

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Taseko Mines Limited v. Western Canada  
Wilderness Committee,*  
2016 BCSC 109

Date: 20160125  
Docket: S121589  
Registry: Vancouver

Between:

**Taseko Mines Limited**

Plaintiff

And

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

Defendants

Before: The Honourable Mr. Justice Funt

## **Reasons for Judgment**

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Place and Dates of Trial:

Vancouver, B.C.  
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April 1-2, 2015

Place and Date of Judgment:

Vancouver, B.C.  
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**I. INTRODUCTION**

[1] Taseko Mines Limited (“Taseko”) claims damages, including punitive damages, injunctive relief, and special costs for defamation by the Western Canada Wilderness Committee, also known as the Wilderness Committee (“Wilderness Committee”), and Mr. Sven Biggs. Mr. Biggs is a director of the Wilderness Committee.

[2] The alleged defamation arises from internet articles posted by the Wilderness Committee in relation to a large open pit copper-gold mine Taseko wishes to construct southwest of Williams Lake, B.C. and for which federal environmental approval is required.

[3] The Wilderness Committee and Mr. Biggs say that the words complained of are not defamatory and are, in any event, protected by defences such as fair comment and justification (truth) and, accordingly, Taseko’s claims should be dismissed.

[4] The Wilderness Committee and Mr. Biggs also seek special costs against Taseko on the basis that Taseko’s claim is an attempt by Taseko to use the litigation process “to silence critics on a matter of public importance” (such a tactic is commonly referred to as a strategic lawsuit against public participation or SLAPP).

[5] For the reasons that follow, Taseko’s claims are dismissed. The Wilderness Committee and Mr. Biggs are awarded their respective costs at Scale B for costs incurred before December 1, 2013 and special costs incurred on or after December 1, 2013.

**II. KEY LEGAL PRINCIPLES**

**A. Defamatory Expression**

[6] A defamatory action has three elements that a plaintiff must prove in order to obtain judgment:

- a) the impugned words refer to the plaintiff;

- b) the impugned words were published, i.e. communicated to at least one person other than the plaintiff; and
- c) the words were defamatory in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person:

[*Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28] [*Torstar*]

[7] In the case at bar, it is common ground that the impugned words refer to Taseko and were published. A signal focus in this case is whether the impugned words "would tend to lower the plaintiff's reputation in the eyes of a reasonable person."

[8] Justice Abella (as she then was), writing for the Ontario Court of Appeal in *Canadian Broadcasting Corporation v. Color Your World Corp.* (1998), 38 O.R. (3d) 97 at 106 (C.A.), leave to appeal dismissed [1998] S.C.C.A. No. 170 [*Color Your World*], described the reasonable person:

The standard of what constitutes a reasonable or ordinary member of the public is difficult to articulate. It should not be so low as to stifle free expression unduly, nor so high as to imperil the ability to protect the integrity of a person's reputation. The impressions about the content of any broadcast -- or written statement -- should be assessed from the perspective of someone reasonable, that is, a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility. A degree of common sense must be attributed to viewers.

[My emphasis.]

[9] With respect to the third element a plaintiff must prove, lowering the plaintiff's reputation, the overall context is considered. Where the topic is one of public interest, the Court considers that relevant factors may include:

- a) the plaintiff's engagement in public discourse;
- b) the reputation the plaintiff enjoyed before the alleged defamatory words were published;
- c) the reputation of the defendant(s);

- d) the plaintiff's expectation that there would be debate and criticism;
- e) the reasonable person's expectation that the topic would give rise to debate and criticism; and
- f) the legal framework and process for formal public discussion such as hearings before a governmental tribunal.

[10] Justice Abella, in *Color Your World* at 106, provides a particularised explanation of what is meant by lowering an individual's reputation:

I take as my starting point the following definition of defamation:

A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one ...

(R.F. Hueston and R.A. Buckley, *Salmond on the Law of Torts*, 21st ed. (London: Sweet & Maxwell, 1996) at p. 140 citing *Sim v. Stretch* (1936), 52 T.L.R. 669 at p. 671, [1936] 2 All E.R. 1237 (H.L.), and *Vander Zalm v. Times Publishers* (1980), 1980 CanLII 389 (BC CA), 109 D.L.R. (3d) 531 at pp. 535 and 543, 18 B.C.L.R. 210 (C.A.)

[11] If the plaintiff establishes the three elements, the onus shifts to the defendant(s) to advance a defence. In the case at bar, pleaded defences include:

- a) fair comment;
- b) justification (truth); and
- c) responsible communications on matters of public interest.

## **B. Fair Comment**

[12] In *Torstar*, Chief Justice McLachlin, writing for the majority, set forth the fair comment defence:

[31] ... As reformulated in *WIC Radio*, at para. 28, a defendant claiming fair comment must satisfy the following test: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the

comment, though it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. *WIC Radio* expanded the fair comment defence by changing the traditional requirement that the opinion be one that a “fair-minded” person could honestly hold, to a requirement that it be one that “anyone could honestly have expressed” (paras. 49-51), which allows for robust debate. As Binnie J. put it, “[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones” (para. 4).

[13] With respect to public interest, the Chief Justice states:

[104] In *London Artists, Ltd. v. Littler*, [1969] 2 All E.R. 193 (C.A.), speaking of the defence of fair comment, Lord Denning, M.R., described public interest broadly in terms of matters that may legitimately concern or interest people:

There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment. [p. 198]

[105] To be of public interest, the subject matter “must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached”: Brown, vol. 2, at pp. 15-137 and 15-138. The case law on fair comment “is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews”: *Simpson v. Mair*, 2004 BCSC 754, 31 B.C.L.R. (4th) 285, at para. 63, *per* Koenigsberg J. Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.

[106] Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a “public figure”, as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.

[14] The Chief Justice was writing with respect to the defence of responsible communication. I will apply her discussion of public interest to the defence of fair comment.

[15] With respect to what is comment, in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, the Supreme Court of Canada stated:

[26] ... In *Ross v. New Brunswick Teachers' Assn.* (2001), 201 D.L.R. (4th) 75, 2001 NBCA 62, at para. 56, the New Brunswick Court of Appeal correctly took the view that “comment” includes a “deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof”. Brown’s *The Law of Defamation in Canada* (2nd ed. (loose-leaf)) cites ample authority for the proposition that words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. This is particularly so in an editorial context where loose, figurative or hyperbolic language is used (Brown, vol. 4, at p. 27-317) in the context of political debate, commentary, media campaigns and public discourse. See also, R. D. McConchie and D. A. Potts, *Canadian Libel and Slander Actions* (2004), at p. 340.

[16] With respect to the basis in fact necessary to support the defence of fair comment, Justice Craig in *Vander Zalm v. Times Publishers, a Division of F.P. Publications (Western) Ltd.* (1980), 18 B.C.L.R. 210 at 231-232 (C.A.) stated:

This conclusion [the publication, a cartoon, was defamatory] therefore, requires a consideration of the defence of fair comment. What is “fair comment”? It must be “the expression of an opinion based on true facts, *i.e.* facts admitted or proved to be true” -- Gatley on Libel and Slander (6th ed.) page 325 -- but the “true facts” need not be stated at the time of the expression of the opinion. They may be implied and specified as particulars in the defence: *Kemsley v. Foot*, [1952] A.C. 345... If the commentator sets out the facts in the comment he may rely on the defence of fair comment only if he proves every fact to be true. On the other hand, if he merely implies the fact, or facts, in the comment and gives the facts in the form of particulars he need establish only the truth of one of the facts: see *Kemsley v. Foot*, *supra*.

...

Counsel for the respondent submitted to the trial judge, and to this court, that the plea of “fair comment” was unavailable because there were “no facts stated” at the time of the publication of the cartoon from which there could be an inference that the cartoon was a fair comment. He submitted that the cartoon was not a comment on a matter of public interest but, solely, a statement of fact vilifying the respondent. In a portion of the reasons of the trial judge which I have quoted, he said that while he thought there was “merit” in the submission he did not find it necessary to decide that issue because he felt that the defence of fair comment failed “in any event”.

The statement of defence contains a number of facts upon which the appellants rely in support of the defence of fair comment. In his cross-examination, the respondent conceded, frankly, that he had said or done some of the things set out in the particulars in the statement of defence. The nature of the cartoon indicates that the cartoonist is commenting, unfavourably, on the conduct of the appellant as Minister of Human

Resources. The nature of the conduct is set out in the particulars in the statement of defence. I think that the publisher could not be expected to accompany the cartoon with a statement of facts upon which the cartoon was based, nor could the cartoonist be expected to incorporate all these facts in the cartoon.

[17] In *WIC Radio*, the Supreme Court of Canada stated:

[31] It is true that “[t]he comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made”; Brown, vol. 2, p. 15-36, and *Gatley on Libel and Slander* (10th ed. 2004), at para. 12.12. What is important is that the facts be sufficiently stated or otherwise be known to the listeners that listeners are able to make up their own minds on the merits of Mair’s editorial comment. If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defence is not available (*Chicoutimi Pulp*, at p. 194).

...

[34] I agree with Southin J.A. that a properly disclosed or sufficiently indicated (or so notorious as to be already understood by the audience) factual foundation is an important objective limit to the fair comment defence, but the general facts giving rise to the dispute between Mair and Simpson were well known to Mair’s listening audience, and were referred to in part in the editorial itself. Simpson’s involvement in the *Declaration of Family Values* was familiar to Mair’s audience. Her repeated invitations to her followers to pick up the phone and call talk shows and politicians assured her views a measure of notoriety (*Barltrop v. Canadian Broadcasting Corp.* (1978), 25 N.S.R. (2d) 637 (C.A.)). The respondent has offered no persuasive reason to justify the Court of Appeal’s interference with the trial judge’s conclusion that

the defence has established that every element of the factual foundation was either stated or publicly known; that Mair was aware of them all; and that they were all substantially true in the sense that they were true in so far as they go to the pith and substance of the opinion Mair expressed. [para. 61]

This provides a sufficient launching pad for the defence of fair comment.

[18] With respect to the meaning of “fair” in fair comment, Craig J.A. in *Vander Zalm* stated at 231:

The word “fair” in the phrase “fair comment” is a misnomer because it conveys the concept that comment must be “reasonable”. This is not the case as pointed out by Diplock J. in addressing the jury in *Silkin v. Beaverbrook Newspapers Ltd.*, [1958] 1 W.L.R. 743, [1958] 2 All E.R. 516 at 520, when he said:

So in considering this case, members of the jury, do not apply the test of whether you agree with it. If juries did that, freedom of speech, the right of the crank to say what he likes, would go. Would a fair-minded man holding strong views, obstinate views, prejudiced views, have



been capable of making this comment? If the answer to that is yes, then your verdict in this case should be a verdict for the defendants. Such a verdict does not mean that you agree with the comment. All it means is that you think that a man might honestly hold those views on those facts.

