IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *West Moberly First Nations v. British Columbia,* 2018 BCSC 1835

Date: 20181024
Docket: S180247
Registry: Victoria

Between:

West Moberly First Nations, and Roland Willson on his own behalf and on behalf of all other West Moberly First Nations Beneficiaries of Treaty No. 8

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia, the Attorney General of Canada, and British Columbia Hydro and Power Authority

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver, B.C. July 23-27, 30-31, August 1-3, and September 4-7, 2018
Place and Date of Judgment:	Victoria, B.C. October 24, 2018

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I. INTRODUCTION

[1] This is an application for an interlocutory injunction. 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 an order to prohibit the defendant, the British Columbia Hydro and Power Authority ("BC Hydro"), from continuing with certain work on what is known as the "Site C" project (the "Project"). The Project consists essentially of a hydroelectric dam, generating station and associated infrastructure currently under construction along the Peace River between Hudson's Hope and Fort St. John in northeast British Columbia.

[2] The notice of civil claim alleges, among other things, that the Project infringes West Moberly's rights under Treaty 8 as protected by s. 35 of the *Constitution Act, 1982*, and that the infringement cannot be justified. Among the various items of relief that West Moberly seeks in this action is a permanent injunction to prohibit BC Hydro from continuing with or completing construction of the

Project and to prevent the federal and provincial governments from issuing further permits allowing for its construction, completion or operation.

[3] The precise form of order that West Moberly seeks on this application has been a moving target. In its most recent draft, West Moberly seeks, as its primary relief, to enjoin all construction and related activities on the Project for the earlier of 24 months or pending final determination of its claim except for certain so-called "preservation activities." Those are defined to mean such measures as BC Hydro and government regulators determine to be necessary to ensure safety, prevent environmental harm and preserve, maintain and care for the product of the work that has already been done.

[4] If I am not prepared to make that order, West Moberly seeks, in the alternative, to prohibit further work during that period only in 13 so-called "critical areas" - that is, areas that West Moberly has identified in the path of construction as being of particular importance for the exercise of its treaty rights. To the extent the order permits work to be done outside the critical areas, West Moberly seeks to include a term in the order to prohibit the defendants from relying on the product of that work to argue at trial that the Project has advanced too far to be stopped.

[5] Along with the proposed injunction, West Moberly seeks an expedited trial date within the next 18 months and relief from the obligation that would otherwise apply pursuant to Rule 10-4(5) to provide an undertaking as to damages.

[6] BC Hydro and Her Majesty the Queen in Right of the Province of British Columbia ("British Columbia") oppose the application. They say that West Moberly's claim is without merit, that there is no risk of irreparable harm if no injunction is granted and that the balance of convenience lies against granting an injunction. The Attorney General of Canada ("Canada"), although it opposes the relief sought in the action, takes no position on the application.

[7] For the reasons that follow, I am not persuaded that either form of the injunction sought should be granted.

[8] In summary, I have concluded that the proposed injunction, in either of its iterations, would be a prohibitive as opposed to a mandatory order. I have also found that West Moberly has raised a serious question to be tried and that there is a risk that it will suffer irreparable harm if an injunction is not granted. Nevertheless, I have concluded that the balance of convenience lies against granting either form of the injunction sought for the following principal reasons:

(a) although the claim raises a serious question to be tried, West Moberly's chances of ultimately succeeding with it and halting the Project permanently are not strong;

(b) the proposed injunction, in either of its iterations, would be likely to cause significant and irreparable harm to BC Hydro, its ratepayers and other stakeholders in the Project,

including other First Nations and that harm outweighs the risk of harm to West Moberly flowing from not granting an injunction; and

(c) this application was brought relatively late in the life of the Project (i.e., two and a half years after the commencement of construction), significantly compounding the harm that an injunction would cause.

II. BACKGROUND FACTS

A. West Moberly and Treaty 8

[9] West Moberly is a “band” as defined in the *Indian Act*, R.S.C. 1985, c. I-5. It is one of eight British Columbia First Nations whose predecessors were either signatories or adherents to Treaty 8.

[10] West Moberly says that the ancestors of its members were part of a larger Dunne-za community that has lived along or in the vicinity of the Peace River since time immemorial. West Moberly emphasizes the centrality of the Peace River and its environs to its culture, identity and way of life.

[11] Historically, the Dunne-za ancestors of West Moberly are said to have practiced a seasonal round. That is, they moved around their traditional territory in small family groups to hunt, trap and fish, staying in different places in each season. Periodically they would gather at special locations in their traditional territory for spiritual ceremonies and celebrations. They are reported to have travelled on the Peace River and its tributaries using moose-hide boats and rafts.

[12] In the late nineteenth century the Klondike gold rush began attracting European miners and settlers into the area in greater numbers. As their numbers grew, conflict with the local Aboriginal peoples became more frequent.

[13] Treaty 8 was negotiated and signed at Lesser Slave Lake on June 21, 1899, with a view to resolving that conflict and opening the area for European settlement and resource development. It is one of several numbered treaties that were reached between various Aboriginal groups and the Crown between 1871 and 1923.

[14] Treaty 8 followed a pattern similar to that of the other numbered treaties. The nature of the bargain that was struck in Treaty 8 was recently described by Karakatsanis J. in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, at para. 5, as follows:

> [5] The Mikisew are descendants of an Aboriginal group that, along with a number of other First Nations, adhered to Treaty No. 8 with Her Majesty in 1899. Under Treaty No. 8, First Nations ceded a large amount of land — much of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan, and the southern portion of the Northwest Territories — to the Crown in exchange for certain guarantees. Among these guarantees was a provision protecting the right of the signatories to hunt, trap, and fish:
>
> > And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her

> Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

[15] In 1914 what was then the Hudson's Hope Band also adhered to Treaty 8. Two reserves were created for that band, the first north of the Peace River (what is now known as the Halfway River First Nation reserve) and one south of the Peace River at Moberly Lake. The Hudson's Hope Band split into two separate bands in 1971, at which time West Moberly was formed and assigned the southerly reserve.

[16] West Moberly's reserve covers 2,000 hectares and lies approximately 75 kilometres from the future Site C dam site and 15 kilometres from the transmission corridor that will link the new power station to the rest of BC Hydro's grid. As of May 8, 2018, West Moberly was said to have 312 members with 119 of them living on reserve.

[17] In this litigation and in other contexts, West Moberly has asserted that it currently uses a traditional territory encompassing 12,782,156 hectares, or 127,821.56 square kilometres for the exercise of its treaty rights.

[18] West Moberly has been active in recent years in asserting its treaty rights in that traditional territory. It has opposed other industrial projects that have been proposed within it. In the context of those challenges, West Moberly has identified several areas within its traditional territory but generally outside of the Project footprint that it considers to be of central importance to the exercise of its treaty rights. These include the so-called Peace Moberly Tract or "PMT", the Johnson Creek Network (south of the Dinosaur Reservoir), the Farrell Creek Network (north of Hudson's Hope) and other areas.

[19] Evidence of West Moberly's use of those areas was adduced in part through two reports, the Aitken and the Gething studies, that West Moberly had prepared in 2014 to document the anticipated impacts of certain other industrial projects that were then under consideration elsewhere in its traditional territory. The Aitken Study (formally styled as the "*Preliminary Report on the Potential Adverse Impacts to Cultural Valued Components from the Aitken Section of the Proposed North Montney Pipeline Project*") was prepared for the National Energy Board. The Board subsequently approved that project in 2015. The Gething Study (formally styled as "*A Traditional Land Use Study and Assessment of the Bulk Sample for the Proposed Gething Mine and a Preliminary Assessment of the Full Mine*") was prepared for litigation in this Court involving that project. That project has not yet gone ahead but may do so in the future.

[20] Those studies and the affidavits of West Moberly members themselves suggest that the exercise of West Moberly's treaty rights in those other areas is, in varying degrees, under strain by virtue of other industrial development that has taken place there. Nevertheless, the evidence also suggests that West Moberly continues to use those other areas extensively in the exercise of its treaty rights. In the Gething Study, for example, West Moberly described the Klinse-Za area as "the centre of West Moberly's culture."

[21] The evidence suggests that while some West Moberly members have hunted occasionally in the Project area, they generally prefer not to do so because they see the Peace River valley as an important sanctuary for ungulates – a place where the animals can cross the river, take shelter from predators and calve. In addition, large parts of the Project area have already been taken up by uses that are visibly incompatible with the exercise of treaty rights, such as farmland and the current route of Highway 29. An important exception is the PMT, which is still used by West Moberly extensively for hunting and the exercise of other treaty rights. An existing transmission line and associated right of way already runs through that area and is to be widened as part of the Project.

[22] There is some evidence that West Moberly members currently use parts of the Project area to fish, although not extensively. They do fish extensively in other places nearby, such as at Moberly Lake and its environs. There is also some evidence that West Moberly members trap in the Project area, particularly in those parts of it that will be impacted by the construction of the transmission lines and access roads. Also, there is some evidence suggesting that West Moberly members pick berries, medicinal plants and other resources along the banks of the Peace River but it is not clear to what extent this occurs in the planned inundation zone. There are many places in the Project area that are said to have cultural significance, including many archaeological sites.

B. BC Hydro and the Existing Dams on the Peace River

[23] BC Hydro is a Crown corporation continued under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212 and mandated by statute to provide the people of British Columbia with reliable electricity service. To that end, it provides service to 1.9 million customers, representing 95% of the population of the province.

[24] If and when it is completed, Site C will be the third hydroelectric dam and generating station on the Peace River built and operated by BC Hydro or its predecessors. Construction of the first of these, the W.A.C. Bennett Dam, was completed in 1968 and created the Williston Reservoir. It is the largest freshwater body in British Columbia, with a surface area of almost 1,800 square kilometres and a shoreline perimeter of 1,770 kilometres. It impounds a drainage area of 70,000 square kilometres and has a storage capacity of 74 billion cubic metres.

[25] Just over a decade later, the Peace Canyon Dam was completed in 1980. The accompanying Dinosaur Reservoir flooded the Peace River from the W.A.C. Bennett Dam to the Peace Canyon Dam, a distance of approximately 23 kilometres.

C. Overview of the Project

[26] If and when it is completed, the Project will result in an earth-fill dam 1,050 meters long and 60 metres high, a generating station, a substation, the widening of an existing transmission line and the realignment of Highway 29.

[27] The resulting reservoir is expected to be approximately 83 kilometres long, extending from the existing Peace Canyon dam to the new dam site. It will be two to three times wider than the existing

river. It will cover the area of the existing river and approximately 5,500 hectares of what is currently dry land on either bank. Water levels will be approximately 50 metres higher than the existing river at the future dam site, with the difference decreasing the further upstream one travels. As a result, many of the islands in the Peace River near the future dam site will be inundated but other islands near Hudson's Hope and the Peace Canyon dam will not.

[28] Extensive quarrying and clearing are underway to make way for these works. In particular, BC Hydro plans to clear approximately 2,918 hectares of forest along the Peace River and on the islands within it, in areas that are expected to be inundated or destabilized by the reservoir. BC Hydro also plans to conduct additional clearing to make way for transmission lines as well as road and rail access.

[29] In all, the Project will require approximately 64 square kilometers of land. Of that area, 52 square kilometres is owned by the Crown. The remainder is owned by BC Hydro itself or various private owners.

[30] Water from the Peace River that is used to generate electricity at the W.A.C. Bennett and Peace Canyon dams will be reused downstream at the Site C dam, which will have the capacity to generate up to 35% of the power produced at the W.A.C. Bennett dam using a reservoir that will be only about 5% as big as Williston. The associated generation facility is expected to produce electricity for at least a century following its completion.

D. Regulatory History

[31] Site C was first identified in 1958 as a potential site for what was to be the third major hydroelectric project on the Peace River. In 1983, the British Columbia Utilities Commission (the "BCUC") rejected the application for an energy project certificate in relation to Site C. The BCUC determined that it had not been demonstrated that the proposed project was necessary at that time to meet the province's energy demands. In the early 1990's, BC Hydro's Board of Governors removed the Project from its 20-year plan but retained it as an option for future development.

[32] BC Hydro renewed its interest in proceeding with the Project in or around 2004. By then, the case for proceeding with it was seen to have improved because BC Hydro's projections were showing that demand for electricity would exceed supply at some point during the early 2020's. As interest in the Project grew, BC Hydro began the process of public consultations and obtaining regulatory approval. In 2007, consultation began with the 11 affected First Nations, including West Moberly.

[33] In 2010, the provincial government enacted the *Clean Energy Act*, S.B.C. 2010, c. 22 (the "*CEA*"), with a view to, among other things, streamlining the regulatory review of the Project. The Project was, for example, exempted from the requirement that would otherwise have applied to obtain a certificate of public convenience and necessity from the BCUC.

[34] In May 2011, BC Hydro submitted a project description report to the British Columbia Environmental Assessment Office and the Canadian Environmental Assessment Agency, thereby initiating the environmental assessment process. A Joint Review Panel ("JRP") was appointed by the governments of Canada and British Columbia to conduct the joint federal and provincial environmental reviews of the Project under the *Environmental Assessment Act*, S.B.C. 2002, c. 43 (the "*EAA")*, and the *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19, s. 52 (the "*CEAA"*).

[35] As part of that environmental assessment process, in January 2013, BC Hydro submitted an Environmental Impact Statement ("EIS") that was over 18,000 pages long.

[36] The JRP produced its final report on the Project after conducting six weeks of public hearings between December 2013 and January 2014. The resulting report was released on May 1, 2014. It did not make a specific recommendation as to whether the Project should proceed or not. Rather, it presented what reads as a balanced view of the Project, recognising its long-term benefits particularly for the energy consumers of British Columbia, but also noting its immediate social and environmental costs, which were expected to be borne disproportionately by the people living in the Peace River valley, including West Moberly and other First Nations.

[37] The JRP report stated, in part, as follows:

> Site C is not an ordinary project. At $7.9 billion, it might be the largest provincial public expenditure of the next twenty years. In the long run, it would provide a large increment of inexpensive firm power at a low cost in greenhouse gases, an attribute whose value will only grow with time. Moreover, there is little doubt about the competence of BC Hydro to build and operate the project efficiently, and to live up to the conditions that would be imposed in its approvals. Today's BC Hydro is not the same company that rode roughshod over the interests of nature and the First Nations in the 1960s. The Panel has been generally impressed by the quality of the EIS, the Proponent's participation at the hearing, and the passionate engagement of so many others.
>
> How one regards the economics of a large capital-intensive Project depends on how one values the present versus the future. If today's society values current over future consumption, such a project is daunting. A few decades hence, when inflation has worked its eroding way on cost, Site C could appear as a wonderful gift from the ancestors of that future society, just as B.C. consumers today thank the dam-builders of the 1960s. Today's distant beneficiaries do not remember the Finlay, Parsnip, and pristine Peace Rivers, or the wildlife that once filled the Rocky Mountain Trench.
>
> Site C would seem cheap, one day. But the project would be accompanied by significant environmental and social costs, and the costs would not be borne by those who benefit. The larger effects are:
>
> - Significant unmitigated losses to wildlife and rare plants, including losses to species under the *Species at Risk Act* and to game and plant resources preferred by Aboriginal peoples;
> - Significant unmitigated losses to fish and fish habitat, including three distinct sub-groups of fish preferred by Aboriginal peoples, one of which is federally listed as a species of special concern;
> - Losses of certain archaeological, historical and paleontological resources;
> - Social costs to farmers, ranchers, hunters, and other users of the Peace River valley; and
> - Forced changes to the current use of lands and waters by signatories to Treaty 8, other First Nations and Métis, whose rights are protected under article 35 of the

Constitution Act, 1982.

> These losses will be borne by the people of the Valley, some of whom say that there is no possible compensation. Those who benefit, once amortization is well underway, will be future electricity consumers all across the province.

[38] On October 14, 2014, after considering the JRP report and other materials, two provincial cabinet ministers found the Project to be in the public interest as required by s. 17 of the *EAA* and on that basis granted BC Hydro an Environmental Assessment Certificate ("EAC") under that statute, subject to 77 conditions. The conditions were designed, among other things, to avoid or reduce adverse impacts on Aboriginal rights and interests. The responsible federal officials (formally the Governor in Council) likewise found the Project to be justified under s. 54 of the *CEAA* and on that basis approved the Project subject to a similar set of 17 conditions.

[39] Having received the requisite approvals, construction on the Project began in July 2015.

[40] Following the provincial elections in 2017 there was a change in government. While in opposition, members of the New Democratic Party had expressed skepticism about the wisdom of the Project and, in particular, the adequacy of the regulatory review of it that had been undertaken to that point. After assuming power, the new government reopened the review process to some extent by asking the BCUC to assess the advantages and disadvantages of the following three options then under consideration:

(a) to carry on and complete construction;

(b) to suspend construction temporarily; or

(c) to terminate construction.

[41] The BCUC issued a preliminary report on September 20, 2017 and a final report on November 1, 2017. It determined that the option of suspending construction would be the most expensive and risky of the three under consideration. It did not make a recommendation as to which of the other two options was the better one. There followed an exchange of views among the BCUC, the provincial government and BC Hydro about the projected costs that formed the basis of BCUC's analysis but there was no change in the BCUC's conclusions.

[42] After considering numerous factors that were seen to bear on the question, the government announced on December 11, 2017 its decision to carry on with the Project.

E. Litigation History

[43] West Moberly has been opposed to the Project from its inception. On September 17, 2010, it signed a declaration with other First Nations announcing its opposition and vowing "to use all legal means to stop the Site C Dam from proceeding."

[44] To that end, West Moberly has, with others, sought judicial review of various regulatory approvals both in this Court and the Federal Court.

[45] The relevant decisions in this Court and the Court of Appeal disposing of those applications and the appeals from them are as follows:

(a) *Prophet River First Nation v. British Columbia (Environment)*, 2015 BCSC 1682 – dismissing a petition seeking to quash the EAC ("*Prophet #1*") and *Prophet River First Nation v. British Columbia (Environment)*, 2017 BCCA 58 – dismissing the appeal from *Prophet #1*;

(b) *Prophet River First Nation v. British Columbia (Forest, Lands and Natural Resource Operations)*, 2015 BCSC 2662 – refusing an interlocutory injunction pending the hearing of other judicial review applications ("*Prophet Injunction*"); and

(c) *Prophet River First Nation v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2016 BCSC 2007 – dismissing a petition seeking judicial review of 29 permits, three exemptions, and four notifications granted in relation to the Project ("*Prophet #2*").

[46] The application seeking to quash the federal environmental approval was likewise refused: *Prophet River First Nation v. Canada (Attorney General)*, 2015 FC 1030 ("*Prophet FC*") and the appeal from that decision dismissed: *Prophet River First Nation v. Canada (Attorney General)*, 2017 FCA 15.

[47] The petitioners sought leave to appeal from the appellate decisions to the Supreme Court of Canada but on June 29, 2017, the leave applications were denied: *Prophet River First Nation v. British Columbia (Environment)*, [2017] S.C.C.A. No. 127; *Prophet River First Nation v. Canada (Attorney General)*, [2017] S.C.C.A. No. 115.

[48] Among the arguments that the petitioners advanced in seeking judicial review was that the administrative decision-makers were required, before issuing the approvals, to decide whether the Project infringed the petitioners' treaty rights. That argument was rejected as was the petitioners' suggestion that an application for judicial review was the appropriate forum in which to adjudicate the scope and implications of their treaty rights. It was held that in order to obtain a ruling on whether the Project unjustifiably infringed the petitioners' treaty rights, and if so, to prevent that from occurring, the petitioners would have to commence a separate action: *Prophet #2*, at paras. 153-154; *Prophet FC*, at paras. 50-52.

[49] In *Prophet #1*, Sewell J. also considered but rejected the possibility of referring the matter to the trial list, stating as follows, at para. 144:

> [144] I did give consideration to referring the infringement issue to the trial list. However, in my view, that would be inappropriate in this case. I can see no procedural advantage to the parties in that process over leaving it open to the petitioners to pursue an action for infringement if they wish to do so.

