” [RFJ paras. 83 and 84; AR 7, 9-12]

36. With respect to determining inferential meaning(s), the Trial Judge stated that “[w]here the topic is one of public interest, the Court considers that relevant factors may include:

    a. the plaintiff's engagement in public discourse;

    b. the reputation the plaintiff enjoyed before the alleged defamatory words were published;

    c. the reputation of the defendant(s);

    d. the plaintiff's expectation that there would be debate and criticism;

    e. the reasonable person's expectation that the topic would give rise to debate and criticism; and

f. the legal framework and process for formal public discussion such as hearings before a governmental tribunal."

[RFJ para. 9]

37. Applying these six factors, the Trial Judge held that the First Three Articles did not convey the meanings alleged by Taseko and were not defamatory. [RFJ paras. 89-119].

38. This approach to determining the meaning of words complained of by the plaintiff constitutes an error of law. There is no support for the proposition that when the topic of an allegedly defamatory publication is one of public interest, a court should consider the factors outlined in paragraph 9 of the Trial Judge's reasons in determining either: i) the meaning(s) conveyed by the words complained of in that publication; and/or ii) whether those meaning(s) are defamatory.

39. In support of his erroneous approach to determining inferential meanings, the Trial Judge relied upon the partially concurring reasons of Justice LeBel in *WIC Radio Ltd. v. Simpson,* 2008 SCC 40 regarding how to determine whether a publication is defamatory. [RFJ at para. 112]

40. The reasons of Justice LeBel on this point are *obiter dicta*. Whether the publications were defamatory was not an issue on appeal to the Supreme Court of Canada in *WIC Radio*. [*WIC Radio* at para. 67]. In any event, the reasons of Justice LeBel on this point have not been adopted and/or applied by any common law court in Canada.

Correct legal principles: determining meaning and whether publication defamatory

41. The Appellant relies on the long-established common law principles relating to determination of inferential meanings conveyed by words complained of in a defamation action.

42. An inferential meaning is that which the ordinary person, without special knowledge, will infer from the words complained of and this meaning must be determined objectively. Evidence concerning what the reasonable and ordinary meaning of the words is, or the sense in which they might be understood, or of facts giving rise to the inferences to be drawn from the words is inadmissible if this means of proof is relied upon. *Lawson v Baines,* 2012 BCCA 117, Hinkson J.A. (as he then was) at para. 23.

43. The first task of a judge in a defamation case is to answer the "threshold question" of "whether the words cited are reasonably capable of a defamatory meaning". Answering this question of law requires the judge to apply a "common sense construction" to the words complained of. *Lawson v Baines*, 2012 BCCA 117 per Hinkson J.A. at paras. 26, 27.

44. Determining as a fact whether the words complained of convey the inferential meanings alleged by a plaintiff is largely a matter of impression; and it is the broad impression conveyed by the First Three Articles that must be considered and not the meaning of each individual word. *Lewis v. Daily Telegraph Ltd.,* [1963] 2 All E.R. 151 (H.L.), per Lord Devlin at 173-174.

45. What the ordinary man not avid for scandal, would read into the words complained of must be a matter of impression. *Lewis v. Daily Telegraph Ltd*., supra, per Lord Devlin at 154-155.

46. The ordinary reader does not read in the way a lawyer would, directing attention to exact meanings of words and phrases. The layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and is especially prone to do so when the inference is derogatory. *Lewis v. Daily Telegraph Ltd.,* supra, per Lord Devlin at 169 C-D.

47. The average reader skims through a publication without concentrating on the detail, has a greater capacity for implication, and is often guilty of loose thinking

and prone to draw derogatory inferences. *Independent Newspapers Holdings Ltd. v. Suliman,* [2004] Z.A.S.C.A. 57 (C.A.), per Marais J.A. at para. 19.

48. The selective presentation of the plaintiff's words can convey a defamatory impression. *Whatcott v. Canadian Broadcasting Corp.,* 2015 SKQB 7 at para. 57, appeal on this ground dismissed 2016 SKCA 17 at para. 11.

49. Statements related to apprehended harm to the natural environment have been held to be defamatory. *Home Equity Development Inc. v Crow*, 2004 BCSC 124, per Quijano J. paras 31, 32, 101, 102; *Culla Park Ltd. & Ors. V Richards & Ors*, [2007] EWHC 1687 per Eady J. at paras. 50-52 and 71.

50. The Appellant respectively submits that, applying the long-established common law principles discussed above, the First Three Articles should be held to convey each of the inferential meanings alleged in the amended notice of civil claim.

II. Fair Comment

Fair Comment does not apply

51. The Appellant submits that the Trial Judge erred in finding, in the alternative, that the First Three Articles were protected by the defence of fair comment. The Trial Judge also erred in finding, if Articles 4 and 5 were each defamatory, that the defence of fair comment applied. [RFJ paras. 119, 166-170, and 172-174]

52. For the purposes of his analysis of the First Three Articles, the Trial Judge considered whether fair comment applied to the meanings pleaded by Taseko with respect to each of those Articles. With respect to Articles 4 and 5, the Trial Judge assumed they conveyed the "pleaded impression involving callous disregard for the environment". [RFJ paras. 144, 152, 157, 161, 162, 164-267 and 172]

53. If the defendant has pleaded fair comment as a defence, the defendant has the onus of proving the following four elements of the defence: (a) the comment

must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts? Even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was subjectively actuated by express malice. *WIC Radio Ltd. v. Simpson,* 2008 SCC 40 per Binnie J. at para. 28.