[19] With respect to the meaning of express malice of a defendant (which if the plaintiff can establish will defeat the defence of fair comment), Justice Cory, writing for the majority of the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, stated at para 145:

Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey, supra*, at p. 1099, “any indirect motive or ulterior purpose” that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, *Taylor v. Despard*, [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. See *McLoughlin, supra*, at pp. 323-24, and *Netupsky v. Craig*, [1973] S.C.R. 55, at pp. 61-62.

### **C. Justification**

[20] A complete defence to a defamation claim is justification (truth). The meaning of the words (or expression) must be true or substantially true in order for the defence to succeed.

[21] In establishing the defence of justification, facts arising before or after the publication may be used by the defence: Lord Denning M.R. *Cohen v. Daily Telegraph Ltd.* [1968] 1 W.L.R. 916 at 919 (C.A.).

[22] Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed. (Toronto: Carswell, 1999) (loose-leaf updated 2013, release 1) vol. 3 describes the substantially true test (at 10-45 to 10-48):

Substantial truth is the test. “An allegedly defamatory statement is not actionable if it is substantially true”. “It is sufficient if the substance of the allegation is justified.” The defence applies if the words are true in substance and in fact. If the defence is pleaded to multiple imputations, the court must consider whether the evidence is sufficient to prove that each of the imputations is substantially true.

“A statement is substantially true where the alleged defamatory statement is no more ignominious in the mind of the average listener than a true statement would have been.” Minor inaccuracies are acceptable and will be ignored. The literal truth of the precise statement made does not have to be shown. The law “overlooks minor inaccuracies and concentrates upon substantial truth.” The test is substantial, not literal, accuracy. “A technically false statement may nonetheless be considered substantially true if, viewed ‘through the eyes of the average reader,’ it differs from the truth ‘only in insignificant details.’” If the defamatory charge is true in substance, it is immaterial that there are slight inaccuracies in the details of the expression, or with respect to secondary items of importance.

If a false statement in the publication is immaterial to the gist or sting of the libel, it does not render an otherwise true statement defamatory.

And further (at 10-56 to 10-57)

The test is “whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.” In other words, does the publication make the plaintiff significantly worse off than a literally true publication would have, or would the plaintiff have been exposed to any more opprobrium if the publication had been free from error? It must be “so misleading that it produces a different effect on a reader’s mind than would the truth”. If “the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done.”

[Footnotes omitted]

[23] In short, in order for the defence of justification to succeed, the defendants must justify the sting by showing that it is true or substantially true.

#### **D. Responsible Communication on Matters of Public Interest**

[24] In *Torstar*, Chief Justice McLachlin describes the test for the defence of responsible communication:

[98] This brings us to the substance of the test for responsible communication. In *Quan*, Sharpe J.A. held that the defence has two essential elements: public interest and responsibility. I agree, and would formulate the test as follows. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.

[25] Under the defence of fair comment above, I have set forth the meaning of public interest.

[26] With respect to whether the communication was made responsibly, the Chief Justice describes the following factors as part of a non-exhaustive list (at paras. 111-121):

- (a) The seriousness of the allegation;
- (b) The public importance of the matter;
- (c) The urgency of the matter;
- (d) The status and reliability of the source;
- (e) Whether the plaintiff's side of the story was sought and accurately reported;
- (f) Whether inclusion of the defamatory statement was justifiable; and
- (g) Whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage").

### **III. BACKGROUND**

#### **A. General**

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

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

[29] Mr. Biggs was an employee of Wilderness Committee and was one of its directors. He has authored various articles which have been posted on the Wilderness Committee's website.

[30] Taseko holds the mineral rights related to a large copper (and gold) deposit, which is located approximately 125 kilometres southwest of Williams Lake. The area of the deposit is wilderness, with forests, lakes, streams, mountains, and valleys.

[31] In recent years, Taseko has twice sought the necessary federal and provincial governmental approvals for an open pit mine. The impugned words leading to Taseko's defamation claims are in the context of the steps Taseko took in an attempt to obtain the necessary federal environmental approvals.

[32] The alleged defamation occurred after Taseko's first proposal was rejected and shortly after Taseko started to seek approval based on an alternate proposal. In these Reasons, I will refer to the first proposal as the "Original Prosperity Proposal" and the second proposal as the "New Prosperity Proposal".

[33] As part of the federal governmental approval process, a federal review panel was appointed by the Minister of the Environment to assess the environmental effects and to report its conclusions and recommendations with respect to the New Prosperity Proposal.

[34] A similar federal review panel had been appointed on January 19, 2009 for the Original Prosperity Proposal.

[35] As part of the first review, Taseko prepared an Environmental Impact Statement (EIS). The EIS serves to provide focus for an environmental assessment.

[36] The panel's review included undertaking a detailed technical review of environmental matters, inviting comments and submissions, and holding public hearings.

[37] On July 2, 2010, the review panel submitted its report (approximately 250 pages in length) to the Minister of the Environment (and other responsible authorities). The review panel concluded that the Original Prosperity Proposal would result in significant adverse environmental effects.

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

[39] In June 2011, Taseko started the process for a new proposal for the New Prosperity Proposal.

[40] In August 2011, Taseko submitted a project description of the New Prosperity Proposal to the Canadian Environmental Assessment Agency ("CEAA").

[41] In November 2011, the Minister of the Environment announced that the New Prosperity Proposal would undergo a federal environmental assessment,

[42] From January 23, 2012 to February 22, 2012, the CEAA invited public comment on two draft documents:

- a) terms of reference for the review panel; and
- b) EIS guidelines.

[43] On January 26, 2012, the Wilderness Committee posted to its website the first of five articles related to the New Prosperity Proposal. These articles are the subject matter of the current action brought by Taseko. The first three articles encouraged readers to take action by writing to the review panel. The Wilderness Committee's website provided a letter writing tool to assist readers wishing to write to the CEAA with copies to the Prime Minister and the Ministers of the Environment, Fisheries and Oceans, and Natural Resources.

[44] Mr. Biggs wrote two of the articles--the first and the third. The second article is an amended version of the first.

[45] On March 1, 2012, Taseko filed its notice of civil claim for defamation against the Wilderness Committee and Mr. Biggs.

[46] After March 1, 2012, the Wilderness Committee published further articles. These two articles alleged that Taseko's action was a SLAPP.

[47] On April 30, 2012, Taseko amended its notice of civil claim to include the Wilderness Committee's further articles together with further amendments.

[48] On May 9, 2012, a three-member review panel was appointed (its members were different from the panel members for the Original Prosperity Proposal) with the terms of reference having been finalized.

[49] The review panel's terms of reference were similar to the first review panel's terms of reference in that a thorough environmental assessment was to be undertaken. In order to avoid duplication of effort, the review panel's terms of reference directed the review panel to use the information, submissions, and testimony generated as part of the Original Prosperity Proposal review (including the first review panel's report and Taseko's EIS). The review panel's focus was directed to the assessment of "the environment effects of those components" of the New Prosperity Proposal that changed from the Original Prosperity Proposal or were new.

[50] On September 27, 2012, Taseko submitted its EIS for the New Prosperity Proposal to the review panel (approximately 1600 pages in length).

[51] In the following months, Taseko responded to the review panel's written information requests as they arose. Taseko also attended and participated in the public hearings that were held from July 22, 2013 to August 23, 2013.

[52] On October 31, 2013, the review panel issued its report (approximately 250 pages) on the New Prosperity Proposal. The Executive Summary of its report reads (in part):

The Panel concludes that the New Prosperity Project would result in several significant adverse environmental effects; the key ones being effects on water quality in Fish Lake (Teztan Biny), on fish and fish habitat in Fish Lake, on current use of lands and resources for traditional purposes by certain Aboriginal groups, and on their cultural heritage. The Panel also concludes there would be a significant adverse cumulative effect on the South Chillcotin

grizzly bear population, unless necessary cumulative effects mitigation measures are effectively implemented.

[53] Taseko subsequently applied to the Federal Court seeking judicial review of the review panel's report.

**B. The Two Proposals**

[54] Under both proposals, the location and size of the mine were the same. The open pit would be approximately half a kilometre deep and approximately one-and-a-half kilometres across. The lifetime of the mine is approximately 20 years.

[55] In general terms, the first review panel summarized the Original Prosperity Project as follows:

As proposed, the Project would involve an open-pit mine that would produce gold and copper over a 20 year operating life with a production capacity of approximately 70,000 tonnes per day. The Project would include five main elements: mine site, access road, transmission line, rail load-out facility and fish and fish habitat compensation works (Figure 2). The mine site would include an open pit, a camp, an onsite mill, support infrastructure, waste rock stockpiles, a tailings storage facility, and typical large-scale open pit mining equipment, including a primary crusher and overland conveyor. Access to the mine site would be via a 2.8 km access road which would be extended from the existing 4500 road [Forest Service Road]. Electricity would be provided via a 125 km long, 230 KV power transmission line, connected to a new switching station at the existing British Columbia Hydro north-south transmission corridor in the vicinity of Dog Creek, east of the Fraser River. The ore would be processed in the mill and the resulting concentrate would be trucked to the existing rail at loading facility at Macalister. ...

Teztan Biny (Fish Lake) would be drawn down to allow for the creation of a storage area for non-potentiality acid generating waste rock, low grade ore and overburden. The tailings storage facility would encompass the area currently occupied by Y'anah Biny (Little Fish Lake), portions of Teztan Yeqox (Fish Creek) and the surrounding wetlands and meadows, and would be used for the storage of tailings and potentially acid generating waste rock. At the south end of the storage tailings facility, a proposed new lake, referred to as Prosperity Lake would be created as a component of the plan to compensate for fish and fish habitat lost in Teztan Biny, Y'anah Biny and Teztan Yeqox.

[56] Fish Lake is approximately 300 metres southeast of the perimeter of the proposed open pit mine. Fish Lake is a reasonably large lake of approximately 110 hectares.

[57] To the southeast of Fish Lake a tailings storage facility (TSF) was to be located. The TSF is upstream from Fish Lake. The TSF would be bounded by a large embankment on its northwest side. The approximate size of the TSF was to be approximately 120 hectares. As noted, the TSF would encompass a smaller lake, Little Fish Lake, of approximately six hectares.

[58] Upstream further from the southeast of the TSF would be a second embankment, which would serve to create a new lake, Prosperity Lake, of size approximately equal to that of Fish Lake prior to being drained and used for the storage of waste rock (non-potentially acid generating), low grade ore, and overburden.

[59] The key difference in design between the Original Prosperity Proposal and the New Prosperity Proposal was that Fish Lake would not be drained with New Prosperity. Instead, it would be kept by locating the TSF approximately two kilometres further upstream, southeast of Fish Lake. The TSF would be bounded on its downstream (northwest) side by an embankment approximately three kilometres long and approximately 100 metres high. The TSF would cover approximately 1200 hectares (approximately 3 kms x 4 kms).