[50] The provincial environmental approvals were also challenged by way of judicial review by the Peace Valley Landowner Association but that application too was unsuccessful: *Peace Valley Landowner Association v. British Columbia (Minister of Environment)*, 2015 BCSC 1129. An appeal from that decision was dismissed, with reasons indexed at 2016 BCCA 377.

[51] When construction began on the Project in 2015, protesters sought to impede construction activities. BC Hydro obtained an injunction to prohibit the protesters from interfering with that work: *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355 ("*Boon*").

[52] On February 26, 2016, the Deputy Controller of Water Rights issued two water licenses to BC Hydro allowing for the diversion and storage of water for the Project. West Moberly, with others, filed a notice of appeal from that decision to the Environmental Appeal Board on March 29, 2016. The appellants subsequently discontinued the appeal, which was finally dismissed by the Board by orders made July 18, 2017.

[53] This action was commenced on January 15, 2018 and the injunction application was filed on January 31, 2018.

F. Current Status of the Project

[54] BC Hydro has divided the Project into six work areas:

(a) the dam site area;

(b) the reservoir area;

(c) the transmission line right-of-way;

(d) public roads and highways;

(e) Hudson's Hope shoreline protection; and

(f) off-site quarries.

[55] Work has commenced in each of them.

[56] With respect to the dam site, the construction schedule has been delayed by geotechnical issues on the left bank that led to the formation of two tension cracks, as well as by what BC Hydro describes as "productivity issues" with the main civil works contractor. The geotechnical issues led to a one-year delay in river diversion, which had been scheduled for September 2019. BC Hydro recently reached an agreement with the main civil works contractor that, BC Hydro says, will improve the pace of work and allow it to meet the current milestones on schedule.

[57] With respect to the highway realignment, Highway 29 is a public highway running along the north bank of the Peace River connecting Hudson's Hope to Fort St. John. Approximately 800 to 1,250 vehicles use the highway each day. Six segments of the highway must be realigned before the

inundation of the reservoir takes place because those segments will either be inundated or on unstable ground thereafter.

[58] With respect to the shoreline protection measures, prior to filling the reservoir, work will be done at Hudson's Hope to protect the shoreline from erosion and instability, including the placement of a stability berm and flattening the existing slopes. Feasibility testing for riprap for the berm is currently underway and construction proper is scheduled to begin in 2020 and to be completed in October 2022.

[59] With respect to the transmission lines, two new 500 kilovolt transmission lines are being erected to connect the future Site C substation to the bulk transmission system through the existing Peace Canyon switchyard. As part of this sub-project, the Peace Canyon switchyard is also being upgraded. These transmission lines are approximately 75 kilometres in length and will run along an existing right-of-way currently occupied by two 138 kilovolt transmission lines. The existing corridor is 45 metres wide and is to be widened to approximately 120 metres.

[60] BC Hydro is also working on two other projects that are said to depend on the first Site C transmission line coming into service as planned in October 2020. These are the *Peace Region Electric Supply (PRES) Project* and the *Fort St. John and Taylor Electric Supply (FATES) Project*.

[61] Government regulators estimate that approximately 198 permits of various kinds will be needed to complete the Project, of which approximately 100 have already issued.

[62] BC Hydro says that as of May 2018, it had cleared 1,500 hectares of land, excavated eighteen million cubic meters of rock, laid 180,000 cubic metres of roller- compacted concrete and generated millions of cubic meters of waste rock.

[63] In addition to the $2.4 billion already spent on construction and related activities, BC Hydro says that it has made financial commitments totalling approximately $6 billion, including service contracts with third parties. BC Hydro has engaged approximately 200 contractors thus far. There are currently over 2,000 people employed on the Project, including members of other First Nations.

[64] BC Hydro and British Columbia have entered into benefit agreements pertaining to the Project with the Doig River First Nation, the Halfway River First Nation, the Saulteau First Nations and the McLeod Lake Indian Band – all of which are Treaty 8 First Nations. The McLeod Lake Indian Band supports BC Hydro and British Columbia's position on this application. Duz Cho Construction L.P., a business wholly owned by the McLeod Lake Indian Band, has been promised contracting work worth approximately $50 million in connection with the Project.

III. THE EVIDENTIARY APPLICATIONS

[65] In conjunction with West Moberly's application for an injunction, each of the parties has also brought an ancillary application to strike parts of the evidence adduced by one or more of the other

parties on the main application. I address those evidentiary applications individually in the sections that follow.

[66] In ruling on the admissibility of the evidence impugned in those applications, I recognise that this is an interlocutory application on which hearsay can be received. Nevertheless, the consequences of the relief sought here are of such significance that the rules of evidence should be applied with greater rigour: *Premium Weatherstripping Inc. v. Ghassemi*, 2016 BCCA 20, at para. 7*; Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, at paras. 58-60.

A. West Moberly's Evidentiary Application

i. Introduction

[67] In its evidentiary application, West Moberly applies to strike certain of the evidence adduced by BC Hydro and British Columbia on the grounds that the impugned affidavits contain improper opinion, both lay and expert.

[68] In the first (expert) category are five affidavits adduced by BC Hydro containing what purport to be the independent expert opinions of Morton McMillen, Gary Ash, Norman Healey, Randy Baker and David Marmorek. West Moberly contends that those affiants are incapable of offering an independent, impartial and unbiased opinion by virtue of their prior and ongoing connections to BC Hydro and the Project. In support of its objection in that regard, West Moberly cites: *M.M. v. R.M.*, 2016 ONSC 7003, at para. 16; *Ebrahim v. Continental Precious Minerals Inc.*, 2012 ONSC 2918, at para. 46 and *Hutchingame v. Johnstone and Wheeler*, 2006 BCSC 271, at para. 8.

[69] The salient distinction to be drawn, West Moberly submits, is that between "mere institutional relationships" which will tend to go merely to weight, and situations involving "personal relationships between the proposed expert and the party, where the expert has been personally involved in the subject matter of the litigation or where the expert has a personal interest in the outcome," any of which may disqualify the expert: *Beazley v. Suzuki Motor Corporation*, 2010 BCSC 480, at para. 21.

[70] BC Hydro responds that the various connections linking its experts to the Project should not render their opinions inadmissible but instead should be seen as, at most, matters of weight. It argues that it is not the mere fact of a particular kind of relationship between the litigant and its proposed expert that will tend to give rise to grounds for disqualification but rather the extent and nature of that relationship: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, at para. 49.

[71] BC Hydro cites *More v. Bauer Nike Hockey Inc.*, 2010 BCSC 1395, at paras. 180-184, aff'd 2011 BCCA 419 and *Beazley* and *Pfeiffer v. Pacific Coast Savings Credit Union,* 2000 BCSC 1472, at para. 98, rev'd on other grounds 2003 BCCA 122, as examples of cases in which this Court has tolerated the presence of connections similar to those in issue here and treated them as matters of weight rather than threshold admissibility.

[72] In the second (lay) category of evidence to which West Moberly objects are parts of certain of the affidavits adduced by BC Hydro and British Columbia in which the affiants express opinions that, West Moberly contends, do not fit within any of the recognised exceptions justifying the receipt of lay opinion evidence.

[73] West Moberly relies in that regard on *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2013 BCSC 1042, aff'd 2015 BCCA 170. In that case, Grauer J. held that for a lay opinion to be admissible under the exception, it must "consist of everyday inferences from observed facts." Conversely, evidence that concerns "matters of specialised, technical expertise upon which [the affiant] proposes to comment on the basis of [his or her] review of documentation and reports taking into account [his or her] own experience" is not admissible (at para. 18). Grauer J. also noted, by analogy to the hearsay rule, that lay opinion may properly be admitted for purposes other than to prove the correctness of the opinion (at para. 19). For example, in *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*, 2018 ABQB 482 at para. 385, Romaine J. held that while it was permissible for lay witnesses to explain what they did and why, there is no blanket exemption to allow lay witnesses to speak of hypothetical facts, not based on personal observation, drawing on specialised expertise or knowledge unavailable to persons of ordinary experience. West Moberly contends that many of the impugned lay opinions speak to an analysis of hypothetical scenarios or future events – evidence which should more properly be given by a qualified expert: *Toronto Dominion Bank v. Cambridge Leasing Ltd.*, 2006 NBQB 134.

[74] BC Hydro and British Columbia respond that all of the impugned lay evidence is admissible. They argue that it is either factual (as opposed to opinion) or that it falls within an exception - the most frequent example being an alleged exception permitting a respondent to an injunction application to explain the anticipated impact of the proposed injunction on the respondent's operations.

[75] They refer in this regard to *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2015 ABCA 249 ("*Kon Construction*"), in which the court distinguished among three different kinds of witnesses with expertise:

> (a) independent experts retained for the purpose of the instant litigation;
>
> (b) witnesses with expertise who were involved in the subject matter of the litigation but who are not themselves one of the litigants; and
>
> (c) litigants with expertise who were involved in the subject matter of the litigation.

[76] Similar distinctions were drawn in *Westeroff v. Gee Estate*, 2015 ONCA 206 and in *Kaul v. The Queen*, 2017 TCC 55, at para. 32. Each of those decisions recognise a category of "participant experts" or "litigant experts" who can properly attest to the facts they observed and the opinions they formed at the time of the relevant events.

[77] BC Hydro also cites *Chong (Guardian of) v. Royal Columbian Hospital*, 1996 CanLII 3432 (B.C.S.C), at para. 19, for the proposition that a professional witness whose negligence is in issue may properly be called upon to express opinions and explain the basis for them. I note, however, that *Chong* concerned an application by the opposing party to compel the professional witness to answer questions on an examination for discovery, a situation unlike the one before me on this application.

[78] With respect to the impugned lay evidence, I agree with BC Hydro that there is some support in the authorities for its contention that it is permissible for a respondent to an injunction application to explain how the proposed injunction would affect its operations, notwithstanding that such evidence may be forward-looking and hypothetical. Similar evidence has previously been accepted by this Court in related litigation (*Boon*, at paras. 35-36 and 61; *Prophet Injunction*, at paras. 23-26), although the admissibility of that evidence on those occasions does not appear to have been directly challenged as it has been here.

[79] Neither party was able to find authority dealing directly with a challenge to lay opinion evidence adduced by a respondent on an injunction application as to the harm that the proposed injunction would cause it. BC Hydro cites *Cape Dorset (Hamlet) v. Polar Supplies*, 2012 NUCJ 8, as a rare example of a comparable situation. In that case, Polar Supplies, a bankrupt company, was seeking to enjoin the Hamlet of Cape Dorset from carrying out certain work that Polar Supplies alleged would improperly interfere with its contractual relations with third parties. In support of its injunction application, Polar Supplies tendered an affidavit of its trustee containing, among other things, opinions as to the anticipated impact of the work on its "financial viability, decreased revenues and market share." In rejecting Cape Dorset's application to strike those paragraphs of the affidavit as, among other things, improper lay opinion, Tulloch J. held the evidence was admissible but accorded it less weight in light of the affiant's evident relationship with Polar Supplies and the issues in dispute.

[80] Having regard to the principles articulated in these authorities, I have generally refused to strike BC Hydro's evidence addressing the anticipated impact of the proposed injunction and have instead chosen, like Tulloch J. in *Cape Dorset*, to treat the frailties in that category of evidence as a matter of weight rather than threshold admissibility. I have taken that approach particularly where the impugned opinion does not draw on expertise beyond the realm of ordinary human experience. In several instances, however, I have struck the impugned evidence on the basis that it does not fit within any exception to the lay opinion evidence rule or otherwise contravenes one or more other rules of evidence, such as the hearsay rule.

[81] Nevertheless, I have also allowed certain second-hand evidence to be admitted where the affiant is the head of a team notwithstanding the hearsay component of such evidence, as in *Kon Construction* at para. 47, where the admission of such evidence was found to be justified in the interest of judicial economy.

ii. The Impugned Expert Affidavits

a. Affidavit #1 of Morton McMillen

[82] West Moberly objects to the affidavit of Mr. McMillen, who is the designer of the temporary and permanent upstream fish passage facilities to be constructed with a view to mitigating the impact of the Project on fish stocks. West Moberly argues that he should be disqualified because of his previous and current involvement in the Project. It is not disputed that he and his company, McMillen LLC, have been paid millions of dollars by BC Hydro for that and other work.

[83] Mr. McMillen was asked to provide his opinion on five questions. The last of the five questions was whether "the design of the fish passage facilities for Site C [meets] professional standards and best practices." This last question calls for an opinion on his own work, which cannot be given free of bias, it is argued. West Moberly adds that he would also be subject to professional discipline if he answered the question negatively.

[84] BC Hydro responds that it is fanciful to suggest that Mr. McMillen must be biased because of his potential exposure to professional liability. It argues further that Mr. McMillen's situation is similar to that of the expert witnesses in *United City Properties Ltd. v. Tong*, 2010 BCSC 111, where two architects were held to be qualified to provide expert evidence about their own designs. I note that it is not clear from the judgment in that case that the witnesses were going to be asked in the course of that testimony to provide an opinion about the quality of their own work, however.

[85] I am not prepared to strike the affidavit of Mr. McMillen in its entirety on the grounds asserted by West Moberly. His affidavit fits within the second category of expert witness described in *Kon Construction*, insofar as he is a witness with expertise who was involved in the subject matter of the litigation.

[86] The first question put to him seeks Mr. McMillen's opinion on whether the facilities were designed with a particular objective in mind. That is a factual question. The second question is about whether he expected the facilities to have a particular impact. Although that question might have elicited an opinion, I have found Mr. McMillen's answers to both questions to be admissible because in them he is merely describing the nature of the work that he did and explaining why he did it.

[87] Similarly, I consider questions 3 and 4 as not really calling for opinions at all, but rather factual information – they are questions about other studies that have been conducted in relation to other dams or as to the nature of the facilities in place at other dams. Mr. McMillen's answers to those questions contain assertions of fact rather than opinion. Moreover, given that he was cross-examined on the affidavit, I cannot see how West Moberly could have been prejudiced by any bias he may have, inasmuch as the true facts could have been put to him if they were seriously contested.

[88] I find that Mr. McMillen's previous history and ongoing involvement with the Project and BC Hydro goes only to weight.

[89] I reach a different conclusion on Mr. McMillen's response to the last question, namely whether his own design is consistent with professional standards and best practices. I agree with West

Moberly that Mr. McMillen is not capable of providing an independent, impartial and unbiased opinion on that issue and have therefore disregarded that response entirely.

b. Affidavit #1 of Gary Ash

[90] Mr. Ash is a biologist who has done a considerable amount of work for BC Hydro in relation to the Project over the past 44 years. He describes himself as semi-retired. West Moberly contends that he is incapable of providing an independent, impartial and unbiased opinion by virtue of that history. In that regard, West Moberly notes that approximately three quarters of the studies he cited in his exhibited report were prepared for BC Hydro.

[91] West Moberly argues that Mr. Ash ought to be disqualified on the same grounds as the accountant in *M.M.* at para. 16, Mr. Schantz, who was said to be "the source of the financial information being relied on, and also the architect of the arrangements relating to the respondent's income and compensation."

[92] I am not persuaded that Mr. Ash is in the same position as was Mr. Schantz in *M.M*. There, Minnema, J. found it impossible to untangle Mr. Schantz' two roles. I find that that difficulty does not arise in the same way here. Mr. Ash's report explains the basis for his conclusions, which are grounded in geographical facts (the direction of river flows or natural and artificial barriers to fish migration, for example), as well as previous empirical studies of fish populations. There is no reason to question the scientific rigour of the studies that he relies upon other than that they happened to have been prepared for BC Hydro. In any event, Mr. Ash's conclusions do not appear, at least on their face, to be affected by any bias in favour of BC Hydro.

[93] I therefore agree with BC Hydro that the long history of Mr. Ash in connection with BC Hydro in general and the Project in particular is a consideration going, at most, to weight rather than threshold admissibility.

c. Affidavit #1 of Randy Baker and Affidavit #1 of Norman Healey

[94] West Moberly argues that the affidavits of Mr. Baker and Mr. Healey should be struck because of their history of involvement with the Project. They are partners in Azimuth Consulting Group Partnership, which has provided services to BC Hydro in connection with Site C. They both authored or contributed to the methylmercury risk analysis sections of the EIS. Mr. Baker continues to do certain work that is ultimately funded by BC Hydro.

[95] In addition, West Moberly argues that the answers to questions 4-6 in Mr. Baker's report should be struck because of BC Hydro's failure to provide the data supporting the earlier reports authored by Mr. Baker that were cited in those answers, including the EIS. West Moberly sought that data so that its own expert could review Mr. Baker's conclusions independently. In answer to that request for production, BC Hydro responded that Mr. Baker did not compile the requested data for his main report and for that reason it would not be produced.

[96] For the same reasons as I have given in refusing to strike the affidavit of Mr. Ash, I agree with BC Hydro that these affiants are not disqualified by virtue of the work they have previously done on the Project. I find that that issue of their potential bias arising from that history goes at most to weight.

[97] I also agree with BC Hydro that its failure to produce the data supporting the studies that Mr. Baker referred to in his report, as demanded by West Moberly, does not render any part of the affidavit inadmissible. The proper approach, if West Moberly truly needed that information in order for its expert to deal with the evidence on this application, would have been to seek an order to compel its production after being advised that it was not available, as it did in other cases.

d. Affidavit #1 of David Marmorek

[98] West Moberly seeks to strike the answers to questions 1(a), (b) and (c) in Mr. Marmorek's report on the basis that he had done a considerable amount of work on the Project before preparing the report. In the impugned questions, it is argued, he was asked to render an opinion as to the validity of a critique of his own work.

[99] Questions 1(a) and (b) called for factual information: they ask how the predictions in the EIS were arrived at and for a description of the comments on methodology that the authors of the EIS received from the Department of Fisheries and Oceans ("DFO"). Those questions did not call for Mr. Marmorek to express any opinion.

[100] Question 1(c) did call for an opinion, but I do not find it to be an inappropriate one for Mr. Marmorek to offer. Mr. Marmorek was asked whether there is any basis supporting the assertion by West Moberly's expert, Dr. Schindler, that the authors of the EIS had overestimated the anticipated fish biomass in the future Site C reservoir because they used a model designed for lakes which cannot reliably be applied to predict biomass in rivers or reservoirs. Mr. Marmorek responded by saying, among other things, that the approach taken in the EIS was scientifically defensible and that he did not agree that the prediction in the EIS was overestimated for the reason identified by Dr. Schindler. The primary point of the question and his answer was not to defend his own work generally but rather to comment on the validity of Dr. Schindler's specific critique of it. In my view, Mr. Marmorek is capable of offering an unbiased opinion on that question. Indeed, his answer was balanced. He acknowledged that "[p]redictions of fish biomass and productivity are uncertain" and that there were "legitimate differences of opinion between the DFO and the scientists who worked on the Site C EIS" with respect to certain of the predictions in the EIS.

