COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Taseko Mines Limited v. Western Canada Wilderness Committee,* 2017 BCCA 431

Date: 20171213

Docket: CA43466

Between:

Taseko Mines Limited

Appellant

(Plaintiff)

And

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

Respondents

(Defendants)

Before: The Honourable Mr. Justice Frankel

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated January 25, 2016 (*Taseko Mines Limited v. Western Canada Wilderness Committee*, 2016 BCSC 109, Vancouver Docket S121589).

Counsel for the Appellant: R.D. McConchie

A. McConchie

Counsel for the Respondents: D.W. Burnett, Q.C.

P.E. Sheppard

Place and Date of Hearing:	Vancouver, British Columbia June 7 & 8, 2017
Place and Date of Judgment:	Vancouver, British Columbia December 13, 2017

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Goepel

Summary:

Taseko Mines Limited appeals against the dismissal of their defamation claim. They say the judge erred in law by applying the incorrect test to the question of whether publications conveyed inferentially defamatory meanings. They further submit that the judge committed a palpable and overriding error in finding sufficient facts to determine that certain parts of those publications constituted fair comment. Relying on the assertion that parts of those publications do not constitute fair comment, Taseko says that the trial judge's further alternative holding that those publications were protected by qualified privilege was a legal error. They also attack the trial judge's factual findings regarding malice, alleging that he committed a palpable and overriding error by finding that the Western Canada Wilderness Committee and Mr. Biggs were not spurred by express malice in publishing the articles. Finally, they say the judge did not exercise his discretion judicially in awarding special costs to the Wilderness Committee and to Mr. Biggs. Held: Appeal allowed in part. The trial judge applied the correct legal test to the question of whether the publications conveyed inferentially defamatory meanings. The trial judge committed no palpable and overriding error in coming to any of his factual findings, obviating the need to address Taseko's qualified privilege argument. The trial judge erred in awarding special costs.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] Taseko Mines Ltd. ("Taseko") unsuccessfully sued the Western Canada Wilderness Committee and Sven Biggs (collectively "WCWC"), for defamation in relation to five articles posted on the WCWC's website in relation to the building of an open-pit mine, in what is alleged to be a "strategic lawsuit against public participation" or "SLAPP". Costs incurred prior to December 1, 2013, were awarded to the WCWC on Scale "B" and as special costs after this date. Taseko appeals the dismissal of its defamation claim and the costs order. The trial judgement is indexed as 2016 BCSC 109.

[2] For the reasons that follow, I would allow the appeal only to the extent of setting aside the order for special costs.

Background

[3] Taseko is a large Canadian mining company and the 75% owner and operator of a copper-molybdenum mine located north of Williams Lake, BC. It holds the mineral rights to a large copper and gold deposit located about 125 kilometres southwest of Williams Lake in a wilderness area of forests, lakes, streams, mountains, and valleys.

[4] Taseko has twice sought federal environmental approval for an open-pit mine in the area. Both of its mine proposals were rejected by the federal Minister of the Environment, following two comprehensive reports by federal review panels appointed to assess the environment effects of the proposed mine and make recommendations.

[5] The WCWC is a non-profit society that provides environmental news and information to the public through its website. Sven Biggs was a Wilderness Committee employee and one of its directors. He wrote several of the articles posted on the WCWC's website.

Taseko's Two Mine Proposals

Original Prosperity Project

[6] In both of Taseko's proposals, the location and size of the proposed mine were the same. The proposed open-pit mine was to be approximately half a kilometre deep and one-and-a-half kilometres across, with an approximate operating life of 20 years. The first proposal, referred to by the trial judge as the Original Prosperity Project, involved draining Fish Lake, a 110-hectare lake located 300 metres southeast of the mine, to create a storage area for non-potentially acid generating ("non-PAG") waste rock, low grade ore, and overburden (soil and rock from areas overlying the mineral deposits).