[60] The general layout of the New Prosperity Project is shown in Appendix A to these Reasons (the layout is also attached as an appendix to the third amended response filed in these proceedings).

[61] An open pit mine results in waste rock. Some of the rock may be classified as “potentially acid generating” rock, or PAG. If left exposed, PAG rock will over time, result in “acid rock drainage” (ARD) and “metal leaching” (ML). As Taseko described in its Project Description for the New Prosperity Project:

Metal Leaching (ML) and Acid Rock Drainage (ARD) are naturally occurring processes caused when minerals containing metals and sulphur (called sulphides) come into contact with both air and water. When sulphides are exposed to water and oxygen from air, they rust or oxidize. Oxidation of sulphides can also produce acid. If this acid is carried by streams it is called ARD.



[62] By placing the PAG rock in the TSF, the PAG rock is underwater and, accordingly, not exposed to air. Unavoidably, some waste rock is misclassified as non-PAG rock when it is actually PAG rock. Taseko estimated that the misclassification would be about 3%. The total of the misclassified rock would be approximately 6 million tons. Under the Original Prosperity Proposal, misclassified rock (i.e. classified as non-PAG when it was actually PAG rock) would be placed in the drained Fish Lake with the properly classified non-PAG rock. Under the New Prosperity Proposal (described below), it would be placed in the “Non-PAG Pile” just north east of the open pit mine. Taseko expected the Non-PAG rock would serve to buffer the effects of the misclassified rock. Accordingly, adverse environmental effects (in the form of ARD or ML) were not anticipated by Taseko.

[63] The TSF also serves to hold tailings (sulphide waste material removed during the ore concentration process).

[64] Taseko estimated that the TSF would serve to co-dispose approximately 240 million tons of PAG rock and 480 million tons of tailings.

[65] Water within the TSF can be harmful. If it seeps from the TSF, it is typically described as seepage or seepage water.

[66] In the New Prosperity Project description, Taseko states:

Water quality from the main embankment seepage flow into Upper Fish Creek may contain levels of arsenic, iron and mercury which exceed the guideline levels for the protection of aquatic life; during operations seepage flows will have to be collected and pumped back to the TSF or treated and then released into Middle Fisk Creek to supplement flows to Fish Lake.

...

With respect to potential effects on water quality and aquatic ecology outside the Fish Creek watershed, there will be minimal environmental risk associated with seepage from the TSF to ground water. Taseko will implement good waste and water management practices, accepted industry mitigation strategies and commitments identified in the previous EIS/Application.

With the new mine site layout it is anticipated that additional mitigation measures will reduce the potential for any significant environmental effects. Additional mitigation measures to consider include the following:

- A commitment to divert clean water in the vicinity of the plantsite to Fish Lake, treating for suspended solids when necessary;
- A commitment to re-model TSF seepage water and groundwater seepage quality to predict potential impacts on Fish Lake and inform groundwater management plans; and
- A commitment to ensure water quality entering Fish Lake is consistent with goals of maintaining a functioning ecosystem.

[67] Under the Original Prosperity Proposal, seepage was not a significant concern because the seepage would flow to the drained Fish Lake, which was to be used for non-PAG rock and overburden. The seepage could be pumped back to the TSF or used for operational needs.

[68] Mr. Jones is a professional engineer and is Taseko's vice president of engineering. He was involved on Taseko's behalf with respect to both proposals. In cross-examination, he was asked about a presentation he made on behalf of Taseko on April 26, 2010 to the first review panel.

Q Okay. Now, let's go to page 5450 within your presentation. And the portion that I want to read to you is -- begins at line 4 from -- from -- just the bottom of the previous page indicates that you're the speaker. Quote:

What happens to the water quality in Fish Lake, if you try and preserve that body of water with the tailings facility right up against it, is that over time the water quality in Fish Lake will become equivalent to the water quality in the pore water of the tailings facility, particularly when it's that close. You might be able to delay that by moving the tailings facility farther away to Fish Creek south. You may even be able to minimize that, reduce it by mitigation measures that could be applied. But eventually that water quality will change.

And you made those statements at the April 26<sup>th</sup>, 2010 presentation?

A Yes, I did.

Q And they were true?

A Yes, they are.

Q And when you were referring to the tailings facility farther away to Fish Creek south, that was a reference to Option 2, the -- what is now the New Prosperity proposal.

A Not specifically to what's now the New Prosperity. It's in reference to moving the tailings facility -- the concept of moving the tailings facility

farther away from Fish Lake. So the reference to Fish Lake south is an area --Fish Creek south.

Q Well, you were -- you were referring to Plan 2 when you made that statement, right?

A I was talking about Plan 3.

Q No, no. In the -- sorry. The latter part of the statement, "You may be able to delay that by moving the tailings facility farther away to Fish Creek south." "Farther away to Fish Creek south" is a reference to Plan B. [Plan 2].

A. Okay. I can go with that. Fine.

[69] The water in the TSF would be harmful if it were to seep or otherwise escape from the TSF and not be either returned to the TSF or treated (Mr. Jones's reference to pore water was water within the TSF).

[70] In cross-examination at trial, Mr. Jones, in describing the Original Prosperity Proposal, testified:

Q And then, to complete the picture, at page 42 here's a description of "Mine Development Plan 3, preferred option," and Mine Development Plan 3 where the tailing storage facility is quite up close against Fish Lake was the original Prosperity proposal.

A That's correct.

Q Right. Now, one of the advantages that Taseko represented during the original Prosperity proposal hearings was that in the event of a -- of a tailings storage facility failure, the embankment failed, the contents of the -- of the tailing storage facility, to the extent that they moved, would -- would tend to move into the then-drained Fish Lake and into the pit itself, rather than contaminate the rest of the surrounding environment, right?

A That was one of the advantages.

Q Right. And the -- another part of the original Prosperity proposal or one of the other arguments presented by Taseko for that was, look, if we have the tailing storage facility that close to Fish Lake, the -- the pore water within the tailing storage facility is going to get into Fish Lake and render that lake unusable, so draining it is the better option, right?

A In combination with other factors, I would say that's correct.

[71] The first review panel which considered the Original Prosperity Project also commented on Plan 2 (the plan on which the New Prosperity Project is based). As part of its conclusions and recommendations, the review panel in its report stated:

Mine Development Plan 2, with the tailings storage facility located upstream of Teztan Biny [Fish Lake], would in time likely result in the contamination of Teztan Biny ...

... While offering short term benefits, the Panel agrees with the observations made by Taseko and Environment Canada that Mine Development Plans 1 and 2 would result in greater long-term environmental risk than the preferred alternative.

[72] In its EIS for the New Prosperity Project, Taseko describes its models and estimates of seepage from the TSF (embankment and basin seepage). Taseko also describes the design components of the New Prosperity Project intended to address seepage. These include wells, collection ponds, and pumps.

[73] With respect to embankment seepage, Taseko in its EIS states (in part):

*TSF Embankment Seepage*

Seepage from the TSF embankments (Main, South and West embankments) was estimated using the finite element computer program SEEP/W from GEO-SLOPE International Ltd. completed as part of the preliminary engineering design for the project.

The total TSF embankment seepage is estimated to be 10 L/s at the end of Year 1 (January 2014) and increases to 55 L/s at Year 20. The seepage rates are assumed to increase linearly from start-up to the end of operations in Year 20. The total embankment seepage leaving through the Main and South embankments combined was assumed to be 10 L/s at the end of Year 1 increasing to 52 L/s at the end of Year 20. The remaining 3 L/s at the end of Year 20 is assumed to be leaving through the West embankment. Of the total seepage through the North and South embankments, 54% is assumed to be through the Main and the remaining 46% through the South.

For each embankment (Main, South and West), the total seepage captured and recycled during operations and closure is as follows:

- 65% of seepage through the embankments is assumed recovered in depressurization wells in the embankments and collected in the seepage collection ponds and pumped back to the TSF during operations and Closure Phase I.
- Of the remaining 35% that bypasses the embankment depressurization wells, 50% of this seepage is assumed to be captured by the downstream seepage collection ponds.
- Main embankment groundwater pumping wells:
  - In order to minimize the amount of TSF seepage contributing to Fish Lake, groundwater pumping wells will be installed downstream of the seepage collection ponds. The wells are assumed to capture approximately 60% of the

seepage that may bypass the seepage collection ponds. The captured seepage will be pumped back to the Main embankment seepage pond(s) in the long term.

[74] There was considerable debate as to seepage from the TSF (embankment and basin) with information requests issued by the review panel to Taseko on this aspect. As noted above, the review panel, in its final report, concluded (in part) that “the New Prosperity Project would result in several significant adverse environmental effects: the key ones being effects on water quality in Fish Lake (Teztan Biny) on fish and fish habitat in Fish Lake ...”.

[75] At the end of the mine’s life, Taseko proposed various reclamation measures to return the area to a more natural state, while recognizing that it would be impossible to return the area to its original state.

[76] In its August 2011 project description for the New Prosperity Project, Taseko summarized the three Mine Development Plans (MDPs). With respect to the three options Taseko stated:

Taseko’s conclusion in the 2009 Application was that while all three MDPs evaluated are technically feasible, Options 1 and 2 [New Prosperity] were flawed in the respect that the economic risk of developing either development plan could not be supported. Taseko also concluded that even if Options 1 and 2 were not flawed from an economic risk standpoint, Option 3 [Original Prosperity] was still the most appropriate option with respect to technical issues and impact on the physical environment.

Of particular note was the environmental security associated with Options 2 and 3 afforded by MDPs that confine all disturbance to a single watershed upstream of the open pit, thereby providing the least environmental risk outside of the watershed.

Taseko’s conclusion was that MDP Option 3 was the most environmentally responsible option and was the most appropriate option from an overall technical, socio-economic, environmental and economic perspective.

[My emphasis.]

### **C. Contemporaneous Publications**

[77] Contemporaneously with the impugned articles, there were articles written and published by others such as Mr. Peter O’Neill for the Vancouver Sun, and the

Sierra Club on its website. In November 2011, the T̓silhqot'in issued a press release with a sheet titled "Ten facts that show why resubmitted Prosperity Mine proposal cannot be approved". Two of the ten facts read:

2. The company knows its new option is worse than its first plan. TML's V.P. Corporate Affairs, Brain Battison, was clear in his Mar. 22, 2010, opening presentation to the CEEA hearings, when he stated: "*Developing Prosperity means draining Fish Lake. We wish it were otherwise. We searched hard for a different way. A way to retain the lake and have the mine. But there is no viable alternative. The lake and the deposit sit side by side. It is not possible to have one without the loss of the other.*"

...