[101] I am therefore not prepared to strike any part of Mr. Marmorek's affidavit.

iii. The Impugned Lay Affidavits

[102] My rulings in this category are as follows:

Impugned Evidence	**Ruling**
Watson Affidavit #1, paras. 11, 16, 19(b), 38,	Admissible. The impugned evidence is either fact (description of Project or present plans) or opinions on

39, 42-49 (BC Hydro)	anticipated impacts of the proposed injunction, which generally do not draw on any specialised expertise beyond ordinary human experience.
Watson Affidavit #3, paras. 4, 5, 6, 7 (first sentence), 8-12, 14 and 21 (BC Hydro)	Para. 21 is struck as inadmissible opinion or hearsay. The remainder of the impugned evidence is admissible on the basis that it generally explains the rationale for BC Hydro's current plan to clear to 433 metres, which is a matter more of fact than opinion.
Kossari Affidavit #1, paras. 11, 13, 16-22, 24-25, 26-27, 27-28 (BC Hydro)	The last sentence of para. 28 is struck as argument. The remainder of the impugned evidence is admissible because it is either fact (description of Project or present plans) or opinions on anticipated impacts of the proposed injunction, which generally do not draw on any specialised expertise beyond ordinary human experience.
Kossari Affidavit #2, para. 12 (BC Hydro)	See above.
Penfold Affidavit #1, paras. 9, 12, 17-18, 22-27, 29-33 (BC Hydro)	Paras. 23 and 25, the last sentence of para. 27 and para. 31 are struck as hearsay or improper lay opinion. The remainder of the impugned evidence is admissible because it is either fact (description of Project or present plans) or opinions on anticipated impacts of the proposed injunction, which generally do not draw on any specialised expertise beyond ordinary human experience.
Penfold Affidavit #3, paras. 9-10 (BC Hydro)	The second last sentence of para. 9 and the last sentence of para. 10 are struck as hearsay. The remainder of the impugned evidence is admissible because it is either fact (description of Project or present plans) or opinions on anticipated impacts of the proposed injunction, which generally do not draw on any specialised expertise beyond ordinary human experience.
McGhee Affidavit #1, paras. 3, 5, 7-10 and 13 (BC Hydro)	Para. 9 and the first sentence of para. 10 are struck as hearsay. Paras. 5, 7 and 8 are struck as inadmissible lay opinion. The remainder of the impugned evidence is either fact (description of Project or present plans) or opinions on anticipated impacts of the proposed injunction, which generally do not draw on any specialised expertise beyond ordinary human experience.
Drown Affidavit #1, paras. 5 and 8-13 (BC Hydro)	The second sentence in para. 5(b), para. 11 (except for the first sentence) and paras. 12 and 13 are struck as hearsay or as inadmissible lay opinion founded on hearsay. The remainder of the impugned evidence is either fact (description of Project or present plans) or opinions on anticipated impacts of the proposed injunction, which generally do not draw on any specialised expertise beyond ordinary human experience.
Drown Affidavit #2, paras. 5 and 9-14 (BC Hydro)	Admissible. The impugned evidence is either fact (description of Project or present plans) or opinions on anticipated impacts of the proposed injunction, which generally do not draw on any specialised expertise beyond ordinary human experience.
Young Affidavit #1,	Paras. 13-15 are struck as inadmissible lay opinion

paras. 5 and 10-16 (BC Hydro)	founded on hearsay. The remainder of the impugned evidence is either fact (description of Project or present plans) or opinions on anticipated impacts of the proposed injunction, which generally do not draw on any specialised expertise beyond ordinary human experience.
LeCouteur Affidavit #1 (BC Hydro)	I agree with BC Hydro that this affidavit reflects the best evidence that it can reasonably be expected to have marshalled on this application to quantify the anticipated cost to it of the proposed injunction, and as such, that it should be admitted into evidence despite the many opinions (both first and second hand) that it contains. Although I am not striking any part of the affidavit, I have, for those and other reasons that are explained elsewhere in my reasons for judgment on the injunction itself, accorded it little weight.
Reimann Affidavit #1, paras. 25, 27, 30, 33, 34, 36, 38, 71, 78-89, 92 and 94 (BC Hydro)	Paras. 25, 27 33, 36, 71, 86 and 94 are struck as inadmissible lay opinion. The remainder of the impugned evidence is either factual (e.g., explaining BC Hydro policy and rationale for decisions previously taken) or opinion that does not draw on any specialised expertise beyond ordinary human experience.
Mossop Affidavit #1, paras. 11, 13 and 21-22 (BC Hydro)	Paras. 11 and 13 are struck as inadmissible lay opinion. The remainder of the impugned evidence is factual (i.e., descriptive of the measures planned for the reservoir and their purpose).
Jackson Affidavit #1, paras. 2, 35, 43, 52, 56 and 62 (BC Hydro)	The sentence in para. 53 relaying the opinion of D'Arcy Greene and all of para. 56 are struck as hearsay. The remainder of the impugned evidence is either factual (e.g., describing BC Hydro's archaeological programmes and their purpose) or opinion that does not draw on any specialised expertise beyond ordinary human experience.
Drost Affidavit #1, paras. 11, 22, 31 and 44 (BC Hydro)	Para. 31 is struck as hearsay. The remainder of the impugned evidence is either factual or opinion that does not draw on any specialised expertise beyond ordinary human experience.
MacLaren Affidavit #1, paras. 8, 15-17, 19, 26 and 38-39 (British Columbia)	Paras. 38 and 39 are struck as inadmissible lay opinion or argument. The remainder of the impugned evidence is either factual or otherwise admissible to explain government's view and why certain decisions were made by government (to the extent it is relevant), but not for the correctness of the opinions expressed.
Addison Affidavit #1, paras. 15-17, 19, 36, 38, 47-48, 55-57, 59-60, 64-65, 81-82 and 84 (British Columbia)	Paras. 38, 47, 48, 56, 57, the first four sentences in para. 60, all of para. 64 and the first two sentences in para. 65 are struck as inadmissible lay opinion or argument. The remainder of the impugned evidence is factual.
Addison Affidavit #2, paras. 6 and 7 (British Columbia)	Admissible. The impugned evidence is factual.
Brewer Affidavit #1,	Para. 24 is struck as argument.

paras. 21, 24, 26-27, 31, 36 and 39-41 (British Columbia)	The remainder of the impugned evidence is either factual or opinion that does not draw on any specialised expertise beyond ordinary human experience.
Brewer Affidavit #2, para. 4 (British Columbia)	Admissible. The impugned evidence is factual.

B. BC Hydro's Evidentiary Application

i. Introduction

[103] In its evidentiary application, BC Hydro applies to strike all or parts of certain of the expert and lay affidavits adduced by West Moberly.

[104] In particular, BC Hydro applies to strike the following expert evidence:

(a) Affidavit #1 of Dr. David Schindler;

(b) Affidavit #1 of Chris Joseph;

(c) Affidavits #1 and #2 of Donald Steven Graham; and

(d) Exhibit B to Affidavit #1 of Beth Hrychuk.

[105] In addition, BC Hydro applies to strike parts of the following lay affidavits:

(a) Affidavit #1 of Clarence Willson;

(b) Affidavit #1 of George Desjarlais; and

(c) Affidavit #1 of Bruce Muir.

[106] BC Hydro also applies to strike Affidavit #2 of Dr. Harry Sheldon Swain ("Swain #2"), another of West Moberly's lay affiants. Because that affidavit is also the sole subject of the evidentiary applications of Canada and British Columbia, I will address its admissibility, including BC Hydro's objections to it, in a separate section of these reasons.

[107] In its oral and written submissions during the hearing pertaining to its evidentiary application, BC Hydro did not pursue all of the relief that it had originally sought in its written notice of application. In the discussion that follows, I have addressed only those parts of West Moberly's evidence that remain in contention, despite having received submissions from British Columbia supporting all of BC Hydro's original objections. To the extent that I have not addressed British Columbia's submissions on the admissibility of evidence that BC Hydro no longer seeks to strike, I have considered those submissions (as well as West Moberly's submissions responding to them) in weighing that evidence.

ii. The Impugned Expert Affidavits

a. Affidavit #1 of Dr. David Schindler

[108] Dr. Schindler is a professor of ecology who specializes in limnology and environmental contamination. He was asked by West Moberly to provide his opinion on the following matters:

(a) potential sources, causes, or concerns associated with elevated mercury levels observed in Bull Trout at the Crooked River in British Columbia and the construction of the Site C hydroelectric dam; and

(b) potential effects of the Site C hydroelectric dam on fish and fish habitat, including the effectiveness of related mitigation measures.

[109] BC Hydro contends that in his resulting report addressing those topics, Dr. Schindler strayed outside his stated areas of expertise and offered opinions in the following areas, despite lacking the requisite expertise to do so:

(a) human health and Indigenous people's subsistence patterns; and

(b) the efficacy of fish passage facilities and fish mortality rates when passing through hydroelectric turbines.

[110] In addition, BC Hydro argues that many of Dr. Schindler's opinions are nothing more than bald conclusions (one of which, that the Site C Dam should not be built at all, goes to the ultimate issue) and provide no real assistance to the Court. Finally, BC Hydro argues that Dr. Schindler is manifestly "committed to a purpose," leaving him incapable of providing an impartial, independent and unbiased opinion.

[111] For those reasons, BC Hydro submits that the probative value of the affidavit is outweighed by its prejudicial effect and that the entire affidavit should be struck on that basis.

[112] West Moberly responds that Dr. Schindler has the requisite expertise to render the opinions in his report and that his strongly-held views, which are acknowledged, should not be seen as disqualifying him from providing helpful expert opinion evidence.

[113] I agree with BC Hydro that certain of the opinions expressed in Dr. Schindler's report are inadmissible. These include bald conclusions unsupported by any real technical or scientific analysis, value judgments, conclusions falling outside his stated areas of expertise and argument in the guise of opinion.

[114] In particular, I have concluded that the following portions of the report that is attached as Exhibit "B" to Dr. Schindler's affidavit should be struck on that basis:

(a) "Many Indigenous People will cease eating fish if they hear that contaminant levels have increased at all. Guidelines and concentration limits have little effect. While some may call this reaction irrational, it is really no less rational than white society's resistance to building nuclear power plants, in the face of strong evidence that nuclear power is almost always safe. In both cases, the fears are based on a lack of real technical knowledge. In both cases, cultural practices and desires should be respected";

(b) “Fish moving downstream will pass through hydro turbines, with >90% survival predicted for fish <400 mm in fork length to >60% survival for large fish. The description can only be described as ‘fish carnage.’ Is this really considered acceptable mitigation for a valued fishery in the 21st century? It is not in my view”; and

(c) “One must ask: Is Canada’s continued building of hydroelectric facilities really in the best interests of ecosystem and human health, and inclusion of Indigenous People in our reputedly multicultural society? My answer is no.”

[115] I find the remainder of the affidavit to be admissible.

b. Affidavit #1 of Dr. Chris Joseph

[116] Dr. Joseph is a consultant with a doctorate in Resource and Environmental Management. West Moberly retained him as a reply expert to “review the potential economic impacts of a suspension of the Site C project” with particular regard to the following four questions:

(a) what are the benefits and impacts of a two-year work suspension of the Site C project for present or prospective employees and municipalities in the Peace River Regional District (“PRRD”);

(b) what steps could be taken to mitigate any such impacts;

(c) would the answers to (a) and (b) be different in the event of a work suspension in 2019 or later; and

(d) what conclusions can be drawn from para. 12 of the Affidavit #1 of Christa Drost (setting out the number of people in the PRRD who are or expected to be employed at the Project as compared with the size of the local workforce and the rate of unemployment there) and why?

[117] In his responses to these questions, Dr. Joseph asserted, among other things, that the BC Hydro lay evidence adduced on the subject is “unrealistic and/or incomplete.” He then analysed, among other things, the impact of a work suspension on employment prospects in the area, having regard to certain employment databases and statistics, publicly available information about other infrastructure projects underway in the area and various other classes of information that he drew upon.

[118] BC Hydro contends that the report is “unnecessary” because the questions posed and the opinions expressed in it are purely factual and, as such, not properly the subject of expert opinion. But even if they are, argues BC Hydro, then Dr. Joseph does not have the requisite qualifications to render them. BC Hydro also objects to the affidavit on the basis that it is not proper reply.

[119] West Moberly responds that an expert report is necessary to address the question of what alternative employment opportunities may be available to workers affected by any cessation of work that may occur at Site C. Addressing that question requires, at least in part, the application of the kind of knowledge and expertise that Dr. Joseph has. His training includes a Ph.D. in Resource and Environmental Management. In addition, Dr. Joseph has written extensively on the economic impacts of large infrastructure projects in peer-reviewed journals. He has taught courses on economics at the university and professional level and advised provincial governments and others on the socio-economic impacts of infrastructure projects.

[120] West Moberly argues that any lay witnesses with first-hand knowledge of the employment implications of a cessation of work at Site C would be likely to be beholden to BC Hydro and the Project and therefore unavailable to West Moberly. Therefore, the only realistic way in which it can respond effectively to BC Hydro's lay affiants' assertions on those issues is with its own expert.

[121] I agree with West Moberly, for the reasons it puts forward, that Dr. Joseph's report is properly admissible.

[122] In summary, I find Dr. Joseph's report to be "necessary" in the sense that the opinions he expressed in it are sufficiently informed by specialized knowledge and expertise to which the Court would not otherwise be privy. That knowledge and expertise is reflected, in particular, in his selection of the sources that he drew from, in the nature of the information that he drew from them and in his description of the relevance of that information to the answers that he gave. I find him to be qualified by his training and experience to offer those opinions.

[123] I also find the report to be proper reply to BC Hydro's case, given that it was BC Hydro who first raised the impacts of the proposed injunction on local employment levels as a basis to refuse it.

[124] I therefore refuse BC Hydro's application to strike Dr. Joseph's affidavit.

c. Affidavits #1 and #2 of Dr. Donald Steven Graham

[125] Dr. Graham is a consulting engineer and geoscientist. West Moberly has retained him to find an alternate route for the Highway 29 realignment that would avoid certain sensitive cultural sites that West Moberly has identified in the vicinity of Bear Flats. He has affirmed two affidavits in which he proposes such alternatives. BC Hydro objects to those affidavits.

[126] The primary ground for the objection is that the affidavits are irrelevant, given that the optimal route of Highway 29 is not an issue properly before the Court on this application. Rather, at issue is whether an injunction should be granted to stop work on the Project in its current form, as approved by its regulators.

[127] In any event, BC Hydro argues that Dr. Graham is not properly qualified by either his training or experience to propose alternate routes for a highway. BC Hydro submits further that certain of Dr. Graham's opinions are not the product of any technical knowledge or expertise, but rather reflect

value judgments about the weight that should be given to First Nations' cultural sensitivities in selecting among various alternative route options.

[128] BC Hydro also objects to Dr. Graham's reliance on the report that is attached as Exhibit "B" to Dr. Graham's Affidavit #1 because it was prepared for a purpose (i.e., consultation with West Moberly and other First Nations with respect to the route of the highway realignment) other than this litigation and therefore without the duties of an independent expert witness in mind. BC Hydro relies in this regard on an earlier decision of Choi J. in this action striking a report attached to another expert's affidavit on similar grounds: *West Moberly First Nations v. British Columbia*, 2018 BCSC 730 ("*West Moberly (Prior Rulings)*").

[129] BC Hydro also objects to Dr. Graham's Affidavit #2 because it says the questions posed in it are either irrelevant or not properly the subject of expert opinion evidence. Nor, BC Hydro argues, is it proper reply. Instead, it responds primarily to a memorandum authored by a representative of BC Hydro that West Moberly had obtained in the context of the consultation process over the highway realignment, but that BC Hydro had not put into evidence in this action.

[130] West Moberly responds that certain of BC Hydro's arguments are improper because they were not fully set out in its notice of application. In addition, West Moberly argues that Dr. Graham is qualified to render the opinions in his two reports by virtue of his experience with pipelines, which are similar in this respect to highways. Further, West Moberly argues that the earlier report that he attached to his first affidavit should be held admissible because Dr. Graham acknowledges his duty to the Court in the body of the affidavit. West Moberly argues that the decision of Choi J. relied upon by BC Hydro in this respect is distinguishable in that Dr. Graham was the sole author of the earlier report whereas the report struck by Choi J. was authored by the affiant and others. It cites *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2008 BCSC 1263, in which Myers J. accepted into evidence an earlier report that an expert had authored for the purpose of parallel litigation in the United States.

[131] I disagree with BC Hydro that the affidavits are entirely irrelevant. It may be relevant to know that at least some work, such as that proposed by Dr. Graham, could be done outside the critical areas if the work currently planned to be done within them was enjoined.

[132] I also disagree with BC Hydro that Dr. Graham is not qualified to render the opinions in his report by virtue of his lack of experience with highways. The fact that his relevant experience involves pipelines rather than highways goes, in my view, to weight rather than admissibility.

[133] But I do agree with BC Hydro that the earlier report attached as Exhibit "B" to Dr. Graham's Affidavit #1 should be struck as having been completed for an extraneous purpose, without his duty to the Court in mind. I find that the situation before me here is more like the one considered by Choi J. earlier in this action and less like the one before Myers J. in *Microsoft*, where the earlier report had at least been prepared for the comparable and compatible purpose of parallel litigation elsewhere. Here,

Dr. Graham's earlier report was prepared for a partisan purpose that was inconsistent with his obligation of independence and impartiality.

[134] Although West Moberly argues that the decision of Choi J. can be distinguished on the basis that Dr. Graham was the sole author of the earlier report whereas the report before Choi J. had more than one author, I am not persuaded that the distinction is a material one. In *Pichugin v. Stoian*, 2014 BCSC 2061, Skolrood J. refused to admit an expert report into evidence because, among other things, the expert had only provided the requisite Rule 11-2(2) certification two months after having completed and signed the report. In those circumstances, the *post facto* certification "gives the court little comfort that the expert knew and complied with his duty at the time the report was prepared" (at para. 19).

[135] In his Affidavit #2, Dr. Graham was asked to answer two questions pertaining to two of the affidavits that had been adduced by BC Hydro on the injunction application. Dr. Graham was asked whether those affidavits:

(a) "demonstrate that there are technical and engineering challenges which make an alignment of Highway 29 outside the Bear Flats Critical Area unfeasible"; and

(b) "indicate that BC Hydro is actively exploring the feasibility of alignment options outside of the Bear Flats Critical Area."

[136] I agree with BC Hydro that the first question calls for an opinion that would not be particularly helpful to the Court because neither of the two BC Hydro affidavits purport to "demonstrate that there are technical and engineering challenges which make an alignment of Highway 29 outside the Bear Flats Critical Area unfeasible." Rather, they are lay affidavits dealing with other matters: i.e., the consultation history and the schedule and status of the planned realignment work and implications for it of the proposed injunction. But Dr. Graham did not restrict himself in his response to those two affidavits. He elected to respond directly to a subsequently received letter from Mr. Izett, an engineer with one of the contractors working on the highway realignment, who did purport to enumerate such challenges in his letter. BC Hydro subsequently adduced an affidavit from Mr. Izett in sur-reply to Dr. Graham's opinion in this section of the report. In the circumstances, I find Dr. Graham's response to Question 1 (i.e., Section A of the report attached as Exhibit "A" to Affidavit #2) to be admissible, given the need for flexibility in receiving reply evidence on an interlocutory application: *Cantlie v. Canadian Heating Products Inc.*, 2014 BCSC 2029, at para. 12 and *Lockridge v. Ontario (Environment),* 2013 ONSC 6935, at para. 16.

[137] I agree with BC Hydro, however, that the second question does not call for the application of any specialized knowledge or expertise, to the extent the question is even relevant, which is doubtful. I am therefore striking "Section B" of the report attached as Exhibit "A" to Dr. Graham's Affidavit #2.

[138] In summary, I am striking Exhibit "B" to Dr. Graham's Affidavit #1 and "Section B" of Exhibit "A" in Dr. Graham's Affidavit #2. The remainder of the impugned evidence is admissible.

d. Affidavit #1 of Beth Hrychuk, Exhibit "B"

[139] Ms. Hrychuk is an anthropologist and registered professional consulting archaeologist. In her Affidavit #1, she avers as follows, at paras. 5-6:

> 5. Attached to this Affidavit as **"Exhibit B"** is a copy of a report entitled "Cache Creek Gravesite: Peace River Valley, NE British Columbia" (the "Cache Creek Gravesite Report"). It was prepared on or about March 1, 2017 for Nun wa dee Stewardship Society. I co-authored the report with Nikki McConville. The report contains my opinions regarding the appropriate identification and management options available with respect to the Cache Creek Gravesite.
>
> 6. I adopt the Cache Creek Gravesite Report as my expert evidence in this proceeding. The factual assumptions, research conducted, and documents relied upon in reaching this opinion are set out in the Cache Creek Gravesite Report.

[140] BC Hydro applies to strike "Exhibit B" on two grounds:

(a) like the impugned report attached as Exhibit "B" to Dr. Graham's Affidavit #1, it was prepared for an extraneous purpose (i.e., consultations with West Moberly and other First Nations in respect of Site C); and

(b) it had more than one author (citing *Heidebrecht v. Fraser-Burrard Hospital Society* (1995), 15 B.C.L.R. (3d) 189 (S.C.) and *Emil Anderson Construction Co. v. British Columbia Railway Co.* (1987), 15 B.C.L.R. (2d) 28 (S.C.), at para. 186, as authority for the impropriety of relying on a report with more than one author).