[7] Taseko also proposed building a 120-hectare tailings storage facility upstream and south of Fish Lake that would encompass Little Fish Lake (a smaller lake of approximately six hectares), portions of Fish Creek, and the surrounding wetlands and meadows. The tailings storage facility would be used to store tailings (sulphide waste material removed during the ore concentration process) and potentially acid generating ("PAG") waste rock. The tailings storage facility would be used to dispose of approximately 240 million tons of PAG rock and 480 million tons of tailings, and it would be bounded by a large embankment on its northwest side.

[8] Taseko anticipated that despite their plans to capture seepage water using wells, pumps, and collection ponds, some of the water from the tailings storage facility would inevitably make its way into the drained basin of Fish Lake. An engineer and senior project manager employed by Taseko said under cross-examination that the deepest part of the drained lake basin would become a water management pond to collect seepage from the main tailings storage facility embankment, as well as other areas that fed into it.

[9] At the south end of the tailings storage facility, Taseko proposed creating Prosperity Lake, a new body of water approximately the size of the drained Fish Lake, to compensate for the lost fish habitat in Fish Lake, Little Fish Lake, and Fish Creek.

[10] This proposal was not accepted.

New Prosperity Project

[11] In the second proposal, Taseko agreed not to drain Fish Lake, and to instead locate the tailings storage facility approximately two kilometres further upstream, southeast of the lake. The tailings storage facility would be bounded on its northwest side by an embankment approximately three kilometres long and 100 metres high. The tailings storage facility in this

proposal would cover approximately 1200 hectares (about 3x4 km). Non-PAG rock would be placed in a pile just northeast of the open pit mine.

[12] Taseko's vice president of engineering stated under cross-examination that because the tailings storage facility would be located close to Fish Lake, over time the water quality in the lake would become equivalent to the pore water quality in the tailings facility. He noted that this decrease in water quality could be delayed or minimized by moving the tailings storage facility further away, or by employing mitigating measures, but it could not be completely prevented. In its project description for the New Prosperity Project, Taseko stated that Original Prosperity was the most "environmentally responsible option", as it would confine environmental disturbance to a single watershed upstream of the open pit (Little Fish Lake and Fish Creek) and cause the least environmental risk outside this area. In its Environmental Impact Statement ("EIS") for the New Prosperity Project, Taseko acknowledged that preserving Fish Lake would introduce an element of risk. It noted that in the initial proposal, "there was no risk at all to Fish Lake as it no longer existed".

[13] In both proposals, Little Fish Lake would be permanently lost, as it would form part of the larger tailings storage facility. Both proposals would also cause severe damage to Fish Lake and its ecosystem, either by draining the lake from the outset or by building the tailings storage facility nearby and upstream, which would cause harmful water to inevitably seep into the lake.

Environmental Impacts of Both Proposals

PAG and Non-PAG Waste Rock

[14] Open pit mining results in waste rock, some of which is PAG, which over time can cause acid rock drainage and metal leaching. These processes occur when minerals containing metals and sulphur (called sulphides) are exposed to both air and water, causing them to oxidize. This can cause them to produce acid, which can then be carried by streams in the acid rock drainage process.

[15] Taseko asserted that by placing the PAG under water in the tailings storage facility, the rock would not be exposed to air. However, it also anticipated that some waste rock would be misclassified as non-PAG when in fact it was PAG. Taseko anticipated about 3% of the rock would be misclassified, which would amount to a total of approximately 6 million tons of rock. In the Original Prosperity Project, misclassified rock would be placed in drained Fish Lake along with non-PAG rock. In the New Prosperity Project, it would be placed in the non-PAG pile, where Taseko expected the non-PAG rock would "buffer the effects of the misclassified rock". Taseko thus did not anticipate adverse environmental effects in the form of acid rock drainage or metal leaching.