5. This option was looked at and rejected last year by the company, Environment Canada and the CEEA review panel. For example, page 65 [p. 50] of the review report states: "*The Panel agrees with the observations made by Taseko and Environment Canada that Mine Development Plans 1 and 2 would result in greater long-term environmental risk than the preferred alternative.*"

[78] Taseko in its EIS for the New Prosperity Project (September 2012) responded to each of the ten points. With respect to the foregoing two points, Taseko stated:

[Point 2]

The statement in the first sentence is not true. The New Prosperity mine development plan is significantly different than the original Prosperity proposal in that it preserves Fish Lake in its current location. Mr. Battison's statement refers to the viability of alternatives at the time. The New Prosperity plan that will undergo this Environmental Assessment was not a viable alternative based on long term copper and gold prices at the time that the original Prosperity plan was submitted. When Taseko submitted the New Prosperity plan the long term price of copper and gold had risen to levels which now make it feasible, or viable, to absorb the additional cost of relocating the tailings pond and installing ground water control systems. Long term prices of commodities are determined through a "street consensus" which takes the mean of the projections provided by dozens of established banks and analysts.

[Point 6 - referencing T̓silhqot'in Point 5]

The statement that the CEEA review panel and Environment Canada rejected the option is untrue, rather they were commenting on relative risk between alternatives. "Long-term environmental risk" is a technical term. In the original Prosperity proposal a new lake was built upstream of the tailings pond to compensate for the loss of Fish Lake. Technically therefore there was no risk at all to Fish Lake as it no longer existed. By preserving Fish Lake an element of risk is introduced and the New Prosperity EIS addresses those risks. MDP Option 2, which is the basis for the New Prosperity project proposal, was deemed not viable by the company in the original Prosperity EIS as a result

of the economic conditions at that time, not due to technical or environmental risk factors.

[My emphasis.]

#### IV. THE IMPUGNED PUBLICATIONS

[79] Taseko has pleaded that there were five publications in which it was defamed. The first three articles focus on environmental aspects of the New Prosperity Project. The last two articles focus on the current action (before amendments to include these two further articles) stating that the action constituted a SLAPP.

##### A. The First Three Articles

[80] As noted, the first three articles are similar. The three articles read:

##### i. First Article

###### ***Save Fish Lake (Again!)***

[Graphic: Colour photograph of a lake omitted]

On Monday, the federal government announced that they were accepting public comments for an Environment Assessment for Taseko Mines Ltd.'s New Prosperity Gold-Copper Mine project. If that sounds familiar to you it is because just over a year ago Taseko's first Prosperity Mine proposal was turned down by the same government process.

Taseko's original proposal was to use Fish Lake as their tailings pond, where they would store toxic waste rock produced by mining operations. During the first assessment, the company was told they needed to find an alternative to this, because it would destroy Fish Lake. Taseko's engineers offered Little Fish Lake as an alternate site for the tailings pond. However, eventually the toxins from the Little Fish Lake site would make their way downstream to Fish Lake. In fact, the review panel concluded that this "would result in greater long-term environmental risk."

Despite this history, the new mine plan that Taseko is seeking approval for proposes turning Little Fish Lake in to [sic] a toxic tailings pond.

If you are confused as to why the company would return with a proposal that has already been deemed worse than the one that was just rejected, you are not alone. In fact the whole idea of turning a lake, especially a lake called Fish Lake, in to [sic] a dump site for toxic tailings probably seems like a crazy idea.

It's not just that this proposal has already been rejected once; or that it will **threaten tens of thousands of fish** and pollute the headwaters of a river network that supports the world's largest run of wild salmon; or that the locally blue-listed population of grizzly bears would be threatened by this project; or

even that the T̓silhqot̓in Nation, the area's First Nations people, are strongly opposed to the project. **The craziest thing about this project is that - if people like you and I don't take this opportunity to speak up - there is a good chance that this mine will get built.**

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

Together, we can save Fish Lake. Again.

Sven Biggs / Outreach Director

**Wilderness Committee**

[Bolding in original.]

## **ii. Second Article**

### ***Save Fish Lake (Again!)***

[Graphic: Colour photograph of a lake omitted]

On Monday, the federal government announced that they were accepting public comments for an Environment Assessment for Taseko Mines Ltd.'s New Prosperity Gold-Copper Mine project. If that sounds familiar to you it is because just over a year ago Taseko's first Prosperity Mine proposal was turned down by the same government process.

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

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

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

It's not just that this proposal has already been rejected once: or that there is a risk it could **threaten tens of thousands of fish** and lead to pollution of the headwaters of a river network that supports the world's largest run of wild salmon: or that the locally blue-listed population of grizzly bears would be threatened by this project: or even that the T̓silhqot̓in Nation, the area's First Nations people, are strongly opposed to the project. **The craziest thing about this project is that - if people like you and I don't take this**



**opportunity to speak up - there is a good chance that this mine will set built.**

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

Together, we can save Fish Lake. Again.

Joe Foy / National Campaign Director

**Wilderness Committee**

[Bolding in original]

### **iii. Third Article**

*WRITE WILD - FISH LAKE*

[Graphic: Colour photograph of a lake omitted]

You may remember that back in November 2010 the federal government environmental assessment panel said "No" to mining proposal that would have destroyed Fish Lake, located approximately 125 km southwest of Williams Lake, and the 85,000 rainbow trout that call it home.

The Prosperity Mine proposal was turned down because of its massive environmental impacts and the facts that it was strongly opposed by the T̓silhqot'in Nation communities that are located near the proposed mine site. The damage to the lake and surrounding lands, forests and waters was just too devastating to allow the mine to go ahead.

Now the Canadian Environmental Assessment Agency has been asked by the mining corporation Taseko Mines Ltd. to investigate a new mining proposal called the "New Prosperity Mine." In fact this new proposal actually has higher environmental impacts than the one that was already rejected. ...

Please take a moment to stand up for Fish Lake.

...

Some points to consider:

- The "New Prosperity Mine" proposal would use nearby Little Fish Lake as a toxic dump site, and then drain down into Fish Lake eventually polluting that lake too.
- The proposed replacement lake would also result in a massive loss of fish habitat, and would require constant maintenance of spawning channels and ongoing stocking of the lake by governments.

[81] Taseko says that "the inferential meaning or impression left by the words complained of is defamatory (the "false" or "popular" innuendo meaning)": *Lawson v. Baines*, 2012 BCCA 117 at para. 13.

[82] In the amended notice of civil claim, the pleaded inferential meanings included that Taseko had a “callous disregard” or knew or was indifferent to particular environmental aspects of the project, and that Taseko’s second attempt for governmental approval was “abusive”.

[83] With respect to the first article, Taseko pleaded:

19. In the context of Article 1 as a whole, the Post 1 Expression conveyed the following natural and ordinary inferential meanings of and concerning the Plaintiff Taseko as a matter of impression:

- (a) In the Original Prosperity Project, the Plaintiff Taseko, with callous disregard for the environment, proposed to turn Fish Lake into a dump site for toxic tailings;
- (b) In the Original Prosperity Project, the Plaintiff Taseko, with callous disregard for the environment, proposed (in the alternative) to turn Little Fish Lake into a dump site for toxic tailings, with the result that the toxins from those tailings would eventually make their way downstream and contaminate Fish Lake;
- (c) In the New Prosperity Project, the Plaintiff Taseko, with callous disregard for the environment, proposes to turn Little Fish Lake into a dump site for toxic tailings, with the result that the toxins from those tailings would eventually make their way downstream and contaminate Fish Lake;
- (d) The New Prosperity Project is an abusive second attempt by the Plaintiff Taseko to obtain government approval for the use of Little Fish Lake as a dump site for toxic tailings;
- (e) The Plaintiff Taseko knows or is indifferent to the fact that its New Prosperity Project threatens to poison tens of thousands of fish, pollute the eco-system of Fish Lake and the headwaters of a river network that supports the world’s largest run of wild salmon and imperil an endangered population of grizzly bears; and/or
- (f) One or more of the above.

[84] The pleadings were similar with respect to the second and third articles.

[85] With respect to the fourth and fifth articles, the two articles alleging a SLAPP by Taseko, Taseko pleaded inferential meanings which include “improper and abusive purpose”.

**B. The Fourth and Fifth Articles**

**i. Fourth Article**

***WILDERNESS COMMITTEE DEFENDS AGAINST TASEKO SLAPP OVER FISH LAKE FIGHT***

[Graphic: Colour photograph of a lake omitted]

VANCOUVER - Dan Burnett, the Wilderness Committee's lawyer, today filed defence papers with the Supreme Court of British Columbia. The Wilderness Committee's defence answers Taseko Mines Ltd.'s Notice of Civil Claim that had been served on the Wilderness Committee March 1, 2012. Taseko has claimed that the Wilderness Committee has defamed Taseko in an Internet alert in early 2012 about having the Fish Lake area from a proposed open pit mine.

"What the Wilderness Committee is asking the courts to do in its filed Response to the Claim is uphold the Wilderness Committee's right to free speech on this important environmental issue, dismiss the action and impose extra court costs upon Taseko for attempting to use the litigation process to silence critics," said Burnett.

"We are saying that the threat of court action by Taseko Mines Ltd. is aimed at silencing critics such as the Wilderness Committee from speaking out in the debate over protecting the Fish Lake area from the company's proposed Prosperity Mine," said Joe Foy, National Campaign Director for the Wilderness Committee. "This court threat eats away at the very foundations of democracy and free speech that our society is based on," said Foy.

In the company's Notice of Civil Claim, Taseko alleged that the Wilderness Committee had made a number of defamatory statements - including a claim that the company planned to use Little Fish Lake as a toxic tailings pond.

"In fact, Taseko has published plans for its New Prosperity Mine that calls for inundating Little Fish lake under a massive toxic tailings pond that will wipe out a great deal of fish habitat and pollute a great deal of water. That's a plain fact that people should be allowed to write about and speak about without fear that court papers will arrive in the mail from some corporation that doesn't want public debate threatening profits," said Foy.

**ii. Fifth Article**

***HELP US DEFEND FREE SPEECH AND FISH LAKE***

[Graphic: Colour photograph of lake omitted]

I am writing you today because **we urgently need your support!** On March 1, the Wilderness Committee was served with a **Notice of Civil Claim by Taseko Mines Ltd.**

Taseko claimed that Wilderness Committee defamed Taseko in our materials opposing Taseko's proposed open pit copper and gold mine at Fish Lake.

Clearly we don't agree. In fact, we think that this court action by Taseko Mines Ltd. aims at silencing us from speaking out in the debate over protecting the Fish Lake area from the company's proposed New Prosperity Mine. We feel that this is a strategic lawsuit against public participation, or SLAPP.

So why are we just letting you know today about this SLAPP? In the last three weeks, we were busy preparing a response to their claim, and today, our lawyer Dan Burnett, filed defence papers with the Supreme Court of British Columbia.

What Dan says in our defence: "What the Wilderness Committee is asking the courts to do in its filed **Response to the Claim** is uphold the Wilderness Committee's right to free speech on this important environmental issue, dismiss the action and impose extra court costs upon Taseko for attempting to use the litigation process to silence critics."