[141] West Moberly responds that "Exhibit B" is admissible on the same grounds as Exhibit "B" to Dr. Graham's Affidavit #1. In addition, West Moberly submits that although the report had more than one author, Ms. Hrychuk adopted the contents of the report as her own during her cross-examination.

[142] For the reasons set out above in respect of Exhibit "B" to Dr. Graham's Affidavit #1, I agree with BC Hydro that "Exhibit B" to Ms. Hrychuk's Affidavit #1 is likewise inadmissible as having been prepared for an extraneous and incompatible purpose.

[143] I also agree that it should be struck as the work product of more than one author. In her cross-examination, Ms. Hrychuk attributes the work on the "tables" to Ms. McConville. Although Ms. Hyrchuk testified that she (Ms. Hrychuk) "drafted the text", she added that Ms. McConville then "reviewed it. And we did some back and forth review of the report."

[144] In the circumstances, I agree with BC Hydro that it is unclear who, as between them, is ultimately responsible for the opinions in the report. It appears that both of them are. In any event, neither of the two credited co-authors properly certified their awareness of their duty of impartiality in preparing the report – in the case of Ms. Hrychuk that was done *post facto* (which I have found to be improper) and in the case of Ms. McConville, it was not done at all.

[145] "Exhibit B" to the Affidavit #1 of Ms. Hrychuk is therefore struck.

iii. The Impugned Lay Affidavits

[146] My rulings in this category are as follows:

Impugned Evidence	**Ruling**
Clarence Willson #1, paras. 26, 27, 29, 30, 37, 48, 49, 54, 60, 64, 71-74, 76, 88 and 92	Paras. 76 and 92 are struck as containing hearsay that does not fit within the principled exception or any other exception. The remainder of the impugned evidence is admissible. I agree with West Moberly that these paragraphs can properly be received in evidence on the basis that they reflect Mr. Willson's concerns about the anticipated consequences of the Project, informed by traditional knowledge of local flora and fauna. To the extent that his assumptions as to the scope or effect of the Project are incorrect, as BC Hydro argues, the objection goes to weight rather than admissibility.
George Desjarlais #1, paras. 64, 65, 68, 83, 85, 87, 93, 98	Paras. 64, 65, 68 (except for the last sentence) and 83 are struck as inadmissible lay opinion or argument, not presented as having been informed by traditional knowledge. The remainder of the impugned evidence is admissible on the same basis as the impugned evidence I have ruled admissible from the Affidavit #1 of Clarence Willson.
Bruce Muir #1, para. 17, Ex. A	Para. 17 is struck as inadmissible hearsay. First, it is not "necessary" because the same information could be adduced in evidence by other means, without resorting to hearsay (as indeed at least some of it has been). Second, there are no circumstantial guarantees of trustworthiness associated with the declarants' statements, so as to render them inherently "reliable." The same is true of the facts recorded in the report attached as Exhibit "A," which is not admissible for the truth of its contents except insofar as those contents are separately attested to first hand by Mr. Muir or another affiant.

C. The Applications to Strike Swain #2

i. Introduction

[147] All three of the defendants apply to strike all or parts of Swain #2 on the basis that it violates the rule protecting deliberative secrecy or is otherwise improper lay opinion or argument. Dr. Swain was formerly the chair of the JRP.

[148] The first affidavit of Dr. Swain ("Swain #1"), which West Moberly had originally sought to adduce as an expert report, was ordered struck by this Court prior to the hearing of the injunction application before me: *West Moberly (Prior Rulings)* at paras. 139-147. In that decision, Choi J. described the contents of Swain #1 in the following terms, at para. 139:

> [139] In my view, Dr. Swain's report largely outlines his views as to the frailties of the JRP's report and the BC Utility Commission Inquiry of 2017. His report, in effect, outlines an argument as to why the two reports the government relies on to construct Site C are erroneous.

[149] She found Swain #1 to be inadmissible as expert evidence on the following grounds:

> [140] I agree with the defendants that Dr. Swain's report is not necessary and not proper expert opinion because it is argument. Arguments are the domain of counsel, not of expert witnesses. Expert reports are tendered because they assist the trier of fact in deciding issues it could not, otherwise, make without the expert's special knowledge.
>
> [141] Even if I were to have found that Dr. Swain's report meets the threshold criteria at stage one of the analysis, I would nevertheless find that its prejudice far outweighs any probative value, and thus fails the second stage of the *White Burgess* test.
>
> …
>
> [144] In my view, the majority of the report displays a bias. By this, I do not suggest that Dr. Swain's views would change if he were retained by the defendants. Rather, Dr. Swain is committed to a purpose. This is inconsistent with an expert's obligation to the court to provide an opinion that is impartial, independent and absent of bias (*White Burgess* at para. 32). While possessing a passionate belief is not in and of itself a basis to exclude Dr. Swain's report, I find that his orientation and opinions are so entrenched that these render him unreliable to the trier of fact.
>
> [145] Accordingly, I would also exclude Dr. Swain's evidence at the second stage of the *White Burgess* test because it fails to meet the necessary threshold of independence and impartiality. Dr. Swain's affidavit #1 is struck.

[150] One week after Swain #1 was struck, West Moberly filed and served (and now proposes to rely on) Swain #2. West Moberly presents Swain #2 as a lay rather than an expert affidavit. Some, but not all, of the contents of Swain #1 has been carried over and repeated in Swain #2. Despite the changes, Swain #2 continues, for the most part, to fit Choi J.'s description of Swain #1, quoted above. The purpose of the evidence has not changed – West Moberly seeks to rely on Dr. Swain's evidence primarily to call into question the reliability of the conclusions in the JRP report.

[151] In particular, Dr. Swain criticises the JRP report and describes the constraints under which it was prepared. He purports to speak on behalf of the three panel members in urging conclusions that are different from those in the JRP report, sometimes on the basis of information that has come to light since the report was prepared or that was not otherwise available to the JRP at the time.

[152] BC Hydro argues that the affidavit contains improper lay opinion or argument and applies to strike paras. 5-37 on that basis. British Columbia reiterates BC Hydro's objections, focusing on paras. 5, 28-29, 34 and 35-38. British Columbia also applies to strike paras. 5-8, 10, 12, 14-15, 17-18, 20, 22-23, 25-26, 28-29, 31, 33-35 and 37 on the basis that those paragraphs violate the rule protecting deliberative secrecy. Canada also applies to strike parts of the affidavit (i.e., paras. 7, 14, 17-18, 20, 22-23, 25-26, 28-29, 31, 33, 35, and 37) on that latter basis.

[153] West Moberly responds that Swain #2 contains important evidence supporting its injunction application, insofar as it tends to undermine the conclusions in the JRP report, upon which BC Hydro and British Columbia rely heavily in seeking to justify proceeding with the Project. West Moberly says that the scope of Swain #2 is much narrower than Swain #1 and that it no longer contains the offending passages that Choi J. struck as argument.

[154] West Moberly argues further that the rule protecting deliberative secrecy is not engaged here, but if it is, only certain parts of the affidavit are affected. To the extent that parts of the affidavit are

found to violate the rule, West Moberly submits that the veil of secrecy should be lifted in the circumstances of this case.

ii. Should the impugned portions of Swain #2 be struck as violating the rule protecting deliberative secrecy?

a. The Rule and its Scope

[155] The rule protecting deliberative secrecy is an exclusionary rule that is rooted in certain fundamental constitutional principles, most notably the doctrine of separation of powers and the related notion of judicial independence.

[156] The rationale for the rule was recently explained by Gascon J., writing for the majority of the Court in *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval,* 2016 SCC 8 ("*Laval*"), at para. 57:

> [57] The scope of deliberative secrecy is clearly defined in the case law. In *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, the Court, per McLachlin J. (as she then was), stressed that the protection of the process by which judges reach their decisions is a core component of the constitutional principle of judicial independence:
>
> > The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence . . . . As stated by Dickson C.J. in *Beauregard v. Canada*, [[1986] 2 S.C.R. 56,] the judiciary, if it is to play the proper constitutional role, must be completely separate in authority and function from the other arms of government. It is implicit in that separation that a judge cannot be required by the executive or legislative branches of government to explain and account for his or her judgment. To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence.
> >
> > [Emphasis added [by Gascon J.]; pp. 830-31.]
>
> The need to shield the judicial decision-making process from review by the other branches of government flows from the principle of separation of powers that is reflected in the constitutional requirement of judicial independence.

[157] The rule has been invoked to prevent other branches of government from compelling judges to explain or account for their judgments, as it was in *MacKeigan v. Hickman*, the case cited by Gascon J. There, the Royal Commission investigating the wrongful conviction of Donald Marshall sought to question two appellate judges about their rationale for ruling in a particular way when the Marshall case had come before them. The "Orders to Attend" issued by the Commission were quashed at first instance by Glube C.J., whose decision was ultimately upheld at each level on appeal.

[158] But the rule operates to prohibit more than just compelled testimony from judges about their deliberations. It has also been held that judges are not *competent* to testify about their deliberations. That is because the purpose of the rule is not to protect judges' personal interests, but rather "to ensure public confidence in an impartial and independent judicial system": *Kosko c. Bijimine,* 2006 QCCA 671 at para. 40, citing *Valente v. the Queen*, [1985] 2 S.C.R. 673, at 689.

[159] Gascon J. reiterated in *Laval* (at para. 64) that "[j]udges cannot of course choose to lift deliberative secrecy to explain the reasoning behind their conclusions whenever it suits them to do so." Among the broader rationales that have been offered for expanding the operation of the rule in this way is to prevent judges themselves from subsequently augmenting or qualifying their reasons, which offends the need for finality in judicial decision-making and undermines public confidence in the administration of justice.

[160] In addition, the ambit of the rule has been widened further still, so as to make it applicable not only to judges but also to administrative decision-makers performing adjudicative functions. *Ermina v. Canada (Citizenship and Immigration)* (1998), 167 D.L.R. (4th) 764 (F.C.), is an example of such a case. It concerned an application for judicial review of a decision of the Immigration and Refugee Board that vacated the applicant's refugee status. At the hearing before the Board, the applicant sought to elicit testimony from the chair of the panel that had originally granted her that status. The Board refused to hear such testimony relying on the rule protecting deliberative secrecy. The applicant then tried to adduce an affidavit sworn by the former chair and containing the same information. The Board refused to receive that as well.

[161] On the ensuing application for judicial review, Tremblay-Lamer J. upheld the Board's decisions in that regard, finding that the former chair was neither a compellable nor a competent witness. At para. 10, he explained that "[d]ecisions must be final and subject only to review in the ordinary channels." In reaching that conclusion, Tremblay-Lamer J. relied heavily on *Agnew v. Ontario Association of Architects* (1987), 64 O.R. (2d) 8 (Div. Ct.) at 14, in which the Court elaborated on the rationale for extending the rule to administrative decision-makers:

> The authorities do not make it clear whether this general rule applies equally to members of administrative tribunals. In logic, there is no reason why it should not. The mischief of penetrating the decision process of a tribunal member is exactly the same as the mischief of penetrating the decision process of a judge.
>
> Apart from the practical consideration that tribunal members and judges would spend more time testifying about their decisions than making them, their compellability would be inconsistent with any system of finality of decisions. No decision and *a fortiori* no record, would be really final until the judge or tribunal member had been cross-examined about his decision. Instead of review by appeal or extraordinary remedy, a system would grow up of review by cross-examination.
>
> In the case of a specialized tribunal representing different interests the mischief would be even greater because the process of discussion and compromise among different points of view would not work if stripped of its confidentiality.
>
> It is not necessary to catalogue all the different forms of mischief that might result from the compellability of judges and tribunal members to testify about their decisions. It is sufficient to say that there is no reason in logic to distinguish between a judge and a member of the statutory tribunal under consideration here.

[162] Although they are presumptively covered by the rule, administrative decision-makers performing adjudicative functions will not necessarily receive the same level of protection as judges. In *Tremblay v. Quebec (C.A.S.)*, [1992] 1 S.C.R. 952 ("*Tremblay*"), Gonthier J., writing for the Court (at 966), held that while "secrecy remains the rule" for administrative decision-makers, the protection they receive may be lifted in certain cases, particularly where doing so is seen as necessary to allow for a

meaningful review of the fairness of their process. One of the factors that Gonthier J. relied upon in lifting the veil of secrecy in that case was that there was no appeal available from the decision-maker. This circumstance left the applicant with no recourse in challenging the decision other than by way of judicial review.

[163] Since *Tremblay* was decided, it has also been held that not all decisions will attract even that qualified form of protection. In *Laval*, the executive committee of a school board had terminated a teacher in an *in camera* session. In the course of the ensuing labour grievance, the teacher's union sought to question the members of the executive committee about their reasons for the termination. The school board refused to permit this, arguing that it would violate the rule of deliberative secrecy. The Supreme Court of Canada disagreed, holding that the school board could not properly invoke the rule because its executive committee had not been acting as a "quasi-judicial decision-maker" or indeed exercising any public function at all in terminating the teacher. Instead, it was found to be acting only as a private employer, having, in that capacity, no entitlement to assert deliberative secrecy.

[164] Gascon J., writing for the Court on this point, specified that the rule, even in its qualified form, does not protect the deliberations of all administrative bodies but only those performing "adjudicative functions":

> [59] The appellants argue on the basis of *Tremblay* that this principle resolves the question whether the members of the executive committee must testify. Because its members were officers of the Board, a public body that holds its powers and makes its decisions under the EA [i.e., the *Education Act*, (Quebec)], the committee must, the appellants submit, be considered to be one of the administrative decision-making authorities to which *Tremblay* applies. In the appellants' submission, given that the Union has made no allegation of bad faith or of a procedural defect, deliberative secrecy should not be lifted to allow the members to be examined about their in camera deliberations.
>
> [60] I disagree. *Tremblay* does not apply to every administrative organization required to perform [TRANSLATION] "decision-making functions", to borrow the expression the appellants use to characterize a type of administrative act that is not limited to adjudicative functions (A.F., at para. 108). Once again, Tremblay is clear and does not have the scope the appellants seek to attribute to it. That case concerns the deliberative secrecy that applies to administrative tribunals, that is, to bodies that perform adjudicative functions. Moreover, the cases the appellants cite to illustrate the application of deliberative secrecy support this view. In *Duke of Buccleuch* [i.e., *Duke of Buccleuch v. Metropolitan Board of Works* (1872), L.R. 5 H.L. 418] *O'Rourke* [i.e., *O'Rourke v. Commissioner for Railways (1890),* 15 App. Cas. 371], *Ward* [i.e., *Ward v. Shell-Mex*, [1952] 1 K.B. 280], and *Knight Lumber* [i.e., *Re Knight Lumber Co.* (1959), 22 D.L.R. (2d) 92], the arbitrators and administrative tribunal members the parties wished to call to testify had exercised powers of an adjudicative nature. The same is true of *Noble China Inc. v. Lei* (1998), 42 O.R. (3d) 69, in which the Ontario Court (General Division) held that the deliberations of an arbitrator in a commercial arbitration process were protected by deliberative secrecy as a result of *Tremblay*. Deliberative secrecy was also found to apply to deliberations of administrative tribunals performing adjudicative functions in *Comité de revision de l'aide juridique v. Denis*, 2007 QCCA 126, and *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37, 253 N.S.R. (2d) 134.
>
> [Emphasis added].

[165] The issue to be decided here is therefore whether the JRP was performing an "adjudicative function" in that sense when it conducted its review and prepared and issued its report, in which case

its deliberations during that process are covered by the rule. Otherwise, they are not.

b. The Parties' Arguments

[166] Canada and British Columbia contend that the JRP was performing an adjudicative function so as to attract the protection of the rule. They advance three main arguments in support of that contention.

[167] First, they rely on s. 45(7) of the *CEAA*, which confers immunity from suit on members of a review panel like the JRP. That provision states as follows:

> (7) No action or other proceeding lies or is to be commenced against a member of a review panel for or in respect of anything done or omitted to be done during the course of and for the purposes of the assessment by the review panel.

[168] Canada and British Columbia argue that it is a necessary corollary to the granting of immunity in those terms that the review panel must also be protected by deliberative secrecy.

[169] Second, Canada and British Columbia argue that the rule applies to the JRP because Dr. Swain was specifically made aware of it and agreed to be governed by it before assuming his position as chair. They say that it was a condition of Dr. Swain's appointment as chair that he abide by the guidelines set out in Annex A of the Canadian Environmental Assessment Agency's publication entitled, "*Your Role in an Assessment by a Review Panel: A Guide for Chairpersons and Members"* (the "*Guide*"). With his engagement letter, Dr. Swain was provided with a copy of and encouraged to read the *Guide* carefully.

[170] The *Guide* emphasizes, among other things, the confidentiality of panel deliberations and the importance of maintaining public trust in the integrity of the process. It also cautions panel members – and the chair in particular – to avoid expressing personal views outside of the panel's deliberations:

> **Conduct of the review panel**
>
> All persons appointed to membership on review panels are expected to conduct themselves in a manner that is in keeping with the high public profile of the review panel and with the basic principles of the environmental assessment process – impartiality, transparency and equity. [….]
>
> Under the Act, members of the review panel have immunity from legal proceedings in respect of their involvement in the assessment by the review panel. In the case where a court challenge may be launched on the panel review process or on the report of the review panel, members are immune to these legal proceedings.
>
> With respect to the operations of the panel review, the review panel chairperson and members are expected to remain objective and impartial and so must:
>
> …
>
> not make oral or written communications about substantive issues associated with the panel review with anyone except other review panel members and the secretariat;
>
> …
>
> respect the fact that the internal deliberations of the review panel are confidential; …
>
> **Review panel confidentiality issues**
>
> Review panel deliberations often require frank exchanges among review panel members exploring alternative ways to characterize and resolve issues. To ensure that individual review

> panel members will feel free to express their views, such exchanges must be confidential. ….
>
> The deliberations of review panels must be confidential to ensure that their conclusions and recommendations are not disclosed to the proponent, the media, the public or other parties until the Minister of the Environment releases the report. Thereafter, comments to the public by the review panel, if any, should focus on explaining the conclusions and recommendations in its report, rather than on the deliberation leading to them. The review panel chairperson, in particular, should take care to present the review panel's conclusions and recommendations rather than his/her own views.
>
> [Citations omitted; underlining added]

[171] Annex A to the Guide similarly provides that:

> In order for the public to have confidence in the integrity of the panel review process, objectivity and impartiality must be maintained. …
>
> You should be unbiased relative to the Project prior to your appointment and throughout the course of your official duties. ... Maintaining review panel and committee confidences, throughout the panel review or committee process and after the panel review has been completed, will also reduce the possible perception of conflict and will enhance public trust in the entire environmental assessment process.
>
> [Emphasis added]

[172] Canada and British Columbia's third ground is that the JRP was performing the kind of function that has already been held to attract the protection of the rule. In particular, they say that the issue has been authoritatively settled in their favour by the judgments at each level in *Taseko Mines Limited v. Canada (Environment)*, 2014 FC 371, aff'd 2015 FCA 254, leave to appeal ref'd [2016] S.C.C.A. No. 27 ("*Taseko*").

[173] They also argue that the function performed by the JRP was similar to that performed by commissions or boards of inquiry that have been held to enjoy the protection of deliberative secrecy, notwithstanding that they do not make decisions as such: *Stevens v. Canada (Attorney General)*, 2003 FC 1259, at paras. 20-21.

[174] West Moberly responds that the central but unstated assumption underlying the decisions at each level in *Taseko* (i.e., that the review panel was performing an adjudicative function thereby entitling it to the protection of deliberative secrecy) was incorrect and has since been overtaken by subsequent authority, including, most importantly, *Gitxaala Nation v. Canada*, 2016 FCA 187 ("*Gitxaala*") and *Tsleil-Waututh Nation v. Canada (Attorney Genera)*, 2018 FCA 153 ("*Tsleil-Waututh Nation*"). Those authorities have overtaken *Taseko*, insofar as they hold that a report prepared by a review panel under the *CEAA* is not subject to judicial review because the ultimate decision on the project is made by others, rather than the panel.