54. The Trial Judge held that the pleaded meanings for the First Three Articles and the pleaded meaning "involving callous disregard for the environment" with respect to Articles 4 and 5 constituted comment based on the facts set forth in the 2010 Report, the New Prosperity Project Description, the 2013 Report, and the April 26, 2010 testimony of Scott Jones, Taseko's Vice President of Engineering, before the 2010 Review Panel hearings as quoted in a document entitled "Ten facts that show why resubmitted Prosperity Mine proposal cannot be approved" (the "Ten Facts Document") purportedly issued by the Tsilhqot'in First Nation. [RFJ paras. 151, 155, 156, 161, 162, 163, 165,170 and 172; Exhibit 36, Tab 31, AB 3390-3392]

55. The Trial Judge's finding [at paras. 152-156] that any one of the Appellant's pleaded meanings with respect to Article 1 could be based on facts in the 2013 Report, which was published after Article 1, constitutes an error of law. In order to establish the defence of fair comment, a defendant cannot rely on facts which occurred after the publication of the defamatory expression. *Cohen v. Daily Telegraph*, [1968] 1 W.L.R. 916 (C.A.) per Lord Denning M.R. at 919-920; *Makow v. Winnipeg Sun*, 2003 MBQB 56 at para. 119, affirmed 2004 MBCA 41.

56. The Trial Judge also committed an error when he found that the Respondents could rely on the facts in the Ten Facts Document on the basis that document was published on a privileged occasion.

57. The Ten Facts Document was not authenticated at trial. There was no evidence regarding who authored the Document. [Foy p 588 ll 19-47; p 589 ll 1-12; Exhibit 36, Tab 31, AB 3390-3392] There was no evidence that the Ten Facts Document was filed with or read out during any of the review proceedings or any court proceeding. Therefore, the rule that a defence of fair comment can be relied upon where comment is made on matters stated on a privileged occasion does not apply to the Ten Facts Document. *London Artists Ltd v Littler* [1969] 2 QB 375 per Davies L.J. at 395; *WIC Radio,* supra, at para. 59.

58. Also, the Respondents did not plead in their Third Amended Responses to Civil Claim ("3rdARCC") that the words complained of were based upon facts contained in the Ten Facts Document. [AR 23-50, 56-57] A defendant who relies on the defence of fair comment is obliged to provide particulars of the facts upon which he relies. *Stetson v. MacNeill (c.o.b. The Eastern Graphic)* (1997), 152 Nfld. & P.E.I.R. 225 (P.E.I.S.C.T.D.) at para. 59; *Cunningham-Howie v. F.W. Dimbleby & Sons Ltd.,* [1950] 2 All E.R. at 882 (C.A.) per Denning, L.J.

59. In addition, the facts allegedly supporting the purported comments in the First Three Articles and the meaning "involving callous disregard for the environment" in Articles 4 and 5 were not sufficiently indicated in those Articles, and there was no evidence that such facts were notorious to the audience. [Exhibits 1 (Tabs 1-3) and 2, AB 1-11 and 22-23]

60. The law requires that a comment be based on a sufficient substratum of facts to anchor the defamatory comment. This is another mechanism to prevent tenuous facts serving as a springboard for defamatory comment. The facts must be sufficiently stated or otherwise be known to readers so that readers are able to make up their own minds on the merits of the comment. *WIC Radio,* supra, at para. 59; *Mainstream Canada v. Staniford*, 2013 BCCA 341 per Tysoe J.A. at para. 24, leave to appeal dismissed [2013] S.C.C.A. No. 372.

61. The facts on which the defamatory comments are based must be sufficiently indicated or notorious to enable the audience of the publication to judge for themselves how far the opinions expressed in the alleged comments were well founded. If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defence is not available. A purported comment that does not identify the facts on which it is based is treated as if it were a statement of fact. *WIC Radio*, supra, at para. 31, *Mainstream Canada v. Staniford,* supra, at para. 26.

62. A sufficient linkage between the comment and the supporting facts is required. A sufficient linkage can appear in three ways: the factual material can be expressly stated in the same publication as that in which the comment appears (i.e. by "setting it out"); the factual material commented on, while not set out in the material, can be referred to (i.e. by being identified "by a clear reference"); and the factual material can be "notorious". *Mainstream Canada v. Staniford,* supra, at paras. 27 and 28 [See also paras. 37-47].

63. It is not sufficient for facts upon which the comments were made to be contained on other website pages or in hyperlinked documents, unless those other website pages or hyperlinked documents were identified by a clear reference. *Mainstream Canada v. Staniford,* supra, at paras. 45, 46 and 47.

64. It is not sufficient if the facts could only be known by determined readers who conduct research on their own initiative. *Mainstream Canada v. Staniford,* supra, at para. 43.

65. In the instant case, it would take a determined reader researching on their own initiative to locate the facts on which the purported comment was based. The documents which allegedly contained such facts were very lengthy. For example, the 2010 Report is 295 pages long [Exhibit 17, AB 2339,] and the New Prosperity Project Description is 224 pages long [Exhibit 14, AB 449]. The Articles do not refer to those documents and do not indicate where the facts

relied upon for the purported comments may be found in those documents. [Exhibits 1 (Tabs 1-3) and 2, AB 1-11 and 22-23]

Not a fair and accurate account of privileged facts; untrue, distorted and omitted facts

66. The First Three Articles and Articles 4 and 5 do not give a fair and accurate report of the privileged facts upon which the defamatory comment is based.

67. A report of the privileged facts supporting the comment must be substantially accurate in all material respects. *Young v. Toronto Star Newspapers Ltd*. (2003), 66 O.R. (3d) 170 (S.C.) at paras. 107-108, affirmed (2005), 77 O.R. (3d) 680 (C.A.); *Ager v. Canjex Publishing Ltd. (c.o.b. Canada Stockwatch),* 2003 BCSC 891 at paras. 55-60, varied on another issue 2005 BCCA 467.

68. The onus of proving that the report of the allegedly privileged facts supporting the defamatory comment was fair and accurate is on a defendant. *Bennett v. Sun Publishing Co.*, [1972] 4 W.W.R. 643 (S.C.), at paras. 29-31 per Anderson J. The test whether privileged facts supporting the comment have been reported accurately and fairly is objective. *Awan v. Levant*, 2014 ONSC 6890 at para. 109.