The Tailings Storage Facility and Seepage Water

[16] Water within the tailings storage facility would be potentially harmful, particularly when it leaked from the tailings storage facility (this is called "seepage" or "seepage water"). Taseko stated in the New Prosperity Project description that seepage flowing into Upper Fish Creek could contain high levels of arsenic, iron, and mercury that would exceed the guideline levels for the protection of aquatic life. Taseko proposed taking steps to ensure that the environmental risks associated with seepage from the tailings storage facility to ground water would be "minimal". In the Original Prosperity Project, Taseko asserted that seepage would not be a significant concern because it would flow into the drained basin of Fish Lake, where it could then be pumped back to the tailings storage facility or used for operational needs.

[17] Taseko's vice president of engineering stated under cross-examination that in the New Prosperity Project, seepage from the tailings storage facility into Fish Lake would inevitably cause the lake water quality to become equivalent to that of the pore water in the tailings facility. Avoiding this contamination by draining Fish Lake at the outset was one of the advantages of the Original Prosperity Project. The review panel agreed with Taseko and Environment Canada that locating the tailings storage facility upstream of Fish Lake (as in the New Prosperity Project) would cause greater environment risk than the alternative.

Reclamation Measures

[18] Taseko proposed various reclamation measures to return the area to a more natural state at the end of the mine's life, while acknowledging that it would be impossible to return the area to its original state.

The Impugned Articles

[19] The WCWC posted to its website the first three articles encouraging readers to write to the review panel and comment on Taseko's New Prosperity Project. Mr. Biggs wrote the first and third articles. The second article is an amended version of the first.

The First Article

[20] The first article stated that the federal government was accepting public comments on the New Prosperity Project, and noted that Taseko's first proposal had been rejected. It described Taseko's original plan to use Fish Lake as a tailings pond, where they would store "toxic" waste rock produced by the mine. It stated that when Taseko was told they needed to find an alternative to this plan because it would destroy Fish Lake, they proposed to store tailings in Little Fish Lake, where toxins would eventually make their way downstream to Fish Lake. It stated that Taseko was seeking approval to turn Little Fish Lake into "a toxic tailings pond", and that turning a lake, especially one called Fish Lake, into a "dump site for toxic tailings … probably seems like a crazy idea".

[21] It noted that Taseko was returning to a proposal already deemed worse than the one previously rejected. It stated that the proposal would threaten tens of thousands of fish, pollute

the headwaters of a river network supporting the world's largest run of wild salmon, and threaten the local grizzly bear population. It also stated that the Tsilhqot'in Nation, the area's First Nations people, were strongly opposed to the project. The article ended by urging readers to use a letter-writing tool to submit a comment for the Environmental Assessment.

The Second Article

[22] This article included corrected wording about the proposals, including the fact that Taseko had originally planned to drain Fish Lake and store waste rock and overburden in the empty basin, and that in the new proposal, toxins from the Little Fish Lake site "could" (rather than "would") pollute the larger lake downstream. It stated that in the new proposal, Little Fish Lake and the surrounding area would be used to build a larger lake for the tailings storage facility. In similar wording to the first article, it stated that if the reader was confused about why a company would choose a proposal "already deemed a worse alternative than the first by Taseko, Environment Canada, and the Environmental Assessment Panel", they were not alone.

The Third Article

[23] The third article restated some of the content of the earlier articles, and emphasized that the initial proposal was turned down because of "its massive environmental impacts" and the fact that it was opposed by the Tsilhqot'in Nation. It stated that the damage to the lake and surrounding lands, forests, and waters was too devastating to allow the mine to be built. It noted that the new proposal would use Little Fish Lake as a toxic dump site, which would drain down into Fish Lake and pollute it as well, and the proposed replacement lake would result in a massive loss of fish habitat, requiring constant maintenance of spawning channels and ongoing stocking of the lake by governments.

[24] The third article referred to the creation of a new lake, which was part of the Original Prosperity Project, but not the New Prosperity Project.