In the company's Notice of Civil Claim, Taseko alleges that we had made a number of defamatory statements - including a claim that the company planned to use Little Fish Lake as a toxic tailings pond.

In fact, Taseko has published plans for its New Prosperity Mine that call for **inundating Little Fish Lake under a massive toxic tailings pond that will wipe out a great deal of fish habitat and pollute a great deal of water.**

That's a plain fact that people must be allowed to write about and speak about without fear that court papers will arrive in the mail from some corporation that doesn't want public debate threatening profits.

But there is more- much more. Taseko's proposed New Prosperity Mine threatens the region's grizzly bear population. The mine proposal is an affront to all those who care about human rights, given the strong stand the T̓silhqot'in First Nation has taken against the proposal.

So what are we going to do about Taseko's court threat? We are going to speak out and write even more about how the proposed New Prosperity Mine must be stopped in order that the Fish Lake area can be protected and handed down to future generations.

We believe that this court threat of Taseko's eats away at the very foundations of democracy and free speech that our society is based on. We have a duty to stand up to Taseko's bullying.

**Now, more than ever, we need your support. If you can give a donation towards our save Fish Lake campaign at this time I would very much appreciate it.**

Together we can save Fish Lake and the surrounding area from Taseko Mines Ltd.

***For the wild,***

*Joe Foy \ National Campaign Director*

***Wilderness Committee***

*Related Campaign:*

*Save Fish Lake*

[Bolding in original.]

[86] With respect to the fifth article, Taseko pleaded:

36. In the context of Article 5 as a whole, the Post 5 Expression conveyed the following natural and ordinary inferential meanings of and concerning the Plaintiff Taseko as a matter of impression:

- (a) The Plaintiff Taseko brought this lawsuit against the Defendant Wilderness Committee and the Defendant Sven Biggs for the improper and abusive purpose of stifling lawful public debate and stopping the said Defendants and others from exercising their right to lawful freedom of expression;
- (b) This lawsuit is a “SLAPP” or strategic lawsuit against public participation which is brought by the Plaintiff for the abusive purpose of suppressing lawful opposition to the New Prosperity Project;
- (c) The Plaintiff Taseko, with callous disregard for the environment, proposes to inundate Little Fish Lake under a massive toxic tailings pond that will wipe out a great deal of fish habitat and pollute a great; and/or
- (d) One or more of the above.

[87] Taseko’s pleadings are similar with respect to the fourth article.

## **V. ANALYSIS**

[88] I will address the first three articles first because they deal with the Original Prosperity and the New Prosperity proposals. The focus of the last two articles is on the current litigation and whether Taseko has brought the current action for improper purposes. I will address the last two after I address the first three articles.

### **A. Defamation and the First Three Articles**

[89] The Original Prosperity Proposal and the New Prosperity Proposal were topics of public interest, as is any proposal for a large project involving jobs, the environment, and the economy. The projects also engaged First Nations in that the nature and scope of potential or established aboriginal rights or title had to be considered.

[90] Taseko was clearly engaged in public discourse regarding the proposals, and in particular, for the purposes of the case at bar, the New Prosperity Proposal. By

the time of the first article in late January 2012, Taseko had announced the proposal and had by early August 2011 released its project description for New Prosperity.

[91] Mr. Jones testified that the New Prosperity Project description had been posted on the Canadian Environmental Assessment Agency's website by early August 2011. The posting accords with the following statements from the second review panel's October 31, 2013 report:

The Agency and the Panel provided opportunities for public participation throughout the environmental assessment process.

The Canadian Environmental Assessment Registry Internet site for the Project allowed for public access to all documents associated with the environmental assessment of the Project.

[92] Section 78(1) of *Canadian Environmental Assessment Act, 2012* S.C. 2012, c. 19, s. 52 [CEAA 2012] reads:

For the purpose of facilitating public access to records relating to environmental assessments and providing notice in a timely manner of those assessments, there is to be a registry called the Canadian Environmental Assessment Registry, consisting of an Internet site and project files.

[93] Section 79 (1) of the *CEAA 2012* reads:

The Agency must establish and maintain an Internet site that is available to the public.

[94] The predecessor legislation made similar provision for internet access: see s. 55.1 and 55.1(1) of *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 [CEAA 1992].

[95] Taseko enjoyed the reputation of a large mining company operating the well-known Gibraltar mine north of Williams Lake.

[96] With respect to the Original Prosperity Proposal, there had been considerable public involvement with debate and criticism. Taseko would have expected debate and criticism of the New Prosperity Proposal.

[97] As admitted in the pleadings, the Wilderness Committee represents itself as a reliable source of environmental news and information. Mr. Biggs has posted numerous articles on the Wilderness Committee's website.

[98] Based on the Wilderness Committee's name, a "reasonable and ordinary member of the public" would surmise that the Wilderness Committee would likely be a particular proponent of the environment and likely an opponent of a large open pit mine in a wilderness area. As previously noted, Justice Abella in *Color Your World* describes, a reasonable and ordinary member of the public as "a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility. A degree of common sense must be attributed to viewers."

[99] The articles were posted on the internet. A rudimentary search by a reader would have located a variety of information available on the proposed project. As previously noted, the CEAA managed an internet site for the stated purpose of facilitating public access to records relating to the project and the environmental assessments taking place and the description of scope of the project.

[100] The website would accord with the preamble to the *CEAA* 1992, which reads (in part):

AND WHEREAS the Government of Canada is committed to facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based;

[101] The *CEAA* 2012 reflects this same purpose of ensuring "that opportunities are provided for meaningful public participation during an environmental assessment" (at s. 4(1)(e)).

[102] The legal framework itself and the process for formal public discussion would also have been readily accessible and available on the internet.

[103] The “reasonable or ordinary member of the public” would assume that any large project involving the environment would be subject to public hearings and input, with relevant materials readily accessible.

[104] As noted, Taseko has pleaded that the articles conveyed “natural and ordinary inferential meanings” that Taseko had “callous disregard” or knew or was indifferent to the environment, for example, by proposing “to turn Little Fish Lake into a dump site for toxics tailings, with the result that the toxics from those tailings would eventually make their way downstream and contaminate Fish Lake”. Taseko also pleaded the inferential meaning that the New Prosperity Proposal was an “abusive second attempt” to obtain “government approval for the use of Little Fish Lake as a dump site for toxic tailings”.

[105] The three articles focus on the New Prosperity Project. The three articles encourage readers to become involved in the public discourse and to use the Wilderness Committee’s letter writing tool.

[106] In *Torstar*, Chief Justice McLachlin stated:

[49] Second, the free exchange of ideas is an “essential precondition of the search for truth”: *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 803, *per* McLachlin J. This rationale, sometimes known as the “marketplace of ideas”, extends beyond the political domain to any area of debate where truth is sought through the exchange of information and ideas. Information is disseminated and propositions debated. In the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth.

[107] In *WIC Radio*, Justice Binnie stated:

[2] ... An individual’s reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to “chill” freewheeling debate on matters of public interest. ...

[108] The reasonable and ordinary member of the public would expect that a large project with public input invited would give rise to a discussion, debate and controversy.



[109] The three articles focus on the New Prosperity Proposal and not Taseko as a corporation (or its directors or executives). There is no suggestion that Taseko was other than law-abiding.

[110] At the time the articles were written, the New Prosperity Project had yet to be approved; it was a project that was to be undertaken in the future. Taseko had done nothing to the environment. Two of Taseko's key authorities addressed statements regarding alleged actual harm: *Home Equity Development Inc. v. Crow*, 2004 BCSC 124 and *Mainstream Canada v. Staniford*, 2013 BCCA 341.

[111] The reasonable and ordinary person reading the Wilderness Committee's articles would not think less of Taseko and would understand that Taseko was submitting a proposal for a new open pit mine which would be subject to a rigorous environmental review by a federally appointed review panel and to vigorous public debate. The articles would not cause "feelings of hatred, contempt, ridicule, fear, dislike or disesteem" in a reasonable person (*Color Your World* at 14).

[112] In *WIC Radio*, Justice LeBel in his concurring reasons made several observations with respect to comments that may be viewed as defamatory:

[69] ...courts should not be too quick to find defamatory meaning -- particularly where expressions of opinion are concerned. The test is not whether the words impute negative qualities to the plaintiff, but whether, in the factual circumstances of the case, the public would think less of the plaintiff as a result of the comment. ...

...

[72] There is no doubt that a comment may be defamatory. It must simply be borne in mind that just because someone expresses an opinion does not mean that it will be believed and therefore affect its subject's reputation.

[73] This is all the more true in an age when the public is exposed to an astounding quantity and variety of commentaries on issues of public interest, ranging from political debate in the House of Commons, to newspaper editorials, to comedians' satire, to a high school student's blog. It would quite simply be wrong to assume that the public always takes statements of opinion at face value. Rather, members of the public must be presumed to evaluate comments in accordance with their own knowledge and opinions about the speaker and the subject of the comments.

[74] Members of the public will generally have a more solid basis on which to evaluate a comment about a public figure than one about someone who is

unknown. Thus, although public figures are certainly more open to criticism than those who avoid the public eye, this does not mean that their reputations are necessarily more vulnerable. In fact, public figures may have greater opportunity to influence their own reputations for the better.

[113] The reasonable and ordinary member of the public would not consider that Taseko proposed to proceed with “callous disregard” for the environment or that it knew or was indifferent to the environmental harm the project would cause. Taseko was not proposing to proceed with the construction of the New Prosperity Project without first having the New Prosperity Proposal undergo an environmental review with federal government approval subsequently granted.

[114] The reasonable and ordinary member of the public would not view the New Prosperity Proposal as “an abusive second attempt” to obtain federal approval. Often, persons and corporations do not at first succeed and try again. The word abusive suggests some impropriety or illegality. The three articles do not suggest in any manner that Taseko was not law-abiding or that it did not have the right to propose and seek the approval from the federal government of the New Prosperity Project.

[115] The reasonable and ordinary member of the public is neither a sheep nor a parrot. The easy access to a letter writing tool served to encourage engagement in public discourse but did not prevent a member of the public from expressing his or her own opinion. Before using the writing tool, he or she, as a reasonably thoughtful and informed person with a degree of common sense, would have first reflected on his or her own opinion and possibly looked at the CEAA website.

[116] In the overall context, the Court finds that the reasonable and ordinary member of the public would view the statements as comment as part of a freewheeling debate that engaged jobs, the environment, the economy, and First Nations. The Court does not find that Taseko’s “reputation in the eyes of a reasonable person” would tend to be lowered based on an inferential meaning or impression that Taseko had a callous disregard or knew or was indifferent to

particular environmental aspects, or that Taseko's second attempt for governmental approval was abusive.