69. Fairness includes the notion of impartiality. *Tedlie v. Southam Co. (No 3),* [1950] 2 W.W.R. 633 (Man. K.B.). The report of the privileged facts must be balanced. *Gouveia v. Toronto Star Newspapers Ltd.* (1998), 75 O.T.C. 186 (Gen. Div.), paras. 31, 60 and 75. The report must not take the statements out of context or give only one side of the story. *Young,* supra, at para. 109; *Taylor-Wright v. CHBC-TV*, 2000 BCCA 629 per Esson J.A. at para. 47.

70. The facts in each of the Articles are not stated sufficiently, correctly and truthfully. The defence of fair comment requires that the non-privileged facts on which the defamatory comment is based be true. *Holt v. Sun Publishing Co.* (1979), 100 D.L.R. (3d) 447 (B.C.C.A.) per Aikins J.A. at paras. 23 and 38. The facts are invented and distorted. *Sara's Pyrohy Hut v. Brooker* (1993), 8 Alta. L.R. (3d) 113

(C.A.). If the omission of important or material facts falsifies or alters the complexion of the facts supporting the defamatory comment, the defence of fair comment does not apply. The facts are not truly stated. *Creative Salmon Company Ltd. v. Staniford*, 2009 BCCA 61 per Tysoe J.A. at paras. 59-61, leave to appeal dismissed [2009] S.C.C.A. No. 154; See also *Leenen v Canadian Broadcasting Corp* (2000), 48 O.R. (3d) 656 (S.C.) at para. 126, affirmed (2001), 54 O.R. (3d) 612 (C.A.), leave to appeal dismissed [2001] S.C.C.A. No. 432. *Myers v Canadian Broadcasting Corp.*, (1999) 47 C.C.L.T. (2d) 272 at 303-304 (H.C.), varied on another issue (2001), 54 O.R. (3d) 626 (C.A.), leave to appeal dismissed [2001] SCCA No. 433.

71. The Articles omit key facts from the 2010 Report and the New Prosperity Project Description which means the facts allegedly supporting the defamatory comments are untrue.

72. Foy had read these two documents in January 2012, prior to authoring Article 2. [Foy p 492 ll 3-11; p 497 ll 40-47; p 498 ll 1-4]

73. The Articles omit any mention of the numerous mitigation measures described in the New Prosperity Proposal to eliminate, reduce or control potential adverse environmental effects. [Exhibit 14, AB 543-544, 547-548, 552-553, 559-561, 566-567, 572-573, 576-577, 584-585, 590, 593-594, 597-598, 600, 603-604, 606, 608-609, 639-642; *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52, ss. 2(1) and 5; McManus p 127 ll 6-32]

74. The mitigation measures addressed the possible impact of the New Prosperity Proposal on the local grizzly bear population, including a mine configuration which avoids areas of moderate and high value grizzly bear feeding habitat and a monitoring program to be developed with the British Columbia Ministry of the Environment. Foy read these facts in the New Prosperity Project Description. [Exhibit 14, AB 456, 504, 576-577; McManus p 47 ll 6-22; Jones p 176 ll 3-21; Foy p 505 ll 4-18]

75. Other mitigation measures were designed to prevent acid rock drainage or metal leaching by storing PAG overburden and waste rock under water. [Exhibit 14, AB 479; McManus p 81 ll 20-37] Biggs and Foy were aware of these mitigation measures from reading the New Prosperity Project Description prior to authoring Articles 1 and 2 respectively. [Foy p 498 ll 45-47; p 499 ll 1-6; Biggs p 732 ll 9-38, 44-47; p 733; p 734 ll 1-2; Exhibit 14, AB 477]

76. The permanent, secure, and total confinement of all solid waste materials within an engineered disposal facility and monitoring features for all aspects of the facility to ensure performance goals are achieved and design criteria and assumptions were described in the New Prosperity Project Description. Biggs read these facts prior to finalizing Article 1. [Exhibit 14, AB 479; Biggs p 811 ll 5-6; p 812 ll 10-39]

77. Biggs and Foy were aware, before authoring Articles 1 and 2 respectively, that the New Prosperity Project Description spoke of the construction of a series of collection ponds and pumps to collect and pump back into the TSF water seepage from the TSF to prevent that water reaching Fishing Lake and potentially harming aquatic life. [Exhibit 14, AB 479, 488-489, 501 556; Biggs p 820 ll 30-47; Foy p 502 ll 10-24; p 503 ll 31-41]

78. The Project Description also detailed the management of water for all phases of the mine with the focus of keeping contact water (any water that has been exposed to a disturbance and is not limited to PAG rock) separate from non-contact water, so as to mitigate water quality impacts on the receiving environment. [Exhibit 14, AB 811; Jones p 241 ll 2-12]. The Project Description also referred to the potential installation of groundwater monitoring in the area downstream of the TSF as part of the monitoring program, and conversion to recovery wells, to evaluate seepage rates in the foundation of the TSF and recover any foundation seepage that may not be suitable for release. [Exhibit 14, AB 489]

79. Biggs knew before he wrote Article 1 that the Project Description intended to preserving the foot print of Fish Lake and maintain Fish Lake as a biologically functioning lake and ecosystem, so that, following closure, the fishery and recreational use may continue for future generations. [Exhibit 14, AB 409-502; Biggs p 815 ll 37-47; p 816 ll 1-21]

80. Biggs also knew before he finalized Article 1 that Taseko planned to monitor groundwater flows below the TSF during construction and operations to confirm predictions of hydrogeological effects on Fish Lake and to adaptively manage and treat seepage water as necessary prior to supplementing Fish Lake inlet flows with seepage water. [Exhibit 14, AB 409-502; Biggs p 814 ll 16-28; p 815 ll 16-29]

81. Biggs and Foy knew, from reading the New Prosperity Project Description before writing Articles 1 and 2 respectively, that Taseko planned to exceed the minimum requirements to maintain a viable fish population in the Upper Fish Creek watershed, including Fish Lake and Little Fish Lake. [Exhibit 14, AB 502; Foy p 504 ll 26-39; Biggs p 816 ll 30-47; p 817 ll 1-8]

82. Aside from failing to mention Taseko's mitigation measures, the First Three Articles also contain material inaccuracies.