The Fourth and Fifth Articles

[25] The last two articles alleged that Taseko's defamation claim, which had been served on the WCWC on March 1, 2012, was an attempt to stifle Taseko's critics from speaking on a matter of public importance by way of a SLAPP. These articles described the case brought by Taseko; summarized the defence; and included its legal counsel and national campaign director's comments on the lawsuit, the importance of free speech, and their litigation strategy. The two articles also repeated some of the statements from the previous three articles about the project, including details about the "massive" tailings pond that would destroy Little Fish Lake and its fish habitat and pollute a great deal of water, the negative effects the mine would have on the region's grizzly bear population, and opposition to the project from the Tsilhqot'in First Nation. The Fifth Article referred to Taseko's conduct as "bullying", and stated that the lawsuit threatened the foundations of democracy and free speech. The Fifth Article also urged readers to donate to the organization's Save Fish Lake campaign.

The Trial Judge's Reasons

[26] In his reasons for judgment, the trial judge described the legal test for defamatory expression and the defences of fair comment, justification, and responsible communication on matters of public interest. He summarized Taseko's proposals and quoted the articles at length, and referred to several contemporaneous publications from other sources that were also critical of Taseko's proposed projects.

Defamatory Expression in the First Three Articles

[27] The trial judge found that Taseko was clearly engaged in public discourse regarding the proposals, and noted that both the review panel and the Canadian Environmental Assessment Agency ("CEAA") had provided public access to all assessment documents and opportunities for public participation. The trial judge found that there had been considerable public involvement, including debate and criticism, of the Original Prosperity Proposal, and that Taseko would have expected debate and criticism of its new proposal as well. He found that a reasonable and ordinary member of the public would expect that a large project in which public input was invited would give rise to discussion, debate, and controversy. He emphasized that the articles focused on the New Prosperity Proposal, rather than on Taseko as a corporation or its directors or executives. The judge found the articles contained no suggestion that Taseko had been anything other than law-abiding.

[28] The judge held that a reasonable and ordinary reader would not think less of Taseko, and would understand that the company was submitting a proposal for a new open-pit mine that would be subject to rigorous environmental review and public debate. The articles would not cause a reasonable person to have "feelings of hatred, contempt, ridicule, fear, dislike or disesteem" (quoting Abella J.A., as she then was, in *Canadian Broadcasting Corporation et al. v. Color Your World Corp.* (1998), 156 DLR (4th) 27 (Ont.C.A.)).

[29] The judge determined that a reasonable and ordinary member of the public would not conclude based on these articles that Taseko proposed to proceed with "callous disregard" for the environment, that it was indifferent to the environment or the potential harms of the project, or that the new proposal was an "abusive second attempt" to obtain federal approval, as Taseko had pleaded. The judge noted that the reasonable and ordinary member of the public is "neither a sheep nor a parrot", and that the WCWC's letter-writing tool encouraged engagement in public discourse but did not prevent a member of the public from expressing their own opinion, possibly after also looking at the CEAA website.

[30] The judge concluded that a reasonable and ordinary member of the public would view the WCWC's statements as comment in part of a "freewheeling debate" that addressed jobs, the environment, the economy, and First Nations. Taseko's reputation would not tend to be lowered based on an inferential meaning that Taseko had callous disregard or knew and was indifferent to environment aspects of its proposal, or that its second attempt to seek government approval was abusive. Accordingly, the trial judge held that each of the first three articles was not defamatory.

Defences

[31] In the event that he was wrong in his finding that the first three articles were not defamatory, the trial judge also addressed the defence of fair comment. He did not examine the justification defence, as he found that the fair comment defence applied to all three articles. He held that the responsible communication defence did not apply, as Taseko's side of the story was not reported by the WCWC.

Fair Comment: The First Three Articles

[32] In assessing the fair comment defence, the trial judge first noted that Taseko was a large corporation proposing a significant project requiring government approval, and public input had been sought and considered. Criticism was aimed at the project rather than Taseko's "private character". The trial judge held that the fair comment defence (as laid out in *Grant v. Torstar Corp*., 2009 SCC 61) applied to the first three articles because:

(1) They addressed a proposed open pit mine, a matter of public interest;