[175] West Moberly submits that the more pertinent authority on this point is *Apotex Inc. v. Alberta (Minister of Health and Wellness)*, 2006 ABCA 133 ("*Apotex*"), in which the Court held that purely advisory bodies whose decisions do not finally dispose of the parties' rights are not protected by the rule. West Moberly says that the JRP was performing a purely advisory function (as opposed to an adjudicative one) because the JRP was not empowered to decide anything.

c. Analysis

[176] I am not persuaded that the deliberative secrecy rule applies here simply because the JRP members are immunized from liability under s. 45 of the *CEAA*, as Canada and British Columbia argue. It is possible for Parliament to confer such immunity on officials who do not perform adjudicative functions.

[177] Nor am I persuaded that Dr. Swain's acknowledgment of the contents of the *Guide*, if that is what occurred, is dispositive of, or even particularly helpful in resolving the admissibility question before me. The authorities suggest that the applicability of the rule turns on the nature of the function performed by the JRP rather than on the parties' understanding of the various duties and obligations that Dr. Swain may have agreed to take on when he assumed his position.

[178] I agree with Canada and British Columbia, however, that *Taseko* is dispositive of the issue before me insofar as it stands for the proposition that the deliberations of a review panel constituted under the *CEAA* are covered by the rule protecting deliberative secrecy. Their application to strike those parts of Swain #2 that violate that rule must therefore be allowed unless I find *Taseko* to have been wrongly decided in that regard.

[179] That case involved an application seeking judicial review of the report of an independent federal review panel constituted under the *CEAA* to conduct an assessment of a mining project. The review panel had concluded, among other things, that the project would result in significant adverse environmental impacts. After considering the review panel's report, the Governor in Council decided not to allow the project to proceed. The proponent sought judicial review of the review panel's report. It alleged that the review panel had relied excessively on its secretariat in reaching its conclusions. It also complained that the secretariat had, in conducting the review, improperly engaged employees of a competitor who were biased against the project. In the course of the application for judicial review, the applicant sought an interlocutory order from a prothonotary to compel production of certain documents that were expected to illuminate the role of the secretariat in the preparation of the review panel's report. The application was refused.

[180] The applicant appealed that decision. In dismissing the appeal, Harrington J. first considered the question of whether the review panel's report was even subject to judicial review at all, given that it was the Governor in Council who had made the final decision, rather than the review panel. In concluding that it was, Harrington J. relied on *Pembina Institute for Appropriate Development v. Canada (Attorney General),* 2008 FC 302, in which the function of an environmental review panel constituted under predecessor legislation was described in the following terms:

> 15 The purpose of environmental assessment was described by the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, [1992] S.C.J. No. 1 (QL), at para. 95. While the case involved assessment under *the Environmental Assessment and Review Process Guidelines Order*, S.O.R./84-467 (the "EARPGO", predecessor to the current CEAA), I find the general principles espoused to be particularly instructive:

> Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., *Environmental Rights in Canada* (1981), 245, at p. 247:
>
> > The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.
>
> As a planning tool it has both an information-gathering and a decision-making component which provide the decision-maker with an objective basis for granting or denying approval for a proposed development; see M. I. Jeffery, *Environmental Approvals in Canada* (1989), at p. 1.2, (SS) 1.4; D. P. Emond, *Environmental Assessment Law in Canada* (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision-making.

[181] Having found that judicial review properly lies from the review panel's report, Harrington J. went on to consider the applicant's appeal from the prothonotary's refusal to order production of documents. He dismissed the appeal relying on the "basic premise" that the review panel's deliberations were protected under the deliberative secrecy rule. His reasons for doing so are set out at para. 24 of the decision, as follows:

> [24] Furthermore, the basic premise is that such instructions, as may have been given by the Panel to the Secretariat, are immune from disclosure on the grounds of deliberative secrecy. The leading case as applied to administrative tribunals is [*Tremblay*].
>
> > 27 Additionally, when there is no appeal from the decision of an administrative tribunal, as is the case with the Commission, that decision can only be reviewed in one way: as to legality by judicial review. It is of the very nature of judicial review to examine inter alia the decision-maker's decision-making process. Some of the grounds on which a decision may be challenged even concern the internal aspect of that process: for example, was the decision made at the dictate of a third party? Is it the result of the blind application of a previously established directive or policy? All these events accompany the deliberations or are part of them.
> >
> > 28 Accordingly, it seems to me that by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Of course, secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice. This is indeed the conclusion at which the majority of the Court of Appeal arrived, at pp. 2074-75:
> >
> > > [TRANSLATION] However, this confidentiality yields to application of the rules of natural justice, as observance of these rules is the bedrock of any legal system.
> > >
> > > In exceptional cases, therefore, the confidentiality requirement may be lifted when good grounds for doing so are first submitted to the tribunal.

[182] The applicant brought a further appeal from that decision to the Federal Court of Appeal, which was refused on the basis that the review panel's report did not disclose:

> … a sufficient basis to conclude to [sic] the existence of valid or good grounds justifying the lifting of the veil of secrecy. This is not, in our respectful opinion, one of those exceptional cases where, in the view of the Supreme Court of Canada, it would be proper to allow the production of documents which would normally fall under the veil of the secrecy of deliberations.

[183] The Court of Appeal did not specifically consider whether the review panel was the kind of decision-maker that is protected by the rule, but instead, like Harrington J., evidently just assumed that it was.

[184] I note that there is, in addition to *Taseko*, more recent authority specifically holding, contrary to West Moberly's submission, that *Laval* does not preclude the application of the rule to protect the deliberations of advisory bodies that make recommendations but no decision.

[185] Such a finding was made in *Raymond v. Halifax (Regional Municipality)*, 2018 NSSC 149, in the context of an appeal to the Court from a decision by Ms. Dempsey, the Access and Privacy Officer for the Halifax Regional Municipality ("HRM"), refusing to disclose certain records to the appellant under Nova Scotia's freedom of information legislation. In the course of the appeal, the appellant had issued subpoenas seeking, among other things, documents and testimony from the authors of a report that had been prepared by Nova Scotia's Office of the Information and Privacy Commissioner ("OIPC"), as required by statute, for the purpose of providing Ms. Dempsey with background and recommendations to assist her in making her decision.

[186] The OIPC and the HRM applied to quash the subpoenas, relying on, among other things, the rule protecting deliberative secrecy.

[187] Brothers J. quashed the subpoenas on various grounds, one of which was that the rule protecting deliberative secrecy applied in the circumstances. She explained her ruling in that regard as follows at paras. 30-36:

> [30] Tully's report [Ms. Tully was Nova Scotia's Information and Privacy Commissioner, acting here as a review officer for the OIPC], attached as Exhibit A to the affidavit of Amanda George, is 21 pages long and concludes with thirteen specific findings and fourteen recommendations concerning access to records. Tully rendered no decision, and legislatively could not render a decision. The decision of the responsible officer, Dempsey accepts some of the Tully recommendations and rejects others. Dempsey, the Privacy Officer at the HRM, could accept, reject, or partially accept any recommendations. The Tully report, with recommendations, is before the court on this statutory appeal, not as the subject of the appeal but as background information and speaks for itself.
>
> …
>
> [32] To seek evidence from Tully and Burchill [an investigator with the OIPC] is to go behind the OIPC report, which is not permitted. The information, and what the OIPC considered in reaching its recommendations, is not appropriate subject matter for a subpoena. Deliberative secrecy applies here. The process undertaken to come to the recommendations should not be disclosed; such an order for disclosure could potentially have a chilling effect.
>
> [33] The appellant argues that she needs to know what information was considered and presented to the OIPC. This argument is specifically dealt with in the case law concerning deliberative secrecy. As Cromwell, J.A. (as he then was) stated in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37:
>
> > 1 Members of administrative tribunals generally cannot be required to testify about how or why they reach their decisions. This rule of deliberative secrecy protects their time and independence and promotes candid collegial debate.
>
> [34] In *Cherubini*, *supra*, the court determined that how or why an administrative tribunal reached a decision was protected by deliberative secrecy. While administrative tribunals cannot

rely on this principle to the same extent as judicial tribunals, I find in this matter the protection exists. The appellant has offered no valid reason to lift deliberative secrecy in this instance.

[35] Although the report of the OIPC is one of recommendations and not a decision *per se*, the principles regarding the compellability of administrative decision-makers and deliberative secrecy applies. This is supported by *Commission scolaire de Laval c. Syndicate de l'enseignement de la region de Laval*, 2016 SCC 8, and *Cherubini*, supra. In *Cherubini*, Cromwell J.A. said:

> 14 The principle of deliberative secrecy prevents disclosure of how and why adjudicative decision-makers make their decisions. This protection is necessary to help preserve the independence of decision-makers, to promote consistency and finality of decisions and to prevent decision-makers from having to spend more time testifying about their decisions than making them...
>
> 15 At the core of the principle is protection of the substance of the matters decided and the decision-maker's thinking with respect to such matters: *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952 at 964-65. Deliberative secrecy also extends to the administrative aspects of the decision-making process - at least those matters which directly affect adjudication - such as the assignment of adjudicators to particular cases: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 per McLachlin J. (as she then was) at 831-33.
>
> 16 The Supreme Court has confirmed that deliberative secrecy is the general rule for administrative tribunals. However, the Court has also made it clear that administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals: *Tremblay* at 968.

[36] Most of the documents sought through the subpoenas would go to the preparation of the recommendation report, a deliberative function. …

[188] On the other hand, West Moberly's submission finds some support in *Apotex*. At issue there was whether the rule operated to protect the deliberations of an expert committee, constituted by statute to provide advice and recommendations to a government minister in order to inform the minister's decision about whether to add a particular drug to a prescribed list. The Court held that it did not.

[189] It is important to understand the nature of the distinction that the Court drew in arriving at that conclusion. The legislation under which the committee was formed allowed for the formation of two kinds of committees, as cited in *Apotex* at para. 30:

> A Minister may establish boards, committees or councils that AHW [i.e., Alberta's Ministry of Health and Wellness] considers necessary or desirable to act <u>in an advisory or administrative capacity</u> in connection with matters under AHW's administration.
>
> [Emphasis added].

[190] The ministerial order creating the committee stated that the purpose of the committee was to provide "advice and recommendations to the Minister respecting the therapeutic value and cost effectiveness of drug products." The Court held (at para. 32) that the deliberations of the committee were not covered by the rule protecting deliberative secrecy because the committee was not constituted to perform an "administrative" function under the statute, but rather only an "advisory" one:

> [32] The *Government Organization Act* therefore provides that whatever board, committee or council AHW establishes will be created either for the purpose of advising AHW, or for the purpose of acting in an administrative capacity. The Ministerial Order plainly indicates that the Expert Committee has been selected to act in an advisory capacity. Further, the Expert Committee makes no decisions, but only recommendations to the Minister of AHW. <u>It is the</u>

> Minister that is the final decision-maker and who is ultimately responsible to parties attending before the Expert Committee. Therefore, the Expert Committee is not an administrative body and is not protected by deliberative secrecy.
>
> [Emphasis added].

[191] Canada and British Columbia argue that the terms of reference for the JRP are different and place it, at least partly, on the other side of that line. Those terms of reference state, among other things, as follows:

> The Joint Review Panel roles and responsibilities are set out in the Agreement [i.e., the "Amended Agreement To Conduct a Cooperative Environmental Assessment, Including the Establishment of a Joint Review Panel, of the Site C Clean Energy Project"]
>
> …
>
> 3.1 The Joint Review Panel must make a determination on the sufficiency of the EIS in accordance with the Terms of Reference …
>
> …
>
> 1.13. Following the completion of the public hearing, the Joint Review Panel must prepare and submit to the federal Minister of the Environment and the Executive Director of EAO, a report in accordance with the Terms of Reference, which must include:
>
> - a description of the Joint Review Panel process;
> - the rationale, conclusions and recommendations of the Joint Review Panel relating to the environmental assessment of the Project, including any recommended mitigation measures and follow-up programs;
> - an identification of those conclusions that relate to the environmental effects to be taken into account under Section 5 of the CEAA 2012;
> - an identification of recommended mitigation measures that relate to the environmental effects to be taken into account under Section 5 of the CEAA 2012;
> - a summary of any comments received, including those from the public and Aboriginal Groups;
> - recommendations with respect to conditions to be attached to the Environmental Assessment Certificate; and
> - an executive summary in both official languages.
>
> [Emphasis added].

[192] Nevertheless, like the advisory committee in *Apotex*, the JRP did not make the ultimate decision under its governing legislation. A review panel is stated to have the following duties under s. 43 of the *CEAA*:

> 43 (1) A review panel must, in accordance with its terms of reference,
>
> (a) conduct an environmental assessment of the designated Project;
>
> (b) ensure that the information that it uses when conducting the environmental assessment is made available to the public;
>
> (c) hold hearings in a manner that offers any interested party an opportunity to participate in the environmental assessment;
>
> (d) prepare a report with respect to the environmental assessment that sets out
>
> (i) the review panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program, and
>
> (ii) a summary of any comments received from the public, including interested parties;

(e) submit the report with respect to the environmental assessment to the Minister; and

(f) on the Minister's request, clarify any of the conclusions and recommendations set out in its report with respect to the environmental assessment.

[193] The only decision-makers in the *CEAA* scheme are the Minister and the Governor in Council.

[194] The role of the Minister is set out in s. 47(1):

47 (1) The Minister, after taking into account the review panel's report with respect to the environmental assessment, must make decisions under subsection 52(1).

[195] The "decisions" to be made are described in s. 52 as follows:

52 (1) For the purposes of sections 27, 36, 47 and 51, the decision-maker referred to in those sections must decide if, taking into account the implementation of any mitigation measures that the decision-maker considers appropriate, the designated Project

(a) is likely to cause significant adverse environmental effects referred to in subsection 5(1); and

(b) is likely to cause significant adverse environmental effects referred to in subsection 5(2).

(2) If the decision-maker decides that the designated Project is likely to cause significant adverse environmental effects referred to in subsection 5(1) or (2), the decision-maker must refer to the Governor in Council the matter of whether those effects are justified in the circumstances.

(3) If the decision-maker is a responsible authority referred to in any of paragraphs 15(a) to (c), the referral to the Governor in Council is made through the Minister responsible before Parliament for the responsible authority.

(4) When a matter has been referred to the Governor in Council, the Governor in Council may decide

(a) that the significant adverse environmental effects that the designated Project is likely to cause are justified in the circumstances; or

(b) that the significant adverse environmental effects that the designated Project is likely to cause are not justified in the circumstances.

[196] Similarly, under the *EAA*, the sole decision-maker is the Minister, not the JRP:

17 (1) On completion of an assessment of a reviewable Project in accordance with the procedures and methods determined or varied

(a) under section 11 or 13 by the executive director,

(b) under section 14 or 15 by the minister, or

(c) under section 14 or 15 by the executive director, a commission member, hearing panel member or another person

the executive director, commission, hearing panel or other person, as the case may be, must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

(a) an assessment report prepared by the executive director, commission, hearing panel or other person, as the case may be,

(b) the recommendations, if any, of the executive director, commission, hearing panel or other person, and

(c) reasons for the recommendations, if any, of the executive director, commission, hearing panel or other person.

(3) On receipt of a referral under subsection (1), the ministers

(a) must consider the assessment report and any recommendations accompanying the assessment report,

(b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and

(c) must

(i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the certificate to the proponent, or

(iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

[197] But these were not the same provisions that were before the Court in *Gitxaala*. That case concerned, among other things, numerous applications seeking judicial review of:

(a) the decision of the Governor in Council requiring the National Energy Board to issue certificates of public convenience and necessity concerning the Northern Gateway Project, subject to certain conditions; and

(b) the report of a joint review panel that had made that recommendation.

[198] At issue in that context was the effect of a unique legislative scheme integrating provisions of the *National Energy Board Act,* R.S.C. 1985, c. N-7 and only some of the provisions of the *CEAA* that are engaged in this case. Dawson and Stratas JJ.A., writing for the majority, emphasized the uniqueness of the legislative scheme before them at the outset of their analysis as follows, at para. 92:

> [92] This is the first case to consider this legislative scheme, one that integrates elements from the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012* and culminates in substantial decision-making by the Governor in Council. It is unique; there is no analogue in the statute book. Accordingly, cases that have considered other legislative schemes are not relevant to our analysis.
>
> [Emphasis added].

[199] They held that under that particular scheme, it was only the decision of the Governor in Council that was properly subject to judicial review, not the report of the joint review panel that made the recommendation leading to it. Their conclusions in that regard are set out at paras. 120-125 of the decision, as follows:

> [120] The legislative scheme shows that for the purposes of review the only meaningful decision-maker is the Governor in Council.
>
> [121] Before the Governor in Council decides, others assemble information, analyze, assess and study it, and prepare a report that makes recommendations for the Governor in Council to review and decide upon. In this scheme, no one but the Governor in Council decides anything.
>
> [122] In particular, the environmental assessment under the *Canadian Environmental Assessment Act, 2012* plays no role other than assisting in the development of recommendations submitted to the Governor in Council so it can consider the content of any decision statement and whether, overall, it should direct that a certificate approving the project be issued.

> [123] This is a different role—a much attenuated role—from the role played by environmental assessments under other federal decision-making regimes. It is not for us to opine on the appropriateness of the policy expressed and implemented in this legislative scheme. Rather, we are to read legislation as it is written.
>
> [124] Under this legislative scheme, the Governor in Council alone is to determine whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a 'report' within the meaning of the legislation: …
>
> [125] In the matter before us, several parties brought applications for judicial review against the Report of the Joint Review Panel. Within this legislative scheme, those applications for judicial review did not lie. No decisions about legal or practical interests had been made. Under this legislative scheme, as set out above, any deficiency in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not this Court. It follows that these applications for judicial review should be dismissed.

[200] *Tsleil-Waututh Nation* was decided under that same legislative scheme. At issue in that case were numerous applications seeking judicial review of a report by the National Energy Board recommending expansion of the Trans-Mountain pipeline system on certain conditions. The Governor in Council accepted those recommendations and directed the Board to issue a certificate of public convenience and necessity on those conditions. Certain of the applicants argued that the Board's report itself should also be subject to judicial review, despite *Gitxaala*, which they invited the Court to overrule as having been wrongly decided. Dawson J.A., writing for the Court, refused to do so and reaffirmed the soundness of the Court's earlier decision in *Gitxaala*.

[201] West Moberly argues that *Gitxaala* and *Tsleil-Waututh Nation* have effectively overruled *Taseko*. I disagree. The most that can be said is that those decisions may have overruled that aspect of the decisions in *Taseko* holding that judicial review properly lies from the report of a review panel under *CEAA* when the Governor in Council is the sole decision-maker. I do agree with West Moberly, however, that I can make nothing of the fact that the Supreme Court of Canada denied leave to appeal in *Taseko*: *R. v. Meston* (1975), 28 C.C.C. (2d) 497 at 505 (Ont. C.A.).

[202] But it is far less clear to me that *Gitxaala* and *Tsleil-Waututh Nation* have also effectively overruled the deliberative secrecy aspect of the ruling in *Taseko*. Those decisions do not deal with the question of deliberative secrecy at all, nor do they even mention *Taseko*. The fact that a review panel's report may be immune from judicial review does not necessarily mean that the deliberations of its authors attract no deliberative secrecy protection.

[203] The question before me therefore comes down to whether the JRP in this case can be said to have performed the same kind of limited function as the expert committee at issue in *Apotex*, as West Moberly argues. I am not persuaded that it can.

[204] Rather, I find that the reasoning of Harrington J. in *Taseko* on this point remains persuasive notwithstanding the subsequent decisions of the Federal Court of Appeal in *Gitxaala* and *Tsleil-Waututh Nation*. Those cases cannot have overruled the recognition by the Supreme Court of Canada in *Friends of the Oldman River Society,* cited and relied upon by Harrington J.*,* that the work of a review panel has "both an information-gathering and a decision-making component which provide

the decision-maker with an objective basis for granting or denying approval for a proposed development" or in other words, that "environmental impact assessment is simply descriptive of a process of decision-making."