83. Taseko did not propose, in either the Original or the New Prosperity Proposal, to use Fish Lake as a tailings pond or a dump site for toxic tailings. Under the Original Prosperity Proposal, Taseko did not intend to store any toxic material in the drained Fish Lake. [McManus p 44 ll 19-41; p 46 ll 23-33]

84. In the design for the New Prosperity Proposal: i) Taseko's engineers did not offer Little Fish Lake as an alternate site for the tailings pond: ii) toxins would not be released from the tailings pond to make their way downstream to Fish Lake; and iii) Taseko did not propose turning Fish Lake into a toxic tailings pond or a dump site for toxic tailings. The TSF would not contain toxic waste. [McManus p 44 ll 42-47; p 45 ll 1-2, 27-43; p 46 ll 10-22; p 123 ll 1-33]

85. Taseko's design proposal for New Prosperity had not already been deemed worse than the Original Prosperity Proposal and had not already been rejected once by any authority. [McManus p 45 ll 44-47; p 46 ll 1-9, 34-43]

86. The New Prosperity Proposal did not intend to threaten: i) tens of thousands of fish and pollute the head waters of a river network that supports the world's largest run of wild salmon; or ii) the locally blue-listed population of grizzly bears. [McManus p 46 ll 44-47; p 47 ll 1-5]

No honest opinion

87. The Trial Judge erred by finding that the Respondents could have honestly expressed the purported comments in the First Three Articles including the accusation "involving callous disregard for the environment" in Articles 4 and 5.

88. The defamatory comments do not satisfy the objective test described in *WIC Radio*, supra, namely: Could any man honestly express that opinion on the proved facts?

89. It is at this point that one examines selectivity in reporting, since all the facts, whether or not they were included in the publication, become relevant.

90. The purported comments contain imputations of corrupt or dishonourable motives on the part of the Appellant which are not warranted by the facts. *Home Equity Development Inc. v. Crow*, 2004 BCSC 124 at para. 115; *Vogel v. C.B.C*., [1982] 3 W.W.R. 97 (B.C.S.C.), per Esson J. at para. 232; *Campbell v. Spottiswoode* (1863), 3 B. & S. 769 (Q.B.) per Cockburn C.J. at 290.

91. The Trial Judge found that that "the focus of [the First Three Articles] was on the project and not Taseko" and therefore the Respondents' "[c]riticism [was] aimed at the project not the "private character" of Taseko." [RFJ paras. 125-126]. This finding ignores that the fact that the Trial Judge had proceeded with his fair

comment analysis on the basis that Taseko's meanings were established, and those meanings of course concerned Taseko's state of mind.

Articles 4 and 5 - Insufficient substratum of facts – SLAPP Allegation – Fair Comment

92. The Appellant respectfully submits that the Trial Judge erred by finding that the defence of fair comment applied to the pleaded inferential meanings in Taseko's notice of civil claim with respect to Articles 4 and 5; that it constituted, *inter alia,* a SLAPP:

> *"[w]ith respect to the pleaded impressions relating to Taseko's notice of civil claim... The language was clearly comment -- an opinion or view. A person could honestly express the opinion or view based on the factual context. A large mining corporation seeking governmental approval for an open pit mine had filed a notice of civil claim against an environmental organization, with the mining corporation seeking damages, including punitive damages, and injunctive relief."* [RFJ para. 174]

93. There was an insufficient substratum of fact to support the defamatory comment that the plaintiff was guilty of a SLAPP. Further, this is an allegation of corrupt and dishonourable motives which is not warranted by the facts.

III. Qualified Privilege

Qualified Privilege does not apply to Articles 4 and 5

94. The Trial Judge erred in law by finding that Articles 4 and 5 were protected by qualified privilege. [RFJ at para. 175]

95. Articles 4 and 5 do not constitute fair and accurate reports of judicial proceedings. *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 per Cory J. at paras. 150-152.

96. The report must contain nothing in addition to what forms strictly and properly the legal proceedings. The report must be an impartial and accurate account. An article which includes facts and comments apart from the proceedings

themselves will not be protected by the privilege. The report must not be enlarged and embellished by the reporter. The reporter must add nothing of his own. *Ager v. Canjex Publishing Ltd. (c.o.b. Canada Stockwatch)*, 2005 BCCA 467 at paras. 29-34.

IV. Malice

97. The Trial Judge made a palpable and overriding error of fact in finding that the Respondents were not actuated by express malice in publishing the Articles. [RFJ para. 142]

98. A defendant is actuated by malice if he or she publishes the comment: i) knowing it was false; or ii) with reckless indifference whether it is true or false; or iii) for the dominant purpose of injuring the plaintiff because of spite or animosity; or iv) for some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion. More than one finding can be present in a given case. *Smith v. Cross*, 2009 BCCA 529 per Kirkpatrick J.A. at para. 34.

99. Malice is a fact-sensitive issue connected with the context in which it is said to arise. Circumstances in existence prior to and subsequent to publication may tend to show that a defendant was actuated by malice at the time of publication. *Boland v. Globe and Mail Ltd.* (1961), 29 D.L.R. (2d) 401 (Ont. C.A), per Porter C.J.O. at para. 31 dissenting on question of ordering a new trial.