(2) The comments were based on publicly available facts that were easily accessible on the Internet, in particular through the CEAA website. The factual inaccuracies in the articles were immaterial (for instance, the distinction between using Little Fish Lake as a tailings pond and subsuming the lake within a larger tailings storage facility, which the review panel found would involve its "permanent loss"; and the difference between the word "toxic" as used by the WCWC and "harmful", the term Taseko's vice president of engineering used to describe water in the tailings storage facility, which Taseko confirmed would seep into drained Fish Lake in the Original Prosperity Proposal);

(3) The comments in the articles were recognizably comments, a term which includes deductions, inferences, conclusions, criticisms, judgments, remarks, or observations that are generally incapable of proof;

(4) The comments contained opinions that any person could honestly express based on the proved facts set out in the first review panel's report on the Original Prosperity Proposal and Taseko's description of the New Prosperity mine; and

(5) Neither Mr. Biggs nor the Wilderness Committee were motivated by express malice. They attempted to provide an accurate description of key aspects of Taseko's proposals, including by revising the wording in the second article following a letter from Taseko's counsel asserting that the first and third articles were defamatory. All of the individuals involved in the writing and revision of the articles had a genuine interest in the New Prosperity Proposal, and none of them operated with ill-will, indirect motive, ulterior purpose, dishonesty, or knowing or reckless disregard for the truth.

Fair Comment & Qualified Privilege: The Last Two Articles

[33] The trial judge found that the last two articles were defamatory with respect to Taseko's notice of civil claim. He noted that the language in 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 because a law-abiding person does not improperly use litigation to silence its critics exercising their democratic rights. However, the judge held that the defence of fair comment applied, as:

(1) the language was clearly comment (an opinion or view); and,

(2) a person could honestly express this opinion given the factual context: a large mining corporation seeking government approval for an open-pit mine had filed a notice of civil claim against an environmental organization and sought damages, including punitive damages, plus injunctive relief.

[34] The judge noted that qualified privilege also exists with respect to commenting or reporting on documents filed with a court, and held there was no malice or "high-handed and careless" conduct by the WCWC. Thus qualified privilege also provided a defence.

Costs

[35] In addition to awarding the costs that the WCWC incurred before December 1, 2013, the trial judge awarded them special costs on the basis that Taseko had continued to seek punitive damages after the release of the review panel's report, which shows that reasonable individuals with specific expertise could conclude that the New Prosperity mine would result in significant adverse environmental effects.

[36] He found that continuing to seek punitive damages and special costs after the release of the panel's report "attracts the Court's rebuke", as punitive damages may be resorted to only

with restraint in exceptional cases. This rebuke was warranted because the basis for punitive damages straddles civil and criminal law, and when serious allegations are made, particularly when they concern free expression, they should be withdrawn when it becomes apparent that there is no proper basis for them.

[37] While Taseko was entitled to hold strong opinions, litigants have an obligation to evaluate the strengths and weaknesses of their claim throughout the litigation. Seeking punitive damages in this case was an economic threat, and in a defamation case it may have had the effect of silencing critics and signifying that the WCWC was close to breaking the criminal law. The judge allowed for a one-month period during which Taseko could have reviewed the panel's report and reconsidered its position on seeking punitive damages.

The Issues

[38] Taseko submits that the trial judge made the following errors:

(1) Finding that the words in the first three articles are not defamatory;

(2) Finding that all five articles are protected by the defence of fair comment;

(3) Finding that the fourth and fifth articles are protected by the defence of qualified privilege;

(4) Finding that the WCWC and Mr. Biggs were not motivated by actual malice; and

(5) Awarding the WCWC and Mr. Biggs special costs for their costs incurred on or after December 1, 2013.

Position of the Parties

[39] Taseko asserts that the judge erred in law by applying an incorrect legal test to determine whether the words complained of in the articles conveyed inferentially defamatory meanings. They further submit that the judge committed a palpable and overriding error in finding sufficient facts to determine that the fourth and fifth articles constituted fair comment. Relying on the assertion that the fourth and fifth articles do not constitute fair comment, Taseko says that the judge's findings that those articles were protected by qualified privilege was a legal error. They also attack the judge's factual findings regarding malice, alleging that he committed a palpable and overriding error by finding that the WCWC was not spurred by express malice in publishing the articles. Finally, they say the judge did not exercise his discretion judicially in awarding special costs to the WCWC.