[117] The Court's finding is not based on the assumption that the reasonable and ordinary member of the public would have done his or his own research before drawing an inference in forming an impression from any one of the first three articles. With respect to the pleaded impressions, the Court finds that the articles themselves do not convey the pleaded 'stings'. In other words, a reasonable person reading any of the first three articles would not think Taseko had a "callous disregard" for the environment, knew about or was indifferent to environmental harm, or was engaged in an "abusive" second attempt for approval.

[118] In sum, the Court finds that each of the first three articles is not defamatory.

[119] In the event I am wrong in finding that each of the first three articles is not defamatory, I will consider the defence of fair comment.

## **VI. FAIR COMMENT**

### **A. The Test**

[120] The reformulated test for fair comment is set forth above in Chief Justice McLachlin's reasons writing for the majority in *Torstar*. Under the reformulated test, the opinion held could be one that "anyone could honestly have expressed".

[121] For ease of reference, I reproduce the five elements of the defence:

- (1) The comment must be on a matter of public interest;
- (2) The comment must be based on fact;
- (3) The comment, though it can include inferences of fact, must be recognisable as comment;
- (4) The comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and
- (5) Even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

[122] As seen in the second element, the facts that gave rise to the comment must have been in existence at the time the comment was made. In this regard, Lord Denning in *Cohen* stated: “[a] man may comment on existing facts without having them all in the forefront of his mind at the time” (at 920).

[123] Of the five elements of the fair comment test, I will first address two of them (public interest and express malice) because these are common to all of the alleged defamatory statements.

[124] Before proceeding with the analysis of these elements of the fair comment defence, two considerations should be kept in mind. First, the New Prosperity Project was a proposal for the future. This fact lends itself to the finding that statements regarding aspects of the New Prosperity Project are likely to be comment.

[125] Second, the focus of all three articles was on the project and not Taseko. Language such as “the craziest thing about this project”, as found in the first article, is an example. As Justice Grove in *Odger v. Mortimer* (1873), 28 L.T. 472 (C.P.) at 473 stated:

... If mere ridicule of a public man were enough to support an action for libel, every public newspaper - would be perpetually subject to have an action brought against it. The fact is, that public men must put up with laughing, caricaturing, and sneering. Now the question here was this: - was the alleged libel really a malignant attack on Mr. Odger's private character, or was it a holding up of his principles to derision? ...

[126] In the case at bar, Taseko is a large corporation proposing to undertake a significant project that requires governmental approval with public input sought and considered. Criticism is aimed at the project not the “private character” of Taseko.

## **B. Matter of Public Interest**

[127] The first element of the test is whether the comment was on a matter of public interest. As described above, the proposed open pit mine was of public interest. Accordingly, this first element is satisfied.

**C. Malice**

[128] The last of the five elements of the fair comment test is whether the comment was “actuated by express malice”. The onus is on the plaintiff.

[129] The evidence of each of Mr. Biggs, Mr. J. Foy and Ms. Clarke supported that each was a proponent of the environment with a genuine interest in the matter. Mr. Foy was the national campaign director of the Wilderness Committee and Ms. Clarke is an executive of the Wilderness Committee. Each took responsibility for the articles.

[130] In preparing the articles, Mr. Biggs and Mr. Foy considered materials such as relevant parts of the first review panel’s report on the Original Prosperity Proposal, relevant parts of Taseko’s project description for New Prosperity, and the T̄silhqot’in “Ten Facts” document (including Mr. Foy’s checking transcript of the panel hearing on the Original Prosperity Project on the Canadian Environmental Assessment Agency’s website.)

[131] Mr. Biggs wrote the first and third articles, Mr. Foy wrote the second article.

[132] On February 13, 2012, Taseko’s counsel (not counsel at trial) wrote to Mr. Biggs and the Wilderness Committee stating that the Wilderness Committee’s articles on its website were defaming Taseko. Among other matters, Taseko’s counsel demanded that all defamatory references to Taseko be removed from the Wilderness Committee’s website. At that time, only the first and third articles had been posted.

[133] On February 14, 2012, Ms. Clarke, on behalf of the Wilderness Committee, wrote:

The Wilderness Committee acknowledges receipt of your letter on February 13, 2012 regarding alleged libellous statements found on our website.

We take these allegations very seriously, are reviewing our materials immediately and evaluating all statements made. We are also consulting with legal counsel on this matter, and will be responding to your concerns as soon as possible.

[134] On February 16, 2012, Taseko's counsel sent a further letter stating that "nothing had been done to address" matters. At that time, Taseko's counsel had not yet received Ms. Clarke's February 14, 2012 letter.

[135] On February 29, 2012, Ms. Clarke wrote a further letter to Taseko's counsel (it was shown as received on March 1, 2012 by Taseko's counsel's office). The letter reads:

Further to our previous letter responding to your February 13 letter on behalf of Taseko Mines Limited, we have investigated the points you raised and reviewed our materials with care. We strongly disagree that anything in those materials amounted to a libel of your client.

As a result of our review, we have made some changes to our materials that reflect your concerns, and we thank you for your interest in clarifying some of the facts involved. Our opinions, of course, may differ substantially from those of your client, but dialogue on important environmental issues facing British Columbia is important to all of us.

Certainly, there is no need to threaten litigation in order to engage in constructive dialogue among those who may disagree. At this point, active participation in the environmental assessment process would clearly best serve the public interest.

[136] As noted, Taseko's notice of civil claim was filed March 1, 2012.

[137] Prior to writing the February 29, 2012 letter, Ms. Clarke testified that she "did some research just to get some fresh eyes" on the articles of concern. She looked at parts of the first review panel's report on the Original Prosperity Project Proposal and parts of Taseko's project description for New Prosperity. She also read the T'silhqot'in "Ten Facts" document. She testified that the changes made to the subsequent article (the second article) were made "to try to clarify exactly" what the New Prosperity Proposal "was saying". She viewed the changes as "more technical terminology" and less plain language.

[138] As noted, Mr. Foy wrote the second article. He made changes to the first article. As to the purpose, he testified that they were "trying to more closely sort of use the language of their [Taseko's] engineers. We've moved a bit from Tim Horton's language into their language."

[139] In cross-examination, Mr. Biggs testified that he did not view the Wilderness Committee or himself as in the role of journalists:

- Q Okay. You don't say anything at all about Taseko's position concerning the allegations that were made in Exhibit 1, Tab 1 [First Article] or Exhibit 1, Tab 2 [Second Article], is that correct?
- A We don't -- again, we're not a news or a journalist operation, we don't held [sic] to those levels of -- of presenting both sides of the story, we present our side of the story, not Taseko's.
- Q Okay. And that was a deliberate decision that you took with respect to the way you would write Exhibit 1, Tab 1 [First Article], you weren't going to present Taseko's side of the story, correct?
- A We were going to present an accurate un -- explanation of our understanding of the mine and what Taseko was proposing to do. We were not going to though, however, offer counterpoints from the company about what they propose to do.
- Q Well, we know you didn't contact the company to give them an opportunity to offer counterpoints, right, you just went ahead and wrote the article?
- A Again, we're not journalists, we're not -- you know, there's no requirement for us to contact people before we write about their work.
- Q Okay. And not only do you say there was no con -- requirement for you to contact people to get their comments before you wrote about them, you were not going to tell your readers what Taseko's side of the story was, right?
- A I think we presented an accurate — an accurate version of what was being proposed based on documents both provided by Taseko and the government as well as media reports.
- Q Oh. You were not going to include —
- A I was not going to include quotations from Taseko if that's what you're asking.
- Q Right, and you weren't going to include quotations from Taseko's project description that contain statements that contradicted allegations you were making in Exhibit 1, Tab 1 [First Article], were you?
- A I -- no, especially if I felt that some of the statements that Taseko made were contradicted by other facts in their own documents.

[140] One does not need to be a journalist to avail oneself of the fair comment defence. Mr. Biggs's testimony accords with the Wilderness Committee as a "reliable source of environmental news and information". The Wilderness Committee has a particular perspective which, as noted, most readers would infer from its name. The

first two articles were titled “Save Fish Lake (Again)”. The third article with the writing tool was titled “Write Wild - Fish Lake”. The titles of these articles are consistent with an environmental perspective.

[141] The testimony of Mr. Biggs, Mr. Foy, and Ms. Clarke supports the Court’s finding that each had a genuine interest in the New Prosperity Proposal with none of them operating with ill-will, indirect motive, ulterior purpose, dishonesty, or knowing or reckless disregard for the truth. Each conducted their own research and each considered each article to provide an accurate description of key environmental aspects of the New Prosperity Proposal and the Original Prosperity Proposal.

[142] In sum, the Court does not find that either the Wilderness Committee or Mr. Biggs were “actuated by express malice”. Taseko has not satisfied its onus of proof.

[143] I will now address the remaining three elements of the fair comment defence for each of the first three articles. I will address these remaining elements as they relate to each individual article.

#### **D. Remaining Elements of the Fair Comment Defence**

[144] As noted, Taseko pleaded defamatory impressions arising from each of the first three articles. The first article gave rise to five claimed defamatory impressions

##### **i. First Article - Pleaded Impressions**

**(a) In the Original Prosperity Project, the Plaintiff Taseko, with callous disregard for the environment, proposed to turn Fish Lake into a dump site for toxic tailings.**

[145] In this regard, the first article reads:

Taseko’s original proposal was to use Fish Lake as their tailings pond, where they would store toxic waste rock produced by mining operations.

[146] In their February 13, 2012 letter, Taseko’s counsel states:

The facts regarding this project are significantly different than what has been falsely stated by the Wilderness Committee and Sven Biggs, including that



Fish Lake was proposed by Taseko to be used as a tailings pond. Fish Lake is not and never has been proposed as “a dump site for toxic tailings” by Taseko. The allegation that waste rock is toxic is also false, as is the allegation that Taseko will be releasing toxins from the tailings impoundment facility into the environment.

[147] Technically speaking, Taseko’s counsel was not correct in their description of what was to happen to Fish Lake under Original Prosperity. As Taseko stated in its EIS for the New Prosperity Project:

... there was no risk at all to Fish Lake as it no longer existed [under the Original Prosperity Proposal].

[148] As noted, *Brown on Defamation* states:

If a false statement in the publication is immaterial to the gist or sting of the libel, it does not render an otherwise true statement defamatory.

[149] In Original Prosperity, non-PAG rock, overburden and PAG rock (misclassified as non-PAG rock) was to be placed in the drained “Fish Lake”. It was also expected that water from the adjacent TSF would seep into the drained Fish Lake. Mr. G. Smyth is an engineer and a senior project manager who works for one of the key engineering firms Taseko engaged for New Prosperity. In cross-examination addressing seepage into the drained Fish Lake under the Original Prosperity Proposal, Mr. Smyth testified:

Q Right. And -- and there was a main tailings embankment as well, but in that particular design the seepage into the then drained Fish Lake didn’t need to be controlled by way of — of collection ponds and pump backs, right?

A That’s not entirely correct.