100. The defendant's repetition and confirmation of his previous statement, which demonstrates a continuing train of thought, may be evidence of express malice. *Lawson v. Thompson* (1968), 1 D.L.R. (3d) 270 (B.C.S.C.). Malice may arise from an ongoing, and obstinate, disregard for the truth, including an unreasonable adherence to a discredited theory, and the reckless use of incendiary terms. *Roshard v. St. Dennis*, 2013 BCSC 1388 at para. 70.

101. Biggs testified in his direct evidence that he stood by the statements made in Article 1 as accurate. [Biggs p 749 ll 30-47; p 750 ll 1-44]

102. Foy also testified in direct that he stood by the accuracy of Article 1 and continued to stand by the statements in it. Foy also continued to stand by the statement in Article 2 that *"[t]he New Prosperity Mine proposal would use nearby Little Fish Lake as a toxic dump site and then drain down into Fish Lake eventually polluting that lake too...", and the statement in Article 4 that "Taseko has published plans for it's* (sic) *New Prosperity Mine that calls for inundating Little Fish Lake under a massive toxic tailings pond that will wipe out a great deal of fish habitat and pollute a great deal of water.*" [Foy p 507 ll 33-43; p 508 ll 22-33; p 510 ll 24-44; p 511 ll 3-9, 22-30; p 513 ll 9-23, 28-40; p 514 ll 5-13, 21-29; p 515 ll 14-30; p 516 ll 22-31; p 517 ll 9-16, 29-36, 45-47; p 518 ll 1-7; p 524 ll 36-44; p 530 ll 3-18; Exhibit 1, Tabs 2 and 4, AB 4-5 and 16-17].

103. It is also a reasonable inference that the Wilderness Committee deliberately misrepresented the nature of Taseko's action as a "SLAPP" and refused to retract and apologize for Article 1 to conceal from its members and supporters the fact that it had sought their support in opposing the New Prosperity Proposal during the public comment period on the basis of factual assertions in Article 1 which the Wilderness Committee knew were false and secretly withdrew.

104. Foy testified in direct how Article 2 replaced Article 1 on the Wilderness Committee website on February 29, 2012 and remained on the website as of the Trial. When Article 2 was posted Article 1 would no longer be available to the public. The Wilderness Committee did not notify its members and supporters, either in Articles 2, 3, 4 and 5 or otherwise, that changes had been made to Article 1. [Foy p 521 ll 6-7; p 522 ll 33-39; p 533 ll 3-6; p 573 ll 7-33; p 597 ll 27-47; p 598 ll 1-6; Exhibit 1, AB 1-21]

105. The Wilderness Committee refused to provide Taseko with a retraction and apology for Article 1 as requested by Taseko's counsel despite the Wilderness

Committee's tacit admission the Article had contained serious falsehoods. [Foy p 569 ll 26-47; p 570 ll 1-13]

106. Article 4, which claims Taseko's action is a "SLAPP", states that "*Taseko has claimed [in its notice of civil claim] that the Wilderness Committee has defamed Taseko in an Internet alert in early 2012*." This is untrue and misleading by omission. Taseko's notice of civil claim included a claim that it had been defamed by Article 1, which Foy knew from reading the notice of civil claim prior to finalizing Article 4. Foy gave evidence at trial that Article 1 had been changed for the purpose of avoiding the very litigation commenced by Taseko. [Foy p 526 ll 33-35; p 565-575; p 604 ll 9-47; p 605 ll 1-8; Exhibit 1, AB 12-13; Exhibit 8, Tab 34, AB 218-230]

107. Foy described in his evidence that the purpose of Article 5 was to solicit donations from the Wilderness Committee's supporters for its legal costs in defending Taseko's claim. [Exhibit 1, Tab 5, AB 18-19; Foy p 653 ll 41-47; p 654 ll 1-23]

108. Foy admitted under cross-examination that the Wilderness Committee had a policy of insurance which covered expenses involved in defending the claim, and that Foy knew about the insurance early on at the beginning of this process. [Foy 672 ll 21-40] None of the Articles posted after Taseko's notice of civil claim was filed mention the insurance policy. [Exhibit 1, AB 1-21]

109. Both Biggs and Foy knew or were recklessly indifferent to factual errors in the Articles.

110. Under cross-examination Biggs admitted that in preparing Article 1 he reviewed the map located on page 10 of the August 2011 New Prosperity Project Description and knew from that review the proposed locations of the TSF and non-PAG waste pile in relation to Fish Lake, and therefore, knew or ought to have known that Taseko did not propose to turn "Fish Lake … in to a dump site

for toxic tailings." [Biggs p 807 ll 17-47; p 808 ll 1-30; p 809 ll 24-36; Exhibit 2, AB 22-23; Exhibit 14, AB 474].

111. At trial, Biggs gave evidence that his position was that he wasn't going to include claims or information from the New Prosperity Project Description Project that contradicted allegations he was making in Article 1, testifying under cross-examination "*we're not in the business of telling people what Taseko has to say … we're not a news or a journalist operation, we don't [get] held to those levels of -- of presenting both sides of the story, we present our side of the story, not Taseko's*." [Biggs p 826 ll 23-26; p 827 11 17-25; p 828 ll 3-12] The deliberate omission of information contrary to a thesis a defendant is attempting to develop which distorts the truth is evidence of malice. *Leenen v Canadian Broadcasting Corp*, supra, at para. 113.

112. Under cross-examination, Foy admitted that a map of the Original Prosperity Proposal was available to him in January through March of 2012, and that he understood it reflected the Proposal's layout. He recognized what the map represented to be the locations of the tailings pond and the drained Fish Lake. [Foy p 555 ll 7-47; p 556 ll 1-3; Exhibit 6, AB 27]

113. At trial, Foy refused to accept under cross-examination that Taseko's Original Prosperity Proposal did not involve using Fish Lake as a "tailings pond" despite his understanding that map showed Fish Lake was in a different location than the proposed tailings pond, the map was not wrong, and despite making the following admission:

> Q Okay. And so your evidence today is that you today believe that tailings were to be deposited in the Fish Lake basin after Fish Lake was drained. Is that what you're saying?
>
> A No, sir.