[205] That dual role continues to be reflected in the legislation governing the mandate of the JRP in this case. First, a review panel constituted under the *CEAA* is a gatherer of information. It is required to hold public hearings (s. 43(1)(c)). It is vested with the same powers as a court of record to compel witnesses to testify and produce records (s. 45). Second, it is also a decision-maker. It is required to prepare a report setting out its "rationale, conclusions and recommendations" (s. 43(1)(d)(i)), emphasis added).

[206] Although the ultimate decision to grant or deny project approval is made by others (and so judicial review may not lie from a review panel's report), I find that the essential function that a review panel is required to perform under the *CEAA* is still, at least partly, an adjudicative one. In that sense, its role is closer to that of a commission of inquiry (held in *Stevens* to attract deliberative secrecy protection), than it is to the expert committee at issue in *Apotex*, which had no comparable duties or powers but could only provide "advice and recommendations" as requested by the minister.

[207] As an administrative decision-maker performing an adjudicative function, the JRP qualifies for deliberative secrecy protection.

[208] Moreover, the broader policy rationales articulated in the authorities cited above for extending the protection of deliberative secrecy to administrative decision-makers, such as promoting finality in decision-making, encouraging frank and open debate among those appointed to such panels and preventing them from having to spend more time testifying about their work on the panel than actually doing it, apply with equal force to a review panel constituted under the *CEAA*, like the JRP.

[209] I have therefore concluded that the deliberations of the JRP are protected by deliberative secrecy and consequently that the impugned statements in Swain #2 referring to those deliberations should be struck on that basis, unless there are good grounds for lifting the veil of secrecy in this case.

[210] This is not an application for judicial review like *Tremblay,* where a request was made to lift the veil in order to demonstrate a suspected breach of the rules of natural justice. The test for determining whether deliberative secrecy should be lifted in civil litigation was described by Cromwell J.A. (as he then was) in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37, as follows, at paras. 36-37:

> 36 What is the threshold for lifting deliberative secrecy in the context of a tort action? By analogy to the judicial review cases, it would seem that there must be evidence of a clearly articulated and objectively reasonable concern that a relevant legal right may have been infringed and that the proposed discovery will afford evidence of it. ...
>
> 37 I would also add this. The decision about whether to lift deliberative secrecy in a particular case involves a weighing of the competing interests of protecting tribunals from undue disclosure with the need of litigants to have access to information in order to assert their rights. Deliberative secrecy should not be lifted any more than necessary to provide access to the required information. It follows, therefore, that among the factors that may be taken into account

> in balancing these interests is what other sources of information are available to the party that would not intrude upon deliberative secrecy.

[211] I am not persuaded that that the deliberations of the JRP, as presented in Swain #2, could reasonably be said to meet that test. Even if I were to accept West Moberly's premise that there were "administrative and evidentiary limitations placed on the JRP's ability to assess the need for Site C," that would not be direct evidence of an infringement of the Treaty or other rights of West Moberly. Indeed, the JRP was specifically directed not to consider the question of whether the treaty had been or would be infringed by the Project and accordingly did not do so.

[212] In any event, this action is not about the validity of the JRP's process or even its conclusions *per se*. It is open to West Moberly to adduce evidence from other sources to question the justification presented for the Project, as it has done, without intruding upon the secrecy of the deliberations of the JRP.

[213] Nor do I accept West Moberly's alternative submission that Canada and British Columbia's sole reason for asserting deliberative secrecy on behalf of the JRP is to shield themselves from criticism or embarrassment. There is no basis in the evidence to support that contention.

[214] I am therefore striking the following paragraphs of Swain #2 on this ground: 7, 10 (last two sentences), 12 (last two sentences), 14 (last sentence), 15, 17 (last two sentences), 18, 20, 22, 23, 25, 26 (second sentence), 28, 29, 31, 33, 34, 35 and 37.

iii. Should Swain #2 be struck in whole or in part as otherwise improper?

[215] I also agree with BC Hydro and British Columbia that, apart from the violation of deliberative secrecy, almost all of Swain #2 is inadmissible as argument, impermissible lay opinion or otherwise improper.

[216] First, I have given no weight to those statements in Swain #2 in which Dr. Swain purports to speak on behalf of all three JRP members, rather than just himself. The following paragraphs fall into that category: 8, 10, 12, 14, 17, 20, 22 (first sentence), 25, 26, 28, 29, 31, 33 and 37.

[217] Second, I have given no weight to those statements in Swain #2 that convey Dr. Swain's opinions, particularly his efforts to reweigh the evidence and assess what his revised conclusions are or would have been in light of new information that he has now chosen to consider or that he or the panel members did not have available at the time. The following paragraphs fall into that category: 6, 8, 17, 18, 23, 25, 28, 29, 31, 34 and 35 (first sentence).

[218] Finally, I have given no weight to those paragraphs in which Dr. Swain relays information that is not the product of his own first-hand knowledge. The following paragraphs fall into that category: 15, 29, 34, 37-42.

[219] The remainder of Swain #2, for the most part, merely reproduces the conclusions of the JRP report or its terms of reference or other background documents – i.e., information that is already in the record from other sources.

IV. THE INJUNCTION ISSUES

[220] The test to be applied on an application for an interlocutory injunction is well-settled and was recently reiterated in *R. v. Canadian Broadcasting Corporation,* 2018 SCC 5 ("*CBC*"). That test requires that the applicant establish the following three elements:

(a) there is a serious question to be tried (in the case of a prohibitive injunction) or a strong *prima facie* case (in the case of a mandatory injunction);

(b) there is a risk of irreparable harm; and

(c) the balance of convenience supports granting an injunction.

[221] The parties' arguments on the injunction application raise the following issues:

(a) whether the injunction sought, in either of its iterations, is properly classified as a mandatory or a prohibitive one;

(b) whether West Moberly has made out either a "serious question to be tried" or "a strong prima facie case," as the case may be;

(c) whether there is a risk that West Moberly will suffer irreparable harm if neither form of injunction is granted;

(d) whether the balance of convenience favours an injunction;

(e) whether an expedited trial should be ordered; and

(f) insofar as continued construction work is permitted between now and trial, whether the defendants should be required to undertake not to rely on the product of that work as a basis for arguing that an injunction should not be granted following the trial.

[222] I will address each of those issues in turn.

V. DISCUSSION OF THE INJUNCTION ISSUES

A. Is the injunction sought, in either of its iterations, properly classified as a mandatory or a prohibitive one?

i. West Moberly's Argument

[223] West Moberly contends that the injunction it seeks, in either of its iterations, is a prohibitive one. It says that the proposed order would not compel the defendants to do anything. Rather, it is framed in entirely prohibitive terms. What is proposed to be enjoined is further work on the Project (or

alternatively only in the critical areas), *except to the extent* such work is necessary to ensure site safety, mitigate environmental impacts or preserve and maintain the product of the work done thus far.

[224] West Moberly argues that it is absurd to suggest that the lower "serious issue to be tried" standard would apply only if it had sought to enjoin all work, but because it is seeking an order permitting *some* work to be done in the interest of safety etc., it must therefore meet the higher "strong *prima facie* case" standard.

[225] West Moberly also argues that it is only where there is a "restorative" element to the relief sought that a proposed order can properly be treated as a mandatory one, and there is no such element in the order sought here.

ii. BC Hydro and British Columbia's Argument

[226] BC Hydro and British Columbia argue that the proposed order would amount to a mandatory injunction because it would require a great deal of work to be done that would not otherwise have to be done. That additional work is said to include the following:

(a) maintaining and protecting excavated areas from weather and partial slope failures or collapse;

(b) managing acid rock drainage and metal leachate issues;

(c) safely managing surface runoff and seepage water;

(d) establishing erosion and sediment protection measures;

(e) designing a plan to manage and maintain the protection of excavated areas;

(f) installing instrumentation such as slope indicators and piezometers for monitoring where instruments are not already in place;

(g) inspecting, maintaining and reporting for reservoir instrumentation including slope indicators and piezometers;

(h) inspecting and maintaining temporary access roads; and

(i) dealing with the suspension or termination of contracts.

[227] In addition, they say that the proposed order, in either of its iterations, would require BC Hydro to proceed with the Project in a manner that would be radically different from its current plan. It would require BC Hydro to apply for and obtain regulatory permits and approvals that are different from the ones that have already been obtained or are in the process of being obtained.

iii. Analysis

[228] The distinction between a mandatory and a prohibitive injunction, and the policy rationales driving it, were recently explained in *CBC* by Brown J., writing for the Court, at paras. 15-16:

> [15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR—MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial". The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR—Macdonald* as "extensive review of the merits" at the interlocutory stage.
>
> [16] A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions. While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR—MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take ... positive actions". For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the ... injunction are likely to be". In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.
>
> [Original emphasis. Citations and footnotes omitted].

[229] In those paragraphs, Brown J. identified what appear to be two main rationales for drawing a distinction between mandatory and prohibitive orders. First, it is seen as potentially unfair to resolve the action at an interlocutory stage and grant relief tantamount to a final judgment on the merits when the plaintiff can get restorative relief later, after both parties have had the opportunity to present their cases more fully at trial. Second, forcing the defendant to take positive action, such as restoring the *status quo ante*, may, for that reason or otherwise, be unduly burdensome for the defendant.

[230] Both factors are said to militate in favour of conducting an extensive review of the merits at the interlocutory stage before granting a mandatory order.

[231] I agree with BC Hydro that restorative action is identified only as an example of how a mandatory order can be unduly burdensome, but I disagree with the implicit suggestion in BC Hydro's argument that the question should therefore turn exclusively on how burdensome the proposed order will be. Brown J. recognised that truly prohibitive orders too can be very costly or burdensome for the defendant.

[232] In the last sentence of para. 15, Brown J. wrote as follows:

> The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the

> plaintiff, further demand what the Court described in *RJR—Macdonald* as 'extensive review of the merits' at the interlocutory stage."
>
> [Emphasis added]

[233] Granting the order sought here would not be equivalent to "a final determination of the action in favour of the plaintiff." That element of the rationale is therefore notably missing in this case. In this case, the positive action that the defendants would be required to take in order to comply with the order is not the relief that West Moberly is seeking in the claim. It will not give West Moberly something that it wants at the end of the trial or prevent the defendants from carrying on with the Project if they ultimately succeed at trial in defeating the claim. In summary, it will not lead to a premature resolution of the merits, which is one of the potential sources of unfairness in a mandatory order that was said in *CBC* to justify the distinction.

[234] Moreover, I also agree with West Moberly that the "overall effect" of the proposed order would be to prohibit further construction and related activities, subject only to certain exceptions.

[235] It is true, as BC Hydro and British Columbia argue, that the proposed order has a mandatory aspect to it, insofar as BC Hydro would be compelled for all practical purposes to carry out the preservation activities and otherwise alter its construction plans. I also do not doubt that the additional work that would be required would be significant in absolute terms. Nevertheless, I find the mandatory aspect of the proposed order to be incidental. Its significance would be a function of the massive scale of the Project rather than the essential nature of the proposed order. It is the *relative* significance of what the defendants would have to "do" as compared to what they would have to "refrain from doing" that is more important in this regard. I find that the significance of the latter clearly outweighs that of the former.

[236] I therefore conclude that the proposed order, in either of its iterations, is properly classified as a prohibitive one.

B. Has West Moberly made out a serious question to be tried?

i. West Moberly's Argument

[237] West Moberly says that it has presented a meritorious case that the Project is an unjustified infringement of its rights under Treaty 8. It alleges that Treaty 8, properly interpreted, confers the following rights:

(a) to hunt, fish and trap in connection with the Peace region;

(b) to continue without forced interference in the traditional mode of life and patterns of activity in the Peace region;

(c) to maintain a practical, cultural, and spiritual connection to the Peace region; and

(d) to conduct traditional, cultural, and spiritual activities at or in connection with the Peace region.

[238] West Moberly alleges that the W.A.C. Bennett and Peace Canyon dams adversely impacted on those rights without any real effort to consult with, let alone accommodate the interests of the Aboriginal peoples affected. If the Project is allowed to be completed, it will continue that history and infringe the Treaty by virtue of the cumulative effects of all three projects.

[239] West Moberly argues that it is highly unlikely that the Crown will be able to justify the infringement under the test set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 ("*Sparrow*"), and *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 ("*Tsilhqot'in Nation*"). Under that test, once an infringement is made out, the Crown must establish that:

(a) it discharged its procedural duty to consult and accommodate;

(b) its actions are backed by a compelling and substantial government purpose; and

(c) the infringement is consistent with the Crown's fiduciary obligations.

[240] This latter criterion involves inquiry into whether the infringement:

(a) is necessary to achieve the government's goal (rational connection);

(b) minimally impairs the Treaty right (minimal impairment); and

(c) is proportionate, such that "the benefits that may be expected to flow from that goal are not outweighed by the adverse effects on the Aboriginal interest."

[241] With respect to the first branch of the justification test, West Moberly says that although the consultation and accommodation that has occurred to date has previously been found to be adequate, that finding was made without West Moberly having had the opportunity to establish the broader interpretation of Treaty 8 that it advances in this action. If it is successful at trial on that question, it argues, the adequacy of the consultation and accommodation that has occurred thus far will have to be revisited.

[242] In any event, West Moberly argues that even if that issue has already been determined against it in previous litigation, the Crown must still satisfy the remaining two branches of the justification test and it will be unable to do so.

[243] In particular, it says that the Project is unnecessary because the province's anticipated demand for energy has been exaggerated and in any event other, less destructive sources of energy were never properly considered. The only reason the present government opted to proceed with the Project was to avoid the prohibitive cost of halting it. That is not a purpose that can properly be said to be so compelling and substantial as to justify the infringement, it is argued.

ii. BC Hydro and British Columbia's Argument

[244] BC Hydro and British Columbia submit that the proposed injunction cannot properly be granted because West Moberly has not made out even a serious question to be tried. Their main argument in that regard is that West Moberly's claim rests on a legally flawed interpretation of the Treaty and, as such, is bound to fail.

[245] The correct interpretation of the rights conferred by Treaty 8, including the oral promises that were made in conjunction with the written document, have already been the subject of extensive judicial pronouncement, particularly in the Supreme Court of Canada. BC Hydro and British Columbia rely in this regard on the decisions of the courts in *R. v. Badger*, [1996] 1 SCR 771 ("*Badger*"); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 ("*Mikisew 2005*"); *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 ("*Grassy Narrows*"); and *Keewatin v. Ontario (Natural Resources)*, 2013 ONCA 158 ("*Keewatin*").

[246] BC Hydro and British Columbia argue that those decisions make clear that the rights conferred under the Treaty are:

(a) confined exclusively to harvesting rights (i.e., hunting, trapping and fishing) and ancillary activities; and

(b) cannot be interpreted to protect a particular place such as the Peace River region, because such an interpretation would run contrary to the "taking-up" power.

[247] British Columbia relies in this regard also on an "Amended Economic Benefit Agreement" ("EBA") that the province entered into with West Moberly and others in 2009. British Columbia argues that under the EBA, West Moberly has already accepted payment in compensation for any infringement of the Treaty that occurs during the period of the agreement, which remains in force.

[248] The EBA states at s. 5.1(b) that it resolves all claim with respect to, among other things:

> …
>
> (b) compensation for infringement, during the Term of this Agreement, of rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982*, but not including compensation for alleged past infringements of rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982*, or for alleged infringements that may occur subsequent to the termination of this Agreement.

[249] BC Hydro and British Columbia argue that it is not necessary to consider the question of justification if there is no infringement made out or if West Moberly has already been compensated under the EBA. But if the Crown is called upon to justify an infringement, it is argued that the Crown has already met the first of the three branches of the justification test with the findings that have already been made in the judicial review proceedings previously brought by West Moberly and others, to the effect that the consultation and accommodation that has occurred in this case was sufficient and in keeping with the honour of the Crown: *Prophet #2,* at paras. 153-154 and *Prophet FC,* at paras. 61 and 69-70.

[250] With respect to the second and third branches of the justification test, BC Hydro and British Columbia argue that it has long been held that the taking up of land for the generation and production of electrical energy is a compelling and substantial objective.

[251] They also argue that it would be inappropriate for the Court to second guess whether the Project was the only way to meet the energy needs of the province in order meet the requirements of minimal impairment and proportionality. Such an exercise, it is argued, would require the Court to become the arbiter of provincial energy policy and to scrutinize and determine complex issues like load forecasting, the viability of the suggested alternative energy sources and their desirability.

iii. Analysis

[252] In *Penner v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 26 ("*Penner*"), Warren J. described the nature of the test that must be met to show a serious question to be tried, at para. 54:

> The jurisprudence has made it clear that the threshold is a low one. If the case is not obviously frivolous, the court will normally proceed to the irreparable harm and balance of convenience elements of the test without further examination of the merits.

[253] I find that West Moberly has made out a serious question to be tried, in the sense that the claim it advances is not "obviously frivolous." That does not mean, however, that it has demonstrated a clear path to success. In order to succeed at trial, West Moberly must prevail on a host of contested issues, each presenting their own challenges.

[254] The written text of the Treaty, even when read in light of the oral promises that were given, appears to focus on harvesting rights. West Moberly relies on contemporaneous reports of the negotiations suggesting that the Crown representatives also assured the Aboriginal peoples that there would be no forced interference more generally in their mode of life or patterns of activity, but there is little support in the jurisprudence for that broader interpretation.

[255] That being said, the existing jurisprudence does not expressly rule out West Moberly's broader interpretation either. It may be that the leading cases have tended to focus on harvesting rights because it is only those rights that have been asserted to date. *Badger* was about a prosecution for illegal hunting. *Mikisew 2005* concerned the placement, without proper consultation, of a road that went through or around a reserve and interfered with traplines and hunting. *Grassy Narrows* involved a claim that a logging permit would be incompatible with Treaty-protected harvesting rights.

[256] It would not be prudent on an interlocutory application such as this to attempt resolve the issue of whether the Treaty affords protection to cultural or spiritual practices unconnected to the harvesting rights expressly recognised in the written text of the Treaty and existing jurisprudence. In any event, I am not prepared to find at this stage that the claim based on the broader interpretation of the Treaty is, on that basis, "obviously frivolous."

[257] With respect to West Moberly's claim to treaty rights that are specifically "connected to the Peace," it is clear from the judgment of Binnie J. writing for the Court in *Mikisew 2005* (at para. 32) that Treaty 8 did not promise the First Nations "continuity of nineteenth century patterns of land use." West Moberly seeks to assert treaty rights linked to a specific place. That is problematic in view of the existing jurisprudence. But if West Moberly can show that the Peace River region has a special status among other places in its traditional territory, such that the treaty rights it asserts can only be exercised in connection with the Peace River region as it existed before the construction of the existing dams, then the cumulative effects of the previous projects on the Peace River region could, when combined with the Project, be said to give rise to an infringement. The Crown's "taking up" power cannot be exercised so as to leave West Moberly with no meaningful way to exercise its treaty rights.

[258] I agree with BC Hydro and British Columbia, however, that this aspect of the claim is also problematic because it is not clear what right West Moberly can properly assert under the Treaty that can only be exercised in the Peace River region. This appears to be a site-specific kind of claim rather than an activity-based claim. The evidence adduced on this application suggests, moreover, that West Moberly's treaty rights are exercised, for the most part, outside the Project footprint.

[259] West Moberly may also be able to make out an infringement by showing that so much of its traditional territory has been taken up in the vicinity of Site C and elsewhere that West Moberly is left with no meaningful ability to exercise one or more of its treaty rights. The claim is not currently framed in that way, however. The notice of civil claim (at para. 41) speaks of cumulative impacts of this Project and the other dams, not other kinds of resource-based projects elsewhere. Moreover, the extensive evidence adduced on this application is far from determinative in establishing that West Moberly is or will be unable to exercise its treaty rights meaningfully elsewhere.

[260] On the other hand, West Moberly has adduced some evidence indicating that the wider effects of the Project, particularly after the inundation of the reservoir, could have a negative impact on the vitality of the ungulates they hunt and the fish that they catch elsewhere in the traditional territory, that is, outside the Project footprint itself. Therefore, even if BC Hydro and British Columbia are correct in their submission that the Treaty protects only harvesting rights, it is at least arguable that the ongoing construction at Site C will leave West Moberly with no meaningful ability to hunt or fish there or elsewhere as a result of the many indirect impacts of the Project, such as habitat destruction.