Q There was some collection -- there was -- there was a -- a good -- a good amount of seepage from the main embankment did go into the drained Fish Lake, though, right?

A Yes. The drained Fish Lake -- the deepest part of it actually became the water management pond that collected the seepage from the main embankment as well as other areas that fed to it.

Q Yes. And that pond at the bottom of the drained Fish Lake basin would be essentially treated the same way you would treat a tailings pond because it’s water from a tailings pond, right?

A It wasn’t all water from a tailings pond. It --

Q No, but you'd treat that pond -- you wouldn't put it -- you wouldn't put it into the natural environment, would you?

A No. The water was required for the process.

Q Correct. It would be confined within that pond that it was sitting in, in the drained Fish Lake, or pumped back if necessary to keep the water level up into the TSF, or perhaps used for operational needs, but you certainly wouldn't put it off into the natural creeks and rivers, right?

A Well, the plan was to use it as part of the operations in the way that you've described in the mill in the tailings facility. It was not designed to be -- to release to the receiving environment, but we never evaluated that as a -- a prospect.

[150] As Mr. Jones's testimony confirmed, TSF water may be harmful. The word toxic is generally understood to mean harmful.

[151] In the context, the Court finds that in relation to the sting, any inaccuracies are footling and immaterial. The language was recognizable as comment (comment may include "a deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof"). The comment also was one that a person could honestly express on the facts set forth in the first review panel's report of the Original Prosperity Proposal and Taseko's project description for the New Prosperity Project. As previously noted, information and facts about New Prosperity would have been easily accessible on the internet, and, in particular, on the CEAA website.

[152] I now turn to the second alleged defamatory impression of the first article.

**(b) In the Original Prosperity Project, the Plaintiff Taseko, with callous disregard for the environment, proposed (in the alternative) to turn Little Fish Lake into a dump site for toxic tailings, with the result that the toxics from those tailings would eventually make their way downstream and contaminate Fish Lake.**

[153] In this regard, the first article reads:

During the first assessment, the company was told they needed to find an alternative to this, because it would destroy Fish Lake. Taseko's engineers offered Little Fish Lake as an alternative site for the tailings pond. However, eventually the toxins from the Little Fish Lake site would make their way downstream to Fish Lake.

[154] In their February 13, 2012 letter, Taseko's counsel states:

We further note that Little Fish Lake is a small water-body, somewhere in size of around six hectares, and is subject to winter kill of any fish that are trapped in that water-body over the winter. The site of Little Fish Lake is involved in both the original Prosperity plan and in the New Prosperity plan; however, it was never proposed to be tailings impoundment facility or "tailings pond." Little Fish Lake is too small to be a tailings pond.

[155] The layout of the New Prosperity Project shown in Appendix A to these Reasons was originally from Taseko's 2011 project proposal. Little Fish Lake (Y'anah Biny) is covered by the much larger TSF. I note that page 39 from the first panel report (for Original Prosperity) states that the destruction of Little Fish Lake would be avoided under the alternative mine plan (which became New Prosperity). However, the map at page 41 of the first panel report shows the TSF directly over Little Fish Lake. Mr. McManus, Taseko's senior vice-president, confirmed during cross-examination at trial that Little Fish Lake would be under the TSF in New Prosperity. The second review panel stated that the New Prosperity Proposal "would involve the permanent loss of Little Fish Lake and its surrounding area from the placement of a 12 km<sup>2</sup> tailings storage facility".

[156] In context, the distinction between a tailings pond and a much larger TSF, which includes potentially harmful water and tailings is not material. Taseko also anticipated a large volume of seepage from the TSF, which it planned to capture and return to the TSF or treat. An honest person could be skeptical as to whether Taseko's design and efforts would be successful. The language is comment that an honest person could hold based on the first review panel's report for the Original Prosperity Proposal, and its alternative, and Taseko's project description for New Prosperity.

[157] Now, I will examine the third alleged defamatory impression.

**(c) In the New Prosperity Project, the Plaintiff Taseko, with callous disregard for the environment, propose to turn Little Fish Lake into a dump site for toxic tailings, with the result that the toxins from those tailings would eventually make their way downstream and contaminate Fish Lake.**

[158] This impression deals with the New Prosperity Project proposal. As noted, under the proposal, Little Fish Lake would be covered by (or become part of) the much larger TSF. TSF water may also be harmful.

[159] Taseko's project description for the New Prosperity Project contemplated seepage from the TSF. In its project description, Taseko stated: "Seepage losses will be returned to TSF via a seepage collection and recycle system." As noted, the review panel concluded that there would be a significant adverse environmental effect on the water quality in Fish Lake under the New Prosperity Proposal.

[160] Mr. Jones's April 26, 2010 testimony, partially quoted in the T̄silhqot'in's "Ten Facts", quoted above as part of his cross-examination, forms a factual basis for the impression:

What happens to the water quality in Fish Lake, if you try and preserve that body of water with the tailings facility right up against it, is that over time the water quality in Fish Lake will become equivalent to the water quality in the pore water of the tailing facility, particularly when it's that close. You might be able to delay that by moving the tailings facility farther away to Fish Creek south. You may even be able to minimize that, reduce it by mitigation measures that could be applied. But eventually that water quality will change.

[Underline denotes portion quoted in T̄silhqot'in's "Ten Facts"]

[161] The Court finds that the fair comment defence applies based on Taseko's project description for New Prosperity and Mr. Jones's April 26, 2010 testimony quoted in "Ten Facts". I will now address the fourth pleaded impression.

**(d) The New Prosperity Project is an abusive second attempt by the Plaintiff Taseko to obtain government approval for the use of Little Fish Lake as a dump site for toxic tailings.**

[162] As noted, under the New Prosperity Proposal, Little Fish Lake was to be subsumed as part of the TSF. The TSF would contain harmful water. The New Prosperity Proposal was a second attempt proposal after the first proposal was rejected. On these facts, a person could honestly express the opinion set forth in the stated impression.

**(e) The Plaintiff Taseko knows or is indifferent to the fact that its New Prosperity Project threatens to poison tens of thousands of fish, pollute the eco-system of Fish Lake and the headwaters of a river network that supports the world's largest run of wild salmon and imperil an endangered population of grizzly bears.**

[163] The New Prosperity Project would cover an area of approximately 25 square kilometres in the Fish Creek (Teztan Yeqox) watershed. As noted, this is a wilderness area. Taseko's proposal for New Prosperity contemplated the loss of approximately 20,000 square metres of fish habitat. The TSF would cover a large area and would also seep. The proposal also recognized that the Fish Creek watershed was grizzly bear habitat. With these facts, the Court finds that a person could honestly express the opinion set forth in the stated impression.

**ii. The Second Article - Pleaded Impressions**

[164] The pleaded impression with respect to the second article are:

- (a) In the Original Prosperity Project, the Plaintiff Taseko, with callous disregard for the environment, proposed to turn Little Fish Lake into a dump site for toxic tailings, with the result that toxins from those tailings could eventually make their way their way downstream to Fish Lake;
- (b) The New Prosperity Project is an abusive second attempt by the Plaintiff Taseko to obtain government approval for the use of Little Fish Lake as a site for the storage of toxic waste rock and overburden, with the result that toxins from Little Fish Lake could make their way downstream and fatally contaminate Fish Lake;
- (c) The Plaintiff Taseko knows or is indifferent to the fact that its New Prosperity Project threatens to poison tens of thousands of fish, pollute the eco-system of Fish Lake and the headwaters of a river network that supports the world's largest run of wild salmon and imperil an endangered population of grizzly bears; and/or
- (d) One or more of the above.

[165] The pleaded impressions are very similar to some of the pleaded impression for the first article. The factual basis is the same. The Court finds that the fair comment defence applies.

**iii. The Third Article - Pleaded Impressions**

[166] The pleaded impressions with respect to the third article are:

- (a) In the New Prosperity Project, the Plaintiff Taseko, with callous disregard for the environment, proposes to use Little Fish Lake as a toxic dump site, with the result that the toxins will then drain down and pollute Fish Lake;
- (b) In the New Prosperity Project, the Plaintiff Taseko, with callous disregard for the environment, proposes to create an artificial replacement lake, knowing or indifferent to the fact it will result in a massive loss of fish habitat, damage spawning channels and reduce or eliminate native fish populations:
- (c) The New Prosperity Project is an abusive second attempt by the Plaintiff Taseko to obtain government approval for a project which will increase the environmental damage resulting from development of the mine: and/or
- (d) One or more of the above.

[167] The pleaded impressions are similar to some of those for the first article.

[168] The third article refers to “The proposed replacement lake which would also result in a massive loss of fish habitat, and would require constant maintenance of spawning channels and ongoing stocking of the lake by governments”. In cross-examination, Mr. Foy testified that this language referred to the TSF.

[169] To the extent confusion could arise between the TSF and any proposed replacement lake (as had been proposed under the Original Prosperity Project proposal), the Court does not find that it would materially change the pleaded impressions. The pleaded impression was callous disregard of the environment, for fish, and fish habitat.

[170] The Court finds that the fair comment defence applies to the pleaded impressions based on the factual basis described above with respect to the first and second articles and which were included in the first review panel’s report for the Original Prosperity Project, Taseko’s project description for the New Prosperity Project, and Mr. Jones’s April 26, 2010 testimony quoted in the T̓silhqot’in’s “Ten Facts”.

## **VII. THE LAST TWO ARTICLES**

[171] The pleaded impressions with respect to the last two articles are:

- (a) The Plaintiff Taseko brought this lawsuit against the Defendant Wilderness Committee and the Defendant Sven Biggs for the improper and abusive purpose of stifling lawful public debate and stopping the said Defendants and others from exercising their right to lawful freedom of expression;
- (b) This lawsuit is a “SLAPP” or strategic lawsuit against public participation which is brought by the Plaintiff for the abusive purpose of suppressing lawful opposition to the New Prosperity Project;
- (c) The Plaintiff Taseko, with callous disregard for the environment, proposes to inundate Little Fish Lake under a massive toxic tailings pond that will wipe out a great deal of fish habitat and pollute a great deal of water; and/or
- (d) One or more of the above.

[172] The third pleaded impression involving callous disregard for the environment (Little Fish Lake, fish habitat, and water pollution) fails to support Taseko’s defamation claim for two reasons. First, the Court finds that a reasonable and ordinary member of the public would not form such impression from the articles (in this instance, the fifth article) following the Court’s reasoning in this regard with respect to the first three articles. Second, the fair comment defence would apply. As described, the requisite factual basis existed at the time of publication and a person could honestly express that opinion on that factual basis.

[173] With respect to the pleaded impressions relating to Taseko’s notice of civil claim, the two articles are defamatory, subject to an available defence. The language of the articles refers to Taseko, the words were published, and they would tend to lower Taseko’s reputation in the eyes of a reasonable person. A law-abiding person does not use litigation improperly to silence critics exercising democratic rights.