[Foy p 556 ll 8-47; p 557 ll 1-5, 13-47; p 558; p 559; p 560 ll 1-10]

114. He admitted that the word "*pond*" in the phrase "*use Fish Lake as their tailings pond*" was assumed to have its ordinary meaning. He also admitted knowing that overburden and waste rock were not the same thing as tailings. [Foy p 560 ll 38-47; p 561 ll 1-14]

115. When Foy made the changes to Article 1, he had in mind the distinctive differences between the Original and New Prosperity Proposals in relation to the location of the TSF, or tailings pond. [Foy p 561 ll 33-42]

116. Foy agreed under cross-examination that he knew that the waste rock that Taseko proposed to store in the drained Fish Lake basin under the Original Prosperity Proposal was not inherently toxic and could only come to contain potentially toxic elements if accidentally comingled with PAG. [Foy p 673 ll 15-47; p 674-676; p 677 ll 1-25] Biggs admitted in his direct testimony that he knew prior to authoring Article 1 that waste rock and overburden were not inherently toxic unless "contaminated with a certain amount of PAG". [Biggs p 686 ll 3-16; p 713 ll 28-47; p 714 ll 1-16; Exhibit 36, AB 3335]

117. Under cross-examination, Foy gave evidence that he saw the map of the New Prosperity Proposal. He understood the location of Fish Lake and the TSF, which he equated with a "tailings pond". He knew the TSF did not include Fish Lake [Foy p 561 ll 15-47; p 562; p 563 ll 1-2; Exhibit 5, AB 26]

118. Foy admitted under cross-examination that the following change in language in Article 2 reflected "*the reality of the actual plan for New Prosperity and what we thought might be what Taseko had been complaining about*": *"… to use the Little Fish Lake basin and surrounding area to build a larger lake for the tailings storage facility*." [Foy p 571 ll 15-47; p 572 ll 1-6]

119. Foy gave evidence that the statement in Article 3 that "*[t]he proposed replacement lake would also result in a massive loss of fish habitat*" was intended to be a reference to the New Prosperity Proposal, and that he stood by the statement. Foy approved of the posting of Article 3 to the Wilderness

Committee's website. Unlike the Original Prosperity Proposal, Foy knew that the New Prosperity Proposal did not include the creation of Prosperity Lake, or any other artificial lakes. [Foy p 523 ll 23-47; p 524 ll 1; p 525 ll 31-43; p 607 ll 37-47; p 608-610; p 611 ll 1-39; p 649 ll 3-31; p 650 ll 1-9]

V. Special Costs

120. The Trial Judge erred in exercising his discretion and awarding the Respondents their respective costs incurred on or after December 1, 2013 as special costs. [RFJ paras. 201 and 203] The Trial Judge did not have a sound basis for the exercise of such discretion. *Currie v. Thomas* (1985), 19 D.L.R. (4th) 594 (B.C.C.A.) per Esson J.A. at paras. 52-55.

121. The Trial Judge found that the 2013 Report, released October 31, 2013, included key findings about "*adverse environmental effects on water quality in Fish Lake ... and on fish and fish habitat in Fish Lake*... *[which] were similar to those the defendants had described"* in the Articles. Therefore, the Appellant's failure to withdraw its claims for "*punitive damages and special costs after the release of the panel's report attracts the Court's rebuke... [because it became] apparent that a proper basis [did] not exist for the allegations."* [RFJ paras. 194-198]

122. The Appellant had pleaded, and maintained at trial, the position that an award of punitive damages against the Respondents would be warranted if the Court made a finding of express malice on the part of the Wilderness Committee or Biggs. [ANOCC para. 46, AR 18; Plaintiff's Closing Submissions p 952 ll 39-46]

123. This does not constitute reprehensible, scandalous or outrageous conduct on the part of the Appellant warranting an award of special costs. *Young v Young,* [1993] 4 S.C.R. 3 per McLachlin J. (as she then was) at para. 251; *MacLeod v. Harrington (Public Trustee of)* (1995), 14 B.C.L.R. (3d) 201 (C.A.), per Hinds J.A. at paras. 220 and 222.

124. The Trial Judge's finding that the Appellant's claim for punitive damages had little merit is not a basis for awarding solicitor-client costs. *Young v Young,* supra, at para. 251. Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs. *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) per Lambert J.A. at para. 23.

125. In order to justify an award of special costs, it is not sufficient simply to establish that the Appellant's allegations of malice were not proven. It is necessary to show that the Appellant acted improperly in making or maintaining the allegations in the proceeding or otherwise acted improperly in the manner in which it conducted the litigation before special costs will be awarded. It must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of malice. The matter must be considered from the point of view of the Appellant at the time it made or maintained the allegations. *Cimolai v. Hall*, 2007 BCCA 225 per Donald J.A. at para. 68 citing Joyce J., in *Hung v. Gardiner*, 2003 BCSC 285.

126. The 2013 Report did not make any findings which established the truth of the specific inferential meanings pleaded by the Appellant with respect to the Articles; e.g. the 2013 Report did not find that: i) Taseko has a "callous disregard for the environment"; ii) Taseko "knows or is indifferent to the fact that its New Prosperity Project threatens" the environment; and iii) "[t]he New Prosperity Project is an abusive second attempt by the Plaintiff Taseko to obtain government approval for the use of Little Fish Lake as a dump site for toxic tailings." [Exhibit 18, AB 2635; AR 7, 9-12]

127. The Appellant objected at trial to the admissibility of the 2013 Report on a number of grounds. The Trial Judge erred by failing to rule on whether the 2013 Report was admissible, and if so, on what basis.