[40] For their part, the WCWC says that the judge applied the correct legal test regarding inferential meanings, and that Taseko pleaded aggressive and extreme inferential meanings that they failed to prove at the requisite civil standard. They say Taseko has not demonstrated that the judge committed palpable and overriding error in finding sufficient facts to support the defence of fair comment, nor in finding that the WCWC did not act with malice in publishing the third and fourth articles. The WCWC says that Taseko has failed to pass the high hurdle of successfully challenging a judge's exercise of discretion in issuing the special costs order, in light of the fact that he applied the correct legal test.

Discussion

Legal Framework

[41] In *Grant* at para. 28, the Court set out the three elements a plaintiff must prove in order to be successful in a defamation action: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published. In this case, the words clearly refer to Taseko, and they were published. Thus, the only element in issue is whether the impugned words are defamatory.

[42] The applicable test of whether words are defamatory has been stated in a variety of terms. The defamatory meaning must be one which would be understood by reference to an ordinary and reasonable person, and not a meaning by someone who may be naturally inclined to attribute the best or worst meaning to words published about the plaintiff. The impugned words must be construed in their natural, normal, ordinary, plain, usual, fair, obvious, and commonly accepted sense. This is not an exhaustive list of appropriate adjectives, but an illustration of the applicable test: Raymond E. Brown, *Brown on Defamation – Canada* (Toronto: Thomson Reuters, 1994) (loose-leaf updated 2017, release 4), ch. 5 at 3, 16-23.

[43] An inferential meaning is the impression an ordinary, reasonable person would infer from the allegedly defamatory material. An inferentially defamatory meaning excludes any special knowledge that the recipient may have. The court is not limited to meanings offered by the parties, but the meaning offered by the plaintiff is to be treated as the most injurious meaning the words are capable of conveying: *Brown on Defamation*, ch. 5 at 26-27.

[44] Furthermore, the meaning of the words must generally be understood in the context of all of the circumstances and the publication as a whole: *Brown on Defamation*, ch. 5 at 3, 153.

[45] In *Color Your World*, Abella J.A. stated the test as follows:

[14] 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 & R.A. Buckley, *Salmond on the Law of Torts*, 21st ed. (London: Sweet & Maxwell, 1996) at 140 citing *Sim v. Stretch 1936*, 52 T.L.R. 669 at 671, and *Vander Zalm v. Times Publishers* (1980), 109 D.L.R. (3d) at 531, 535, 543).

[15] 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.

[46] In *Lawson v. Bains*, 2012 BCCA 117 at para. 23, this Court described defamatory inferential meaning as follows:

[23] The meaning of the remainder of the words complained of was determined by the trial judge, based upon the inferential meaning or impression left by the words complained of. Reliance on this means of proof requires that the meaning is that which the ordinary person, without special knowledge, will infer from the words complained of and this meaning must be determined objectively. Evidence concerning what the reasonable and ordinary meaning of the words is, or the sense in which they might be understood, or of facts giving rise to the inferences to be drawn from the words is inadmissible if this means of proof is relied upon: see *Hodgson v. Canadian Newspapers Co.* (1988), O.R. (3d) 235 (Gen. Div.), varied on appeal as to damages (2000), 49 O.R. (3d) 161 (C.A.), leave to appeal dismissed [2000] S.C.C.A. No. 465 at para. 37, and the authorities referred to therein.

[47] At the end of the day, the basic test to apply when discerning whether an "inferential" meaning is defamatory is based on the natural and ordinary meaning that a reasonable person would infer from the entirety of the publication.

The Standard of Review

[48] When there is a trial by judge and jury, the judge has a gatekeeping function, in that he or she must first determine if the impugned words are "capable of being defamatory", which is a question of law. If so, then the case is submitted to the jury to determine if the words are defamatory, which is a question of fact. This two-step analysis is not necessary if there is a judge alone trial: *Mainstream Canada v. Staniford*, 2013 BCCA 341 at para. 15.