[261] West Moberly relies in this regard on, among other things, the report of Dr. McNay, a biologist. That report raises concerns about the impact of the Project on wildlife in the area, both within and beyond the Project footprint. BC Hydro argues that Dr. McNay's report is of limited assistance because he did not render an opinion specifically addressing the impact of the Project on West Moberly's ability to exercise its Treaty rights in a meaningful way. Rather, his report merely questioned the reliability of other studies showing ungulate populations to be stable or growing in the area.

[262] The studies commissioned by BC Hydro for the EIS suggested that the Project is expected to kill approximately 300 moose (i.e., 5% of an estimated 5,500 moose in three management areas potentially affected by the Project). Nevertheless, both the EIS and the JRP concluded, after considering the report of Dr. McNay among other things, that the Project would have no lasting impacts on moose, elk, deer or caribou numbers.

[263] In addition, the provincial government plans to set aside additional lands as protected areas for animal habitat, especially ungulate winter range, including designating "old growth management areas," to replace habitat lost to the Project. It is expanding parks and conservancies within West Moberly's traditional territory and elsewhere. In 2016 the province introduced new moose hunting restrictions to shorten the season for non-Aboriginal hunters in an effort to bolster ungulate populations.

[264] With respect to the Project's anticipated impact on West Moberly's fishing rights, the studies commissioned by BC Hydro suggest that there will be a change in the species mix but overall there will be a net gain in fish habitat and biomass. West Moberly argues that this is misleading, given that those increases will not benefit their favoured species. That argument is problematic, argues BC Hydro, in view of West Moberly's failure to particularise the individual fish species that it favours, despite having been directed to do so by Choi J. several months before the hearing of this application: see *West Moberly (Prior Rulings),* at paras. 70-71.

[265] Nevertheless, it is not disputed that some migratory sub-groups of some fish species may be lost as a result of the Project and that some fish species (particularly arctic grayling and mountain whitefish) are not expected to survive, at least in the reservoir itself, although there is evidence that they will continue to thrive elsewhere. There is also some evidence to suggest that, overall, the population of grayling will increase and that there is at least some basis for optimism with respect to bull trout – both species favoured by West Moberly.

[266] One of the main concerns that West Moberly raises in connection with its fishing rights (and indeed its members' health generally) is the increase in methylmercury levels that the future reservoir is expected to cause in local fish. That issue is complicated by an ongoing debate about the persistence of elevated methylmercury levels in the Williston reservoir after many decades.

[267] Another contested area in the evidence is BC Hydro's contention that the adverse impacts of the Project on fish populations will be effectively mitigated with the planned fish passage measures. BC Hydro submits that these measures have a proven track record at other dams although West Moberly disputes this.

[268] Having considered the extensive record that was adduced for this application on these issues in particular, I find that West Moberly's claim that the Project will infringe the Treaty by its adverse impacts on the vitality of the animal and fish populations that West Moberly depends upon for the exercise of its treaty rights, in areas both within and outside the Project footprint, is arguable but not

strong. Much of the evidence on that question, both lay and expert, is contested and I am unable to resolve the many conflicts in that evidence definitively on this application, nor do I need to do so.

[269] With respect to the EBA, I agree with West Moberly that there is at least a triable issue as to whether it has released the Crown from liability only for claims seeking compensation for infringement of its treaty rights, as opposed to claims such as this one seeking injunctive relief. The EBA will remain as a possible defence to the claim at trial, however.

[270] In addition, even if West Moberly can show an infringement of the Treaty, it will still be open to the Crown to seek to justify the infringement and thereby defeat the claim. Here too, West Moberly's claim faces a number of significant hurdles.

[271] With respect to the first branch of the *Sparrow* test for justification, I agree with BC Hydro and British Columbia that it will be open to the Crown to rely upon the findings previously made by this Court and the Court of Appeal in the context of the judicial review proceedings as to the adequacy of the consultation and accommodation that has already occurred in this case.

[272] I also agree with British Columbia that West Moberly will have difficulty relying on inadequacies in the quality of the consultation that took place (or the complete lack of it) in respect of historical projects like the W.A.C. Bennett and Peace Canyon dams: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, at paras. 45-59. Although West Moberly argues that this case is distinguishable because the earlier projects involved similar works (hydroelectric dams) built by the same proponent (BC Hydro or its predecessors), it is at least questionable whether that distinction is a material one for this purpose.

[273] With respect to the second branch of the *Sparrow* test for justification, I also agree with BC Hydro and British Columbia that the authorities support the proposition that the need for hydroelectric power is a compelling and substantial public purpose and that the Crown would have a strong case in asserting that this element of the justification test is also satisfied on that basis.

[274] The next question that would have to be addressed in meeting the justification test is whether the infringement was consistent with the Crown's fiduciary obligations. I find that it is premature and in any event unnecessary to attempt to anticipate the answer to that question on this application, particularly in the absence of any findings as to the precise nature of the infringement in need of justification. Suffice it to say that the outcome of that inquiry is unclear.

[275] Finally, even if West Moberly succeeds in demonstrating an infringement of the Treaty that the Crown is unable to justify under the *Sparrow* test, it is also unclear that the appropriate remedy would be to order a permanent halt to the Project. Such an order would presumably have to be coupled with an ancillary order to restore the Project site to its pre-construction condition or something like it, assuming that would even be possible at that stage.

[276] In summary, although I have concluded that West Moberly has made out a serious question to be tried, I have also found that the case it advances for a permanent injunction to halt the Project is not a particularly strong one on either the law or the evidence. I will return to the weaknesses in West Moberly's claim on the merits in the context of my discussion of the balance of convenience.

C. Is there a risk that West Moberly will suffer irreparable harm if neither form of injunction is granted?

[277] At this stage of the analysis, the issue is "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": *RJR-Macdonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, at 341.

[278] Whether harm is "irreparable" for this purpose depends on the nature of the harm rather than its magnitude. It is "harm that either cannot be quantified in monetary terms or that cannot be cured": *Penner,* at para. 59. There must be a sound evidentiary foundation beyond mere speculation, but at the same time, "clear proof" is not required: *Vancouver Aquarium,* at paras. 58-60. The test is "whether or not there is a likelihood or probability or reasonable possibility of harm": *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2004 BCSC 1764, at para. 45; *Wahgoshig First Nation v. Ontario*, 2011 ONSC 7708, at para. 49.

[279] West Moberly asserts that it will suffer irreparable harm if an injunction is not granted. That harm lies in the many adverse impacts of the Project on the exercise of its treaty rights.

[280] West Moberly relies in this regard on, among other things, the decision of Grauer J. in *Taseko Mines Limited v. Philips,* 2011 BCSC 1675, at para. 65, where he noted that in an area that has already been affected by industrial activity, every additional incursion matters all the more:

> Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last. Each newly cleared trail remains a scar, for although reclamation is required, restoration is impossible. The damage is irreparable. It follows that if only a portion of the proposed new clearings and trails prove to be unnecessary, the preservation of that portion is vital.

[281] BC Hydro and British Columbia respond that West Moberly has not made out a real risk of irreparable harm. They submit that most of the alleged harm that West Moberly refers to will arise only after inundation. That is not scheduled to occur until the fall of 2023, at the earliest, which means that it is not likely to arise prior to trial.

[282] Although BC Hydro and British Columbia urge me to ignore the effects of inundation in assessing whether irreparable harm would flow from a failure to grant an injunction, West Moberly argues that the trial may not be completed before 2023 and therefore that the ultimate effects of inundation too must be weighed on the scales along with all of the other anticipated impacts of the Project.

[283] In any event, West Moberly says that the harm it fears will not be restricted to the period following inundation. Rather, it asserts that the Project will cause irreparable harm prior to inundation by the planned clearing of the reservoir area, the construction of the head pond, the construction of new sections of Highway 29, the clearing of the western end of the transmission line corridor and the construction of the transmission lines – all work to be done prior to inundation. The harm will flow from the loss of mature trees, construction noise, visual disturbances and the release of deleterious substances. In addition, West Moberly argues that irreparable harm may also arise from disruption to cultural practices during construction: *Williams v. British Columbia*, 2018 BCSC 1271 ("*Williams*"), at para. 15.

[284] I agree with BC Hydro and British Columbia that the case can be managed to ensure that a decision is forthcoming prior to inundation, which is currently scheduled for the fall of 2023, or five years from now. That leaves only the preparatory work in the interim. With respect to that work, however, I agree with West Moberly that it has the potential to cause irreparable harm to West Moberly's Treaty rights if West Moberly is ultimately successful in its claim, although I find that the potential for such harm prior to inundation will be on a far more modest scale.

[285] I agree with West Moberly that it is no answer to say, as BC Hydro and British Columbia do, that the anticipated harm will not be irreparable because the trees will grow back after they are cleared. If, as West Moberly alleges, the Peace River region is essential habitat for the wildlife on which it depends for the exercise of the treaty rights claimed, there is a possibility of irreparable harm flowing from the destruction of such habitat. In addition, the construction of the head pond has the potential to harm fish and fish habitat through increased sedimentation. Given the evidence that the species favoured by West Moberly are migratory, there is also some risk that those impacts will extend beyond the Project footprint. There is also risk of construction impacts on archaeological sites.

[286] For these reasons, I am satisfied that West Moberly has established a risk of irreparable harm if an injunction is not granted.

D. Does the balance of convenience favour an injunction?

i. Factors Weighing in Favour of an Injunction

[287] West Moberly portrays the injunction it seeks as the only means left to obtain access to justice and reconciliation in this case. It argues that despite the long history of regulatory review and litigation concerning the Project, no decision-maker yet has agreed even to consider, let alone resolve, whether the Project unjustifiably infringes West Moberly's treaty rights, despite West Moberly's repeated efforts to have that issue addressed. It is therefore essential, West Moberly argues, for it to have its "kick at the goal" before the goal itself is lost forever, which is what will occur if the injunction it seeks is not granted.

[288] I agree with West Moberly that preserving the essential subject matter of the claim is a consideration that weighs in favour of an injunction in this case. But I do not find that West Moberly

has a particularly strong claim, which limits the weight I am prepared to attach to this factor. In particular, for the reasons already canvassed, I have found that West Moberly has not established that it has a clear path to success at trial in making out an unjustified infringement of the Treaty and obtaining a remedy halting the Project permanently.

[289] West Moberly says that another factor weighing in favour of an injunction is that it has proposed a less onerous form of order that would allow work on the Project to continue during the injunction period as long as it occurs outside the designated critical areas. The degree to which a critical areas injunction would truly protect West Moberly's treaty rights while avoiding or at least significantly reducing the adverse impacts of a full project halt is disputed, however.

[290] BC Hydro argues that the configuration of the critical areas does not rest on a sound evidentiary or even logical footing. It calculates that approximately 60% of the Project work is planned to be done within them, while approximately 77.67% of the land that they cover is not required for the Project. Moreover, not all of the land that they cover is actually used for the exercise of treaty rights and indeed much of it has already been put to visibly incompatible uses.

[291] The critical areas were mapped by Steven DeRoy of Firelight Group, a consultant retained for this purposes by West Moberly. Mr. DeRoy holds a Master of Science in Geography. The data he used to create them was derived from interviews with individual West Moberly members at various times, many of which are not in evidence. West Moberly argues that it is permissible for an expert to rely on hearsay, although it acknowledges that doing so reduces the evidentiary value of the resulting report. But it says that the concern is at least partly answered by the report of Dr. Olson, an anthropologist retained by West Moberly who reviewed the configuration of the critical areas, as drawn by Mr. DeRoy, in light of her own research and found them to be consistent with her knowledge of West Moberly's practices.

[292] I agree with BC Hydro that the evidentiary support for the configuration of the critical areas is, at best, questionable in many respects. Nevertheless, I am prepared to accept that West Moberly considers the critical areas to be of particular importance for the exercise of its treaty rights and that their boundaries need not be proven with precision on this application: *Macleod Lake Indian Band v. British Columbia* (1998), 33 B.C.L.R. (2d) 378 (S.C.), at para. 9. I also accept that an injunction covering only the critical areas would probably be significantly less harmful than a full project halt, insofar as it would allow at least some work to proceed.

ii. Factors Weighing Against an Injunction

a. Irreparable harm to BC Hydro and other Stakeholders

[293] BC Hydro and British Columbia assert that the injunction sought, in either of its proposed iterations, would cause irreparable harm in a variety of ways.

[294] First, they say that this is a massive and complicated public infrastructure project that is approximately $2.4 billion into a $10.7 billion budget. Both the budget and the schedule are already

under considerable strain for many other reasons. Any order that would wrest control, even partly, from those who are actually carrying out, managing and regulating the work, is bound to exacerbate that strain and increase the risks.

[295] They submit that the proposed injunction would almost inevitably cause delays and increase costs substantially and if any of the upcoming critical construction milestones, particularly river diversion, are missed, those additional costs will become much greater still. It is ultimately the province's rate payers who will bear the brunt of those additional costs in the form of higher electricity rates.

[296] BC Hydro's tally of the injunction-related costs and the duration of the consequent delays in the Project schedule are summarised and explained in minute detail in Affidavit #1 of Alan Le Couteur, a Project Manager with BC Hydro, which I discussed earlier in these reasons in the context of West Moberly's evidentiary application. Mr. Le Couteur has broken down the anticipated impacts of an injunction by scenarios, as follows:

(a) Scenario A (full Project halt for two years) - $1.44 billion in additional costs and a two-year delay of the Project in-service date;

(b) Scenario B (full Project halt for three years) - $1.86 billion in additional costs and a three-year delay of the Project in-service date;

(c) Scenario C (halt in critical areas for two years) - $660 million in additional costs and a one-year delay of the Project in-service date; and

(d) Scenario D (halt in critical areas for three years) - $1.11 billion in additional costs and a two-year delay of the Project in-service date.

[297] BC Hydro says that any delay of the Project's in-service date may lead to other consequential losses, including lost business and potentially the loss of commercial and industrial customers who may turn to other, likely fossil-fuel-based, suppliers in the meantime and perhaps permanently.

[298] In addition to the additional costs and delays of the Project itself, BC Hydro and British Columbia say that the proposed injunction would also be likely to cause immediate and direct adverse impacts on third parties, such as local communities and other First Nations, several of whom are looking to benefit economically from the Project and its associated employment and contracting opportunities.

[299] One of those is the McLeod Lake Indian Band ("MLIB"). Chief Chingee deposes that, far from advancing the cause of reconciliation with Indigenous peoples, an injunction would have the opposite effect, at least in relation to those First Nations like MLIB who are expecting to benefit from the Project:

> A full halt to the work on Site C would result in the suspension of the Site C agreements and the benefits flowing under them. Payment streams promised to MLIB during operations under the IBA will be delayed, along with the completion of land transfers and the implementation of land management measures under the Tripartite Land Agreement. Not just the suspension of the Site

C Agreements, but the basis for entering in the Renewal Agreement would be fundamentally altered, resulting in the unravelling of reconciliation between the Crown and MLIB.

[300] West Moberly responds that mere risk of delay, by itself, is not necessarily proof of irreparable harm. Even if it is, the anticipated costs of an injunction, particularly one covering only the critical areas, would be a modest price to pay to protect its treaty rights when viewed in the context of the $10.7 billion budget for the Project as a whole.

[301] Further, West Moberly argues, BC Hydro has not supported its calculations of the anticipated costs of an injunction with any independent review. West Moberly has, on the other hand, indeed adduced independent expert evidence on this issue. Its expert, Mr. Elwin, has calculated the cost of a two-year injunction at $511.6 million and a three-year injunction at $777.1 million, assuming a full project halt. Although BC Hydro's estimates are much higher, those estimates are, West Moberly asserts, built on an unwarranted assumption - i.e., the ability of BC Hydro and its contractors to adhere to the current schedule. Moreover, argues West Moberly, the cost of an injunction covering only the critical areas would be far less significant, because it would not lead to any delay of the critical Project milestones, according to Mr. Elwin.

[302] Those assertions, and Mr. Elwin's assumptions in particular, are vigorously contested by BC Hydro. The factual disputes in this respect focus on the following questions:

(a) whether the critical construction milestones will be delayed regardless of an injunction;

(b) to what extent an injunction over the critical areas would delay the critical construction milestones; and

(c) the true cost of a critical areas injunction.

[303] West Moberly argues that, contrary to BC Hydro's submissions on those points, the Project will be significantly delayed regardless of whether or not an injunction is granted, due to the following factors:

(a) placement of concrete is significantly behind schedule;

(b) right bank excavation is behind schedule;

(c) right bank drainage tunnel excavation delay is a sign of serious problems;

(d) left bank excavation delay may impact the start of diversion facilities;

(e) there is a risk that completion of the diversion tunnels will be delayed;

(f) main work contractor performance is substandard; and

(g) there are excessive GSS (i.e., "generating station and spillways") contract interface milestones.

[304] West Moberly argues further that BC Hydro's timelines and cost estimates are not reliable. It cites as an example the estimate that BC Hydro had originally given for the cost of carrying out a re-

routing of the Highway 29 realignment to avoid interfering with a sensitive site at Bear Flats. Earlier, BC Hydro had insisted that avoiding the problem would cost more than $610 million, but when other considerations forced BC Hydro to change the route anyway, a new solution was found at considerably less cost. West Moberly also refers to the skepticism about BC Hydro's estimates and predictions that have been expressed on various occasions by other independent experts charged with overseeing various aspects of the Project.

[305] One of the most significant of the risks identified by BC Hydro involves the realignment of Highway 29. Four of the six segments to be realigned are expected to be completed by the summer of 2023. This leaves only a few months between that point in time and the date for the inundation of the reservoir, currently scheduled for the fall of 2023. If the new highway segments and associated bridges are not completed by then, the highway will be cut off. The construction schedule proposed by Mr. Elwin to allow for a critical areas injunction exacerbates that risk. Mr. Elwin acknowledges that if the proposed injunction remains in place for 24 months or more, the new highway would not be completed until after reservoir filling is scheduled to begin. Mr. Elwin's proposal to alleviate that risk is to accelerate the work on the highway. However, BC Hydro argues that if the injunction lasts 30 months or more, then even accelerating the highway work is unlikely to solve the problem.

[306] In its most recent draft form of order, West Moberly has crafted an even more permissive version of the proposed critical areas injunction that would allow Highway 29 realignment work on the Halfway River and Lynx Creek segments and bridges, as well as the Hudson's Hope shoreline protection Project to proceed during the injunction period. The remaining outstanding issues in contention involve the work proposed to be done on the Highway 29 realignments through Bear Flats and Farrell Creek to the Gates and the other clearing that is planned to occur in each of the critical areas.

[307] The parties also differ sharply on the extent of the clearing work that must be done. BC Hydro says that it must clear the slopes in the area between the Halfway River and the future dam site to a height of 433 metres (i.e., the height of the coffer dam) in order to avoid the risk of debris over-topping the coffer dam and clogging the diversion tunnels in the event of a severe flood along the Halfway River during construction. West Moberly contends that the chances of seeing the magnitude of flooding modelled by BC Hydro to justify clearing to that level are too remote, and that it should instead be sufficient to clear those slopes to only 420 metres. The proposed order would enjoin any clearing above that level, which, by BC Hydro's calculation, amounts to over 1,000 hectares, or approximately two thirds of the clearing that BC Hydro currently plans to do in the area.

[308] The parties also joined issue over the anticipated impact of an injunction on employment prospects in the area. In response to BC Hydro's assertions about likely job losses, West Moberly argues that BC Hydro's evidence on this point too is exaggerated. It says that workers would be likely to get other jobs, given the robustness of the local job market. In any event, argues West Moberly, the same jobs will be available again later if and when the injunction expires.

[309] I received a great deal of evidence and argument on these issues and many others like them. In the end, I do not find it necessary or even helpful to attempt to resolve the many conflicts in the evidence on those subjects. Mr. Elwin himself conceded that an injunction, even one affecting only the critical areas, will probably lead to additional costs in the tens of millions of dollars, for which West Moberly provides no undertaking in damages.