128. First, the Appellant argued that the 2013 Report did not give rise to an issue estoppel against the Appellant in favour of the Respondents. [Plaintiff's Closing Submissions p 893 ll 27-47; p 894-898; p 899 ll 1-11, 29-47; p 900 ll 1-10; p 933-937; p 938 ll 1-10]

129. The 2013 Report is not a judicial decision. The review panel was not exercising adjudicative functions when it issued the 2013 Report; nor was the 2013 Report a judicial decision on the merits. The 2013 Report is not final and binding. It was merely a series of recommendations and not a decision. The 2013 Report expressly states: "*The Panel makes no suggestion as to whether the project should proceed; that decision will be made by the governments of Canada and British Columbia.*" [Exhibit 18, AB 2644 and 2646] *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44 per Binnie J. at para. 35. *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.) per Finch J.A. (as he then was) for the court at para. 30.

130. Also, the 2013 Report: (1) did not address the same question(s) raised in the within action; (2) the 2013 Report was not "final" in the sense that as of the time of trial it was being challenged by judicial review. The conclusions in the 2013 Federal Report are, in effect, simply opinions conveyed with recommendations to the federal government for decision by the government. They are not binding findings. Also, the 2013 Federal Report was being challenged by way of judicial review in the Federal Court at the time of Trial [RFJ para. 53], and therefore, there was no finality to the proceeding; and (3) the parties before the review proceedings which resulted in the 2013 Report were not parties to the action or their privies. *Danyluk v. Ainsworth Technologies Inc.,* supra, at para. 25.

131. Appellate courts have cautioned against importing findings made in an administrative proceeding, where differing considerations and purposes are relevant, into a related civil proceeding before a court. The scope of the proceedings and the resources employed may be significantly different. There is a risk that allowing the earlier findings of an administrative tribunal to govern

could work an injustice as such proceedings potentially involve differing standards and levels of participation by the parties or their privies. *Grennan Estate v. Reddoch*, 2002 YKCA 17, 176 B.C.A.C. 90 per Hall J.A. for the Court at paras. 33 and 34.

132. It therefore is the exceptional case where it is appropriate to adopt the previous conclusions of an administrative tribunal as being dispositive in a subsequent civil case. *Grennan Estate v. Reddoch*, supra, per Hall J.A. at para. 35.

133. The Appellant also argued that the 2013 Report was not admissible by reason of failing to give notice pursuant to the *Canada Evidence Act*, RSC 1985, c C-5, and that public documents are not admissible for the proof of the truth of opinions or conclusions expressed in them. [Plaintiff's Closing Submissions p 1085 ll 7-47, p 1086-1088; p 1089 ll 1-26] The Trial Judge also did not rule on these objections.

134. The 2013 Report was also inadmissible for the purposes of the defence of fair comment as any purported privileged facts within its contents post-dated the publication of the Articles. *Cohen v. Daily Telegraph*, supra.

PART 4 - NATURE OF ORDER SOUGHT

135. The Appellant submits that the Appeal be allowed with costs and the decision of the Trial Judge should be set aside and a new trial ordered, or alternatively, this Court should grant judgment to the Appellant for damages, with costs in this Court and the court below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED: August 24, 2016

_____

Roger D. McConchie
Solicitor for the Appellant

APPENDIX “A”

Current to June 4, 2016

R.S.C. 1985, c. C-5, s. 24

[eff since December 12, 1988](Current Version)

Canada Evidence Act

R.S.C. 1985, c. C-5

PART I

Documentary Evidence

SECTION 24.

Certified copies

24. In every case in which the original record could be admitted in evidence,

> (a) a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody the official or public document is placed, or
>
> (b) a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or Act of Parliament or the legislature of any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof,

is admissible in evidence without proof of the seal of the corporation, or of the signature or official character of the person or persons appearing to have signed it, and without further proof thereof.

R.S.C. 1970, c. E-10, s. 24.

APPENDIX “B”

Current to June 4, 2016

R.S.C. 1985, c. C-5, s. 28

[eff since December 12, 1988](Current Version)

Canada Evidence Act

R.S.C. 1985, c. C-5

PART I

Documentary Evidence

SECTION 28.

Notice of production of book or document

28. (1) No copy of any book or other document shall be admitted in evidence, under the authority of section 23, 24, 25, 26 or 27, on any trial, unless the party intending to produce the copy has before the trial given to the party against whom it is intended to be produced reasonable notice of that intention.

Not less than 7 days

(2) The reasonableness of the notice referred to in subsection (1) shall be determined by the court, judge or other person presiding, but the notice shall not in any case be less than seven days.

R.S.C. 1970, c. E-10, s. 28.

APPENDIX “C”

Current to August 20, 2016

S.C. 2012, c. 19, s. 52, s. 2

[eff since July 6, 2012](Current Version)

Canadian Environmental Assessment Act, 2012

S.C. 2012, c. 19, s. 52

INTERPRETATION

SECTION 2

Definitions

2. (1) The following definitions apply in this Act.

"Agency"

"Agency" means the Canadian Environmental Assessment Agency continued under section 103.

"assessment by a review panel"

"assessment by a review panel" means an environmental assessment that is conducted by a review panel.

"Canadian Nuclear Safety Commission"

"Canadian Nuclear Safety Commission" means the Canadian Nuclear Safety Commission established by section 8 of the Nuclear Safety and Control Act.

"designated project"

"designated project" means one or more physical activities that

(a) are carried out in Canada or on federal lands;

(b) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and

(c) are linked to the same federal authority as specified in those regulations or that order.

It includes any physical activity that is incidental to those physical activities.

"environment"

"environment" means the components of the Earth, and includes

(a) land, water and air, including all layers of the atmosphere;

(b) all organic and inorganic matter and living organisms; and

(c) the interacting natural systems that include components referred to in paragraphs (a) and (b).