[174] The defence of fair comment applies. The language was clearly comment -- an opinion or view. A person could honestly express the opinion or view based on the factual context. A large mining corporation seeking governmental approval for an open pit mine had filed a notice of civil claim against an environmental organization, with the mining corporation seeking damages, including punitive damages, and injunctive relief.

[175] Qualified privilege also exists with respect to commenting or reporting on documents filed with a court. The evidence does not support a finding of malice or “high-handed and careless” conduct by the Wilderness Committee (including Mr. Biggs): See *Hill* at paras. 154 -156.

### **VIII. JUSTIFICATION (TRUTH)**

[176] With the Court’s findings that the fair comment defence may apply to all of the pleaded impressions there is no need to consider the justification defence.

### **IX. RESPONSIBLE COMMUNICATION**

[177] The defence of responsible communication would not apply. Taseko’s side of the story was not reported by the Wilderness Committee or Mr. Biggs.

### **X. COSTS**

[178] Mr. Biggs and the Wilderness Committee argue that Taseko’s claim represents a SLAPP. They seek of an award of special costs.

[179] Rule 14-1(3) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 refers to “special costs” as “those fees that were proper or reasonably necessary to conduct the proceeding”.

[180] Some years ago, our Province for a short period of time, between April 11, 2001 and August 16, 2001, had anti-SLAPP legislation: *Protection of Public Participation Act*, 2001 S.B.C. c. 19. rep. by the *Miscellaneous Statutes Amendment Act*, 2001, S.B.C. 2001, c. 32, s. 28.

[181] If there are to be special rules for costs relating to a SLAPP, such is a matter for the Legislature, as the past legislation evidences.

[182] In determining the award of costs, I will apply the usual rules associated with an award of special costs. I do not wish to create additional rules for costs that may be unique to a SLAPP. The defendants have pleaded that this action is an improper use of the litigation process, an abuse of process, and that the plaintiff is seeking to



use the law of defamation to limit freedom of expression: see paras. 15-17 of the third amended response to civil claim.

[183] With respect to other critics of New Prosperity, defence counsel stated in written argument:

Some of the harsh criticisms came from the T̓silhqot̓in...the Sierra Club...Marilyn Baptiste in the Vancouver Sun...Peter O'Neill in the Vancouver Sun ....The Wilderness Committee was just one of many critical voices – but notably the only one sued by Taseko.

[References omitted.]

[184] In the case at bar, Taseko pleaded that the last two articles were published by the Wilderness Committee “for the predominant purpose of deterring the Plaintiff Taseko from seeking vindication of its reputation in this action”.

[185] Taseko also pleaded:

The Defendants have each been guilty of reprehensible, insulting, high-handed, spiteful, malicious and oppressive conduct relating to publication of the Libels which justifies the Court in granting a substantial award of punitive and exemplary damages and an award of special costs in favour of the Plaintiff, in addition to an award of general damages. The Plaintiff will rely upon the entire conduct of the Defendants before and after commencement of this action to the date of judgment.

[186] At trial, Taseko maintained its position that it was entitled to punitive damages and special costs.

[187] With respect to special costs, our Court of Appeal in *Gichuru v. Smith*, 2014 BCCA 414 set forth the test:

[78] The test for special costs was set out in *Garcia v. Crestbrook Forest Industries Ltd. No. 2* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17, where Lambert J.A., speaking for the Court, after an extensive review of the authorities, concluded:

... it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as “reprehensible”. As Chief Justice Esson said in *Leung v. Leung*, [1993] B.C.J. No. 2909 the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word

reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

[79] A party who alleges serious misconduct against another in a civil lawsuit must be prepared to prove such allegations or reap the consequences in the form of an order for special costs: *Kurtakis v. Canadian Northern Shield Insurance Co.* (1995), 17 B.C.L.R. (3d) 197 (C.A.).

[188] Only in exceptional cases are punitive damages awarded. As the Chief Justice and Justice Abella, writing for the Supreme Court of Canada in *Fidler v. Sun Life*, 2006 SCC 30, stated:

[61] While compensatory damages are awarded primarily for the purpose of compensating a plaintiff for pecuniary and non-pecuniary losses suffered as a result of a defendant's conduct, punitive damages are designed to address the purposes of retribution, deterrence and denunciation: *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, at para. 43.

[62] By their nature, contract breaches will sometimes give rise to censure. But to attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency – the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196; *Whiten*, at para. 36. The misconduct must be of a nature as to take it beyond the usual opprobrium that surrounds breaking a contract. As stated in *Whiten*, at para. 36, "punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)". Criminal law and quasi-criminal regulatory schemes are recognized as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint.

[My emphasis.]

[189] With respect to New Prosperity, Mr. McManus presented Taseko's closing submission to the review panel. He addressed the review panel reading from Taseko's written closing submission filed with the review panel and which would have been subsequently posted on the Canadian Environmental Assessment Agency's website.

[190] At trial, Mr. McManus was cross-examined regarding Taseko's closing submissions:

Q And at page 46 just in the winding up words of your closing submissions on behalf of Taseko, going down the fifth line, the words

that you -- or that you wrote or Taseko wrote and you spoke beginning with the word, "however."

A Yes.

Q

However, Taseko believes that opponents to the mine in aboriginal communities have used culture and heritage inappropriately as a weapon by exaggerating the value of the areas that will be impacted by the mine and their use of those particular lands and resources for cultural purposes. We hope and trust the Panel will see through those tactics.

And that was the view of Taseko that you delivered and was your view?

A It is.

Q And what do you say to those -- what would you say to those from the First Nations communities who will say that that is both factually wrong and deeply hurtful?

A I would say this is what I believe.

Q You're entitled to your view?

A I believe what I said.

Q Right. And you're entitled to your view?

A I am.

Q However hurtful and however they might say it might be factually wrong?

A This is an opinion.

Q Right.

A Right.

Q And you're entitled to express it?

A That's right.

Q And that's a two-way street, sir, isn't it?

A Yes. But I believe this to be true.

Q And the same goes with a bunch of other scathing remarks that you made in your presentation with respect to the integrity of or competence of experts who are --

A Absolutely.

Q Who are opponents?

A Absolutely.

Q With respect to the motivations of those opposing the mine?

A Correct. Some, not all.

Q In fact, at page 3 at the bottom, the last three lines you write:

There is no doubt --

Or you wrote and spoke:

There is no doubt that a great deal of misinformation was the product of an organized campaign designed not to inform the Panel's decision, but calculated to stop the project from proceeding.

And that was one of your expressed opinions?

A It's one of the active main reasons we're here today.

[191] Punitive damages are intended to punish behaviour that departs markedly from ordinary standards of decency, straddling civil and criminal law.

[192] Taseko's statement that there was "a great deal of misinformation" and that it "was the product of an organized campaign designed not to inform the Panel's decision, but calculated to stop the project from proceeding" is comment or opinion.

[193] As is apparent from Appendix 2 of the panel report for New Prosperity, which sets forth the résumés of the three panel members, they were well-qualified and were chosen for their experience and expertise. Undoubtedly, as with any large project with environmental implications, there may have been some misinformation and erroneous speculation about the project, but the panel members were in the position to ignore or discount misinformation, or opinion based on misinformation, as they undertook their analysis.

[194] As noted, on October 31, 2013 the review panel released its report on the New Prosperity Project proposal. Key findings included adverse environmental effects on water quality in Fish Lake (Teztan Biny) and on fish and fish habitat in Fish Lake. In its report, the review panel summarized its reasons for these conclusions:

Water Quality

The Panel has determined, based on strong evidence submitted by government agencies (both Canada and British Columbia) and other participants, that Taseko underestimated the volume of tailings pore water seepage leaving the tailings storage facility and the impacts on water quality caused by recirculation of water within the Fish Lake (Teztan Biny) and Upper

Fish Creek (Teztan Yeqox) system. The Panel has also determined considerable uncertainty remains regarding Taseko's contingency plan for water treatment. Again, this conclusion was based on strong evidence submitted by governments and other participants. The Panel has determined that the proposed target water quality objectives for Fish Lake are not likely achievable and, even with expensive water treatment measures, the protection of Fish Lake water quality is unlikely to succeed in the long term.

Although the seepage mitigation measures proposed by Taseko have the potential to substantially reduce the volume of seepage, the Panel concludes it would not eliminate seepage from entering Fish Lake (Teztan Biny). The Panel concludes the concentration of contaminants of concern in Fish Lake would be considerably larger than Taseko's predictions and that eutrophication of Fish Lake would be a significant problem that is unlikely to be mitigable in the long term.

Fish and Fish Habitat

The likely significant adverse effects on water quality in Fish Lake and the expected eutrophication of Fish Lake would therefore result in a significant adverse effect on fish and fish habitat in Fish Lake.

[My emphasis.]

[195] Once the panel report was released, it was no longer reasonable to continue to seek punitive damages against the defendants. The panel report shows that reasonable individuals with particular expertise could conclude that New Prosperity would result in significant adverse environmental effects.

[196] In the case at bar, Taseko pleaded and maintained serious allegations against the defendants beyond a plea of defamation *simpliciter*.

[197] With the release of the review panel's October 31, 2013 report, it would have been apparent that the review panel's key findings regarding adverse environmental impacts were similar to those the defendants had described. To continue to seek punitive damages and special costs after the release of the panel's report attracts the Court's rebuke. Punitive damages may be "resorted to only in exceptional cases, and with restraint" (*Fidler* at para. 62).

[198] The Court's rebuke is warranted because the basis for punitive damages straddles civil and criminal law. Where serious allegations are made, especially in connection with free expression, such allegations should be withdrawn where, as

matters unfold, it becomes apparent that a proper basis does not exist for the allegations.

[199] As Mr. McManus's testimony shows, Taseko held strong opinions with respect to matters. While a litigant is entitled to hold strong opinions, under our litigant-driven common law system, a litigant has an obligation, especially with respect to serious allegations, to evaluate the strengths and weaknesses of the litigant's claim throughout the litigation. As Justice Hall, in writing for our Court of Appeal in *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, wrote at para. 16:

It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences... .

[200] In this case, seeking punitive damages was an economic threat. In the context of a defamation action, seeking punitive damages may serve to silence critics. Further, Taseko was signifying that the defendants were walking the border of criminal law.

[201] The Court will award special costs to the defendants for their respective costs incurred on or after December 1, 2013. In arriving at this date for the award of special costs, I have allowed for one month during which time Taseko could have reviewed the panel report and reconsidered its position with respect to seeking punitive damages. Prior to December 1, 2013, the defendants are awarded costs at Scale B.

## **XI. CONCLUSION**

[202] The plaintiff's claim is dismissed.

[203] The defendants are awarded costs at Scale B for their respective costs incurred prior to December 1, 2013. For costs incurred on or after December 1, 2013, the defendants' respective costs are awarded as special costs.

[204] I wish to thank counsel for their helpful submissions.

“Funt J.”

APPENDIX A