[49] In this case, the trial judge did not need to determine if the words were capable of being defamatory, and he did not. He concluded that two of the five articles were, in fact, defamatory. The finding that the impugned words were defamatory is a question of fact: *Brown on Defamation*, ch. 5 at 445. This issue is assessed on the standard of palpable and overriding error: *Mitchell v. Nanaimo District Teachers' Assn*., [1994] 94 B.C.L.R. (2d) 81 (C.A.) at para. 41; *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10.

Were the Words in the First Three Articles Defamatory?

[50] Taseko pleaded that the first three articles conveyed certain "natural and ordinary inferential meanings", including, that i) Taseko had a "callous disregard for the environment"; ii) Taseko "knows or is indifferent to the fact that its New Prosperity Project threatens" the environment; and iii) the New Prosperity Project is an abusive second attempt by Taseko to obtain government approval for the use of Little Fish Lake as a dump site for toxic tailings.

[51] Taseko submits that the trial judge applied an incorrect legal test to the determination of inferential meanings. The trial judge set out the test at para. 9 of his reasons:

[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.

[52] Taseko says that this test is derived from the concurring reasons of LeBel J. in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at paras. 67-68, and says it was a legal error to rely on it. I agree, but that is not the end of the analysis.

[53] The reasons for judgment need to be considered as a whole and in their entire context when assessing whether the trial judge applied the wrong legal test: *R. v. R.E.M.*, 2008 SCC 51 at paras. 55, 57. Directly after his comments at para. 9, the trial judge quotes, at para. 10, the test noted above in *Color Your World*. At para. 98, he again states the test in *Color Your World*. At

para. 103, he sets out the "reasonable person" test. At paras. 108–118, as he makes his findings of fact, the trial judge couches each finding within the parameter of the reasonable person test. He does not return to the factors he set out in para. 9.

[54] Reading the reasons as a whole, despite the misstep at para. 9, it is clear that the trial judge was alive to the test he needed to apply, and he applied the correct test when he made his findings.

[55] Having found that the trial judge applied the correct legal test, his findings of fact may only be overturned if he committed a palpable and overriding error: *Housen* at para. 10. On this ground of appeal, the Taseko argued that the judge committed a legal error, but it did not allege that he committed a palpable and overriding error in finding the facts that he did.

[56] Accordingly, having found that there was no error in the trial judge's conclusion that the impugned words in the first three articles were not defamatory, it is unnecessary to address the alternative argument that the content of the articles amounted to fair comment.

The Fourth and Fifth Articles

[57] In its notice of civil claim, Taseko pleaded the following as the "natural and ordinary inferential meanings … as a matter of impression". The first two applied to both articles, and the third applied to the fifth article:

> i) 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;
>
> ii) This lawsuit is a "SLAPP" or strategic lawsuit against public participation which is brought by the Plaintiff Taseko for the abusive purpose of suppressing lawful opposition to the New Prosperity Project;
>
> iii) 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
>
> iv) One or more of the above.

[58] The trial judge concluded that parts of articles 4 and 5 were defamatory, however, he found that fair comment and qualified privilege applied. He concluded that the third inferential meaning alleged by Taseko was not defamatory on the same basis that he found that the first three articles were not defamatory. For the reasons stated above, I would not disturb his conclusion that this third so-called inferential meaning is not defamatory.

Fair Comment

[59] Once a plaintiff has proved the publication is defamatory, the defendant may raise several defences. In this case, the WCWC says that the fourth and fifth articles constitute fair comment.

[60] In *WIC Radio* at para. 28, Binnie J., speaking for the majority, set out the factors that need be proved in order for a defendant to establish fair comment:

[28] For ease of reference, I repeat and endorse the formulation of the test for the fair comment defence set out by Justice Dickson, dissenting, in *Cherneskey* as follows:

> (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?
>
> (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice. [Emphasis added