[310] Ultimately, I agree with BC Hydro and British Columbia that wresting control of the Project, even if only partly, from those who are currently responsible for carrying it out, managing it and regulating it, as West Moberly effectively seeks to do, would in itself cause irreparable harm.

[311] I also agree with BC Hydro and British Columbia that if the Project work is ordered halted in whole or in part, or even if it is merely ordered to be re-sequenced as proposed, the result would be to create a chaotic situation for the defendants and other third party stakeholders.

[312] Among other things, the work that would be enjoined would accumulate during the injunction period and would have to be resumed all at once immediately or very soon upon its expiry. The uncertainty surrounding the anticipated duration of the injunction would also make it difficult if not impossible to plan effectively and to take the numerous steps that would be needed for an orderly resumption of work at that time.

[313] I also accept that whatever work could be done outside the critical areas while such an injunction remained in effect would be less efficient. It is apparent, without having to weigh the expert and lay opinion evidence I received on this topic, that work on the highway realignment, clearing of the vegetation and erecting the transmission lines could not be done on a continuous basis as currently planned, but only intermittently, in a manner that would have to avoid 13 irregularly-shaped critical areas spread across much of the Project footprint, leading to inevitable duplication and waste.

[314] I do not need to quantify the additional costs of the proposed injunction with precision in order to recognise their significance and irreparable nature. I find the situation before me to be similar to the one that Butler J. (as he then was) described in *Boon* (at para. 36), when a different threat to halt this same Project came before him, except that the relevant numbers are now much larger:

> [36] It stands to reason that if the Project is delayed, the construction costs would increase substantially. This is an enormous project. A total of $700 million has already been spent. Mobilization, procurement and site preparation work is proceeding rapidly. I do not need expert evidence to prove that bringing the Project to a halt would dramatically increase costs. Whether that increase is $175 million, $420 million or something in between, need not be resolved on this application.

[315] West Moberly suggested in oral argument that if I am unable to determine whether BC Hydro will be able to achieve river diversion on schedule regardless of an injunction, another option would be to grant the critical areas injunction now but invite the parties to re-argue the injunction application a year from now, when the outcome of that particular controversy will be known. I am not willing to do that. A year from now there are likely to be new controversies about the status of the Project and the ability of BC Hydro to complete the next stage on schedule. I am not persuaded that the appropriate

response to that ongoing uncertainty is to invite serial injunction applications between now and trial. Barring an unforeseen and compelling change in circumstances, the status of the Project in the interim period pending trial should be litigated once, subject only to the final order that will be made after trial.

[316] In summary, I am satisfied that an injunction would be likely to cause significant and irreparable harm to BC Hydro and many others, and that the prospect of such harm weighs heavily in the balance against granting it.

b. Delay

[317] I also find that the harm that would flow from an injunction has been compounded by West Moberly's delay in commencing this action and bringing this application.

[318] It has been held that the doctrine of laches applies to Indigenous litigants asserting Aboriginal or treaty rights, just as it does in other contexts. Such litigants cannot "sleep on their rights" any more than other litigants: *Canada (Attorney General) v. Lameman*, 2008 SCC 14, at para. 13; *Council of the Haida Nation v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Developments)*, 2018 BCSC 1117, at paras. 84-86.

[319] During the period between the start of construction and the commencement of this action, over $2 billion was spent on construction and related activities and a great deal of work was done. The physical landscape has already been transformed beyond recognition in many places. It follows that the cost of a total or partial halt (including the "preservation activities" that would thereby be required) has grown commensurately.

[320] I recognise that West Moberly has not exactly been "sleeping on its rights" – that is, it has not sat idly by while construction has been underway. On the contrary, West Moberly has, in a sense, been seeking to assert its treaty rights to halt the Project for many years. But once this Court and the Federal Court clarified what had to be done in order to advance that issue, West Moberly knew in no uncertain terms that the proper route to enforce its treaty rights as it interpreted them was by way of an action.

[321] I do not accept that West Moberly's delay in commencing this action can be excused for the reasons it has given. Once construction work was underway and the courts had clearly signalled how West Moberly could assert its treaty rights if it wished to do so, it was not reasonable for West Moberly to rely instead on the pending provincial election, the prospect of a change in government or the encouraging skepticism about the Project expressed by various politicians while in opposition.

[322] The explanation that West Moberly has given for not commencing an action while its appeals from the dismissals of its judicial review applications were outstanding and construction had already begun is not particularly compelling. Chief Roland Willson explained West Moberly's rationale in that regard as follows:

> An action for Treaty infringement is a very daunting and expensive process. It didn't make sense to us that we would need to go through an entire court action when we have treaty rights and the Crown has a duty to consult.

[323] Despite the clear guidance received from the courts as to what had to be done to assert its treaty rights, West Moberly appears to have elected instead, for financial and other reasons, not to commence an action or seek an injunction immediately, or at least within a reasonable time after construction began. In opting not to do so, West Moberly deliberately ran the risk that its outstanding appeals in the judicial review proceedings would not succeed. As it turned out, they did not.

[324] I therefore find that the resulting delay is another factor weighing heavily against an injunction, particularly in light of the significant consequences that have flowed from that delay in the interim.

c. The *Status Quo*

[325] It has been held that for the purpose of assessing where the balance of convenience lies on an injunction application, the *status quo* is to be defined as of the time when the claim is brought, not as of the time prior to when the underlying cause of action accrued*: Pacific Northwest Enterprises Inc. v. Ian Downs & Associates Ltd.* (1982), 42 B.C.L.R. 126, at para. 27 (C.A.); *Burquitlam Care Society v. Fraser Health Authority*, 2015 BCSC 1343, at para. 30; *Sunshine Logging (2004) Ltd. v. Prior*, 2011 BCSC 1044, at para. 37; *Boon,* at paras. 38, 71-73.

[326] As a result of West Moberly's delay in commencing this action, the *status quo* today consists of a project that is more than two years into construction. Moreover, the *status quo* for the purpose of this application is not the Peace River region in its natural state. Much of the land in the Project area has already been taken up by visibly incompatible uses, such as farmland and the current route of Highway 29.

[327] It follows, I find, that it is West Moberly, rather than the defendants, who is seeking to alter the *status quo* by enjoining ongoing construction.

d. The Missing Undertaking

[328] West Moberly is both unwilling and unable to provide the usual undertaking under Rule 10-4(5) to pay damages in the event that it is unsuccessful at trial.

[329] I appreciate that courts have, in other cases, sometimes seen fit to relieve Indigenous litigants seeking injunctive relief to protect their Aboriginal or treaty rights from having to comply with this requirement (see, for example, the decisions of Grauer J. in *Taseko* and Branch J. in *Williams*).

[330] I am not persuaded that this is an appropriate case in which to do so, however. In particular, this is not a case in which the missing undertaking is the only significant factor weighing against an injunction, or even one of only a few. I have already found that West Moberly's claim on the merits is not a particularly strong one. I have also found that the financial cost to the defendants and third parties of an injunction will be enormous and far-reaching, partly as a result of West Moberly's own

delay in bringing the application. In light of these considerations, the absence of the usual undertaking looms larger in this case than in others.

[331] The effect of West Moberly's unwillingness or inability to provide the requisite undertaking is to render all of the financial harm that would flow from an injunction entirely irreparable.

iii. Conclusion on the Balance of Convenience

[332] Thus far, I have not listed the public interest as a factor weighing in favour of or against an injunction. Both sides can lay claim to a pressing public interest in this case.

[333] If no injunction is granted, West Moberly may suffer irreparable harm flowing from an unjustified infringement of Treaty 8. Allowing that to occur, if the claim turns out to be successful on the merits, would run counter to the public interest in advancing the cause of access to justice and reconciliation.

[334] On the other hand, if an injunction is granted but the claim turns out to be unsuccessful on the merits, one of the most important public infrastructure projects undertaken in decades will be needlessly put into disarray. All those having a stake in the Project, which includes, in varying degrees, most of the population of British Columbia, will suffer at least some level of irreparable financial harm. Some, particularly those who are relying on the Project for their livelihood in the near term, may have to contend with direct and immediate harm at a more acute level.

[335] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 14, McLachlin C.J. commented on the undue emphasis that has traditionally been placed on protecting the economy and government revenues in assessing the balance of convenience in cases such as this:

> … the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns.

[336] I am mindful of the need not to undervalue the Aboriginal interests at stake in this case. But this is a case with Aboriginal interests weighing on both sides.

[337] As was noted in argument, this case shows many parallels with a series of injunction applications recently brought to this Court by the Blueberry River First Nation ("BRFN"), another group whose ancestors adhered to Treaty 8. In *Yahey v. British Columbia*, 2015 BCSC 1302, BRFN was seeking an injunction to prevent logging pursuant to recently granted licenses, arguing that the proposed work, when combined with the cumulative impacts of previous projects of various kinds, would, if carried out, leave BRFN with no meaningful ability to exercise its treaty rights in its traditional territory. N. Smith J. decided that the balance of convenience did not favour granting the injunction sought, mainly because the logging work that BRFN was seeking to enjoin was not seen to be significant enough relative to the scale of the alleged problem that was the real subject of the complaint. As he put it, at para. 59:

> [59] … it may be possible to show that a single project, although small, is occurring at such a critical time or place that it amounts to a 'tipping point' beyond which the right to meaningfully

> exercise Treaty rights is lost. That is not the evidence in this case. Although Chief Yahey deposes to the significance of the areas involved, I am not satisfied that these [Timber Sales Licenses] will materially increase the cumulative effect on treaty rights that BRFN complains of or that stopping the [Timber Sales Licenses] will amount to a significant slowing of that overall process.

[338] Having said that, N. Smith J. suggested (at para. 64) that BRFN could seek such relief if the application were more appropriately framed to deal with that larger issue:

> [64] BRFN may be able to persuade the court that a more general and wide-ranging hold on industrial activity is needed to protect its treaty rights until trial. However, if the court is to consider such a far-reaching order, it should be on an application that frankly seeks that result and allows the court to fully appreciate the implications and effects of what it is being asked to do. The public interest will not be served by dealing with the matter on a piecemeal, project-by-project basis.

[339] BRFN did apply for that "far-reaching order" two years later. In *Yahey v. British Columbia*, 2017 BCSC 899, Burke J. refused the application, once again on the basis that the balance of convenience did not favour the relief sought. This time, however, one of the main reasons that the balance was found to lie against an injunction was that the Court was not in a position at that stage to make the essential findings as to whether BRFN's infringement claim was made out on the merits.

[340] As Burke J. explained, at para. 121:

> [121] Ultimately, as noted above, the sufficiency of the Province's measures to date is not an adjudication this court can make at this time. Moreover, the Court in *Snuneymuxw* at para. 72 cautioned that the court should be wary of governing by interlocutory order, as it might do here by making adjudication between the merits of the Province's measures and the framework proposed by Blueberry River.

[341] West Moberly contends that in this case, the balance of convenience lies in favour of the injunction it seeks because the factors that tilted the balance against the proposed injunctions sought by the BRFN in those cases are not present here.

[342] First, unlike the application dismissed by N. Smith J., in this case West Moberly is seeking to halt a massive project that will, in one blow, transform the landscape and remove the last stretch of the Peace River valley that had been left relatively intact despite previous development. This is not just another "small" project. Moreover, the previous development on the Peace River causing the cumulative impacts that are the subject of this claim (namely, the W.A.C. Bennett and Peace Canyon dams) were themselves put in place by the same proponent, BC Hydro, who is now before the Court seeking to complete the transformation of the river.

[343] Second, unlike the application dismissed by Burke J., in this case West Moberly has, it says, established the merits of its claim with abundant evidence.

[344] I agree with West Moberly that the considerations it identifies as distinguishing this case from the application dismissed by N. Smith J. weigh, to some extent, in favour of the relief sought. But the massive scale of the Project – that is, the very thing that makes its impact on West Moberly's treaty rights so significant – also amplifies commensurately the harm weighing on the other side of the

scales if the Project were to be enjoined, even in part, as proposed. The fact that BC Hydro is the same proponent who carried out the previous projects on the river also underscores that this is, like the two older dams, an important public infrastructure project rather than a private venture for profit, like the logging work that the BRFN was seeking to enjoin in the first instance.

[345] Despite West Moberly's submission as to the strength of its claim on the merits, I find that this application fails partly for the same reason that led Burke J. to refuse the application that was before her. But there are also other reasons for refusing the relief sought in this case.

[346] Regardless of which form of injunction is considered, I have found, first, that West Moberly will face significant hurdles at trial on every essential issue going to the merits of its claim in seeking a permanent halt to the Project. Its claim, therefore, cannot be described as a particularly strong one. Second, I have found that this action was inexcusably commenced well over two years after construction began, compounding the prejudice to the defendants and third parties that would flow from an injunction. Finally, while I accept that a critical areas injunction would probably cause less harm than a full project halt, even that less onerous form of order would cause considerable harm and possibly very significant harm to a great many people. In either case, the harm would never be compensated if it turned out to have been unnecessary.

[347] In summary, I have concluded that the balance of convenience does not favour granting either version of the injunction sought.

E. Other Relief Sought

i. Should the defendants be required to provide an undertaking?

[348] One of the terms of the proposed critical areas injunction that West Moberly seeks is an order to compel the defendants to undertake not to rely on any work that is permitted and carried out pending trial as a basis for arguing at trial that the Project is, because of that work, too far advanced for a permanent injunction to issue.

[349] West Moberly relies on several authorities for such an order.

[350] The first is *Wilson v. Townend* (1860), 62 E.R. 403 ("*Wilson*"). In that case, the plaintiff had sought an interlocutory and permanent injunction to restrain his neighbour, the defendant, from continuing to build an addition to the defendant's house, on the grounds that the addition, if completed, would block the plaintiff's windows in breach of the so-called doctrine of "ancient lights." In the result, the Court refused to grant the injunction, but only on the condition that the defendant was willing to undertake to remove the newly-built addition in the event that the plaintiff turned out to be successful at trial.

[351] In *Snuneymuxw First Nation et al. v. HMTQ et al.,* 2004 BCSC 205, the plaintiff, also known as the Nanaimo Indian Band, sought an interlocutory and permanent injunction to limit or prohibit the storage of logs and log booms in the Nanaimo River estuary. The estuary had been leased to logging

companies for that purpose. Before that, the estuary had been a bountiful fishing area for the plaintiff. The plaintiff claimed that the current use of the estuary infringed its rights under the Douglas Treaty to carry on with its fishery as it had formerly. Groberman J. (as he then was) described the plaintiff's case (at para. 19) as "a fairly strong one." In the result, he refused to grant the injunction after examining the balance of convenience, particularly because he did not believe that the condition of the estuary would improve significantly in the period until trial even if the order sought was granted. Nevertheless, he wanted to encourage the defendants to continue in their ongoing efforts to accommodate the plaintiff's fishing rights. He was also concerned that the defendants might, in the interim, grant a long-term lease to a third party who would acquire rights that might make the granting of a permanent injunction more unpalatable at trial. He therefore granted a more limited order that required the defendants to include a term in any lease they entered into to render the resulting leasehold interest expressly subject to the plaintiff's claim.

[352] West Moberly relies also on the following authorities: *Playter v. Lucas* (1921), 69 D.L.R. 514, at 519-520; *Dixon v. The Director, Ministry of the Environment*, 2014 ONSC 5582, at para. 72; *Logan v. Grantham Secondary School No. 2* (1910), 17 O.W.R. 553, at 553 (H.C.J.); and *Dupont v. Commission du district d'urbanisme de Belledune (Municipalité)* (1984), 58 N.B.R. (2d) 125, at 133 (Q.B).

[353] I am not persuaded that any of the authorities cited support the relief that West Moberly seeks in this regard. None of them goes so far and in any event, they are all distinguishable in various ways.

[354] In *Wilson,* a nineteenth-century case, the undertaking was voluntarily given. The Court was inclined to grant the injunction but offered the defendant an alternative. The undertaking was solicited from the defendant so that the injunction need not issue. Here, no such undertaking is on offer. Because I am not inclined to grant the injunction for other reasons, it makes no difference that BC Hydro was not prepared to avoid an injunction by undertaking to build only at its own risk.

[355] *Logan* was a similar kind of case. It is a 1910 decision reported with only a very brief endorsement and no facts, but one thing that is clear from the report is that the case for an injunction must have been a sufficiently compelling one because it had already been granted. In the decision relied upon by West Moberly, the Court ordered the injunction dissolved on certain conditions, one of which was that the dissolution was to be (at p.553), "on the distinct understanding that if the defendants proceed they do so at their own risk, and that the plaintiffs are not in any way to be prejudiced by any such proceeding at the trial…."

[356] In *Playter*, the Court did not specifically require the defendant to undertake to proceed with the impugned construction only at his own risk. Rather, the Court (at p.519) understood the effect of the governing law to be such that:

> … the defendant from the date of the issue of the writ proceeds at his own risk, and that if the plaintiffs are ultimately found to be entitled to the injunction as prayed, the defendant may and probably will be ordered to tear down and remove the building in question ….

[357] The only order actually made on that occasion was that "upon the defendant undertaking to facilitate the speedy trial of the action," an injunction would not issue (at at p.519, emphasis added).

[358] Likewise in *Dixon*, Leitch J. merely observed (at para. 72) that by proceeding with the impugned projects, the respondents were running the risk that they might be required to decommission them and not commence operations should the appellants' appeals be allowed. There was no order made to compel the respondents to provide any undertaking to that effect.

[359] In *Dupont*, the Court refused to extend an injunction that had already expired. It observed in passing (at p. 133) that "if the respondent undertakes any construction and the [Provincial Planning] Appeal Board's decision is against him, it must realize that the expenses it will have incurred will be at its own risk." Here too, there was no court order made to compel the respondent to provide any undertaking.

[360] Finally, in *Snuneymuxw,* Groberman J. found the plaintiff's claim to be "a fairly strong one" and on that basis granted a minimally intrusive form of order to prevent third parties from acquiring adverse rights pending trial. I have not concluded that West Moberly's case is "fairly strong." I also disagree with the suggestion that the compulsory undertaking sought here would be a minimally intrusive form of order in the circumstances of this case.

[361] Another important distinction between those authorities and this case involves the relationship of the proposed undertaking to the *status quo*, as I have found it to be. One direct consequence of West Moberly's delay in commencing this action more than two years after the start of construction is that the *status quo* is a project more than two years into construction. In those circumstances, there is no valid basis to require BC Hydro to continue working on the Project (or, in other words, to maintain the *status quo* in the absence of an injunction) only at its own risk.

[362] In summary, I have concluded that there is no valid basis to compel the defendants to provide the undertaking sought. Just as West Moberly should be free to argue that any additional work done between now and the trial will have been done at the defendants' own risk, so too the defendants should be free to argue that the product of that work should weigh even more heavily in the balance against a permanent injunction. Which argument should succeed is a question that should be left for trial.

ii. Should an expedited trial date be ordered?

[363] I agree with West Moberly that the trial should be scheduled so that a judgment will be forthcoming in advance of reservoir inundation, when the most significant component of the alleged harm to West Moberly's treaty rights will take place. That milestone is presently scheduled to occur in the fall of 2023. Rather than order an expedited trial within 18 months as West Moberly requests, which I find to be unrealistic, I will instead direct the parties to agree upon and work toward a schedule culminating with a trial to be concluded in mid-2023.

iii. Document Production

[364] Although West Moberly's most recently proposed form of order includes additional terms requiring BC Hydro to produce various kinds of documents, no such relief was sought in the notice of application. Those terms appear, in any event, to be ancillary to the proposed form of injunction sought, which I have refused.

[365] In the result, I leave the issue of document production to the discovery process in the ordinary course.

VI. GENERAL CONCLUSION

[366] West Moberly's injunction application is refused.

[367] Although I am not ordering an injunction, I am directing the parties to agree upon a schedule leading to trial that would see the trial conclude by no later than mid-2023. To that end, I am also directing the parties to set down a case-management conference before me prior to the end of 2018 or in early 2019 to formalise such a schedule or have it set for them if they are unable to agree on one.

[368] The parties have liberty to speak to costs should they be unable to agree on the appropriate order in light of these reasons for judgment.

"Milman J."

The Honourable Mr. Justice Milman