"environmental assessment"

"environmental assessment" means an assessment of the environmental effects of a designated project that is conducted in accordance with this Act.

"environmental effects"

"environmental effects" means the environmental effects described in section 5.

"federal authority"

"federal authority" means

(a) a Minister of the Crown in right of Canada;

(b) an agency of the Government of Canada or a parent Crown corporation, as defined in subsection 83(1) of the Financial Administration Act, or any other body established by or under an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs;

(c) any department or departmental corporation that is set out in Schedule I or II to the Financial Administration Act; and

(d) any other body that is set out in Schedule 1.

It does not include the Executive Council of - or a minister, department, agency or body of the government of - Yukon, the Northwest Territories or Nunavut, a council of the band within the meaning of the Indian Act, Export Development Canada or the Canada Pension Plan Investment Board. It also does not include a Crown corporation that is a wholly-owned subsidiary, as defined in subsection 83(1) of the Financial Administration Act, a harbour commission established under the Harbour Commissions Act or a not-for-profit corporation that enters into an agreement under subsection 80(5) of the Canada Marine Act, that is not set out in Schedule 1.

"federal lands"

"federal lands" means

(a) lands that belong to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above those lands, other than lands under the administration and control of the Commissioner of Yukon, the Northwest Territories or Nunavut;

(b) the following lands and areas:

(i) the internal waters of Canada, in any area of the sea not within a province,

(ii) the territorial sea of Canada, in any area of the sea not within a province,

(iii) the exclusive economic zone of Canada, and

(iv) the continental shelf of Canada; and

(c) reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and that are subject to the Indian Act, and all waters on and airspace above those reserves or lands.

"follow-up program"

"follow-up program" means a program for

(a) verifying the accuracy of the environmental assessment of a designated project; and

(b) determining the effectiveness of any mitigation measures.

"interested party"

"interested party", with respect to a designated project, means any person who is determined, under subsection (2), to be an "interested party".

"Internet site"

"Internet site" means the Internet site that is established under section 79.

"jurisdiction"

"jurisdiction" means

(a) a federal authority;

(b) any agency or body that is established under an Act of Parliament and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;

(c) the government of a province;

(d) any agency or body that is established under an Act of the legislature of a province and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;

(e) any body that is established under a land claims agreement referred to in section 35 of the Constitution Act, 1982 and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;

(f) a governing body that is established under legislation that relates to the self-government of Indians and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;

(g) a government of a foreign state or of a subdivision of a foreign state, or any institution of such a government; and

(h) an international organization of states or any institution of such an organization.

"Minister"

"Minister" means the Minister of the Environment.

"mitigation measures"

"mitigation measures" means measures for the elimination, reduction or control of the adverse environmental effects of a designated project, and includes restitution for any damage to the environment caused by those effects through replacement, restoration, compensation or any other means.

"National Energy Board"

"National Energy Board" means the National Energy Board established by section 3 of the National Energy Board Act.

"prescribed"

"prescribed" means prescribed by the regulations.

"proponent"

"proponent" means the person, body, federal authority or government that proposes the carrying out of a designated project.

"record"

"record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape and machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy of it.

"Registry"

"Registry" means the Canadian Environmental Assessment Registry established under section 78.

"responsible authority"

"responsible authority" means the authority that is referred to in section 15 with respect to a designated project that is subject to an environmental assessment.

"review panel"

"review panel" means a review panel established under subsection 42(1) or under an agreement or arrangement entered into under subsection 40(1) or (2) or by document referred to in subsection 41(2).

"sustainable development"

"sustainable development" means development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.

Interested party

(2) One of the following entities determines, with respect to a designated project, that a person is an interested party if, in its opinion, the person is directly affected by the carrying out of the designated project or if, in its opinion, the person has relevant information or expertise:

(a) in the case of a designated project for which the responsible authority is referred to in paragraph 15(b), that responsible authority; or

(b) in the case of a designated project in relation to which the environmental assessment has been referred to a review panel under section 38, that review panel.

S.C. 2012, c. 19, s. 52, s. 2, effective July 6, 2012 (SI/2012-56)

APPENDIX “D”

Current to August 20, 2016

S.C. 2012, c. 19, s. 52, s. 5

[eff since July 6, 2012](Current Version)

Canadian Environmental Assessment Act, 2012

S.C. 2012, c. 19, s. 52

ENVIRONMENTAL EFFECTS

SECTION 5

Environmental effects

5. (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are

(a) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:

(i) fish as defined in section 2 of the Fisheries Act and fish habitat as defined in subsection 34(1) of that Act,

(ii) aquatic species as defined in subsection 2(1) of the Species at Risk Act,

(iii) migratory birds as defined in subsection 2(1) of the Migratory Birds Convention Act, 1994, and

(iv) any other component of the environment that is set out in Schedule 2;

(b) a change that may be caused to the environment that would occur

(i) on federal lands,

(ii) in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or

(iii) outside Canada; and

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

(iii) the current use of lands and resources for traditional purposes, or

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Exercise of power or performance of duty or function by federal authority

(2) However, if the carrying out of the physical activity, the designated project or the project requires a federal authority to exercise a power or perform a duty or function conferred on it under any Act of Parliament other than this Act, the following environmental effects are also to be taken into account:

(a) a change, other than those referred to in paragraphs (1)(a) and (b), that may be caused to the environment and that is directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of the physical activity, the designated project or the project; and

(b) an effect, other than those referred to in paragraph (1)(c), of any change referred to in paragraph (a) on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage, or

(iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Schedule 2

(3) The Governor in Council may, by order, amend Schedule 2 to add or remove a component of the environment.

S.C. 2012, c. 19, s. 52, s. 5, effective July 6, 2012 (SI/2012-56).

LIST OF AUTHORITIES

Statutory Authority	Page(s)
Canada Evidence Act, RSC 1985, c C-5	30
Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52, ss. 2(1) and 5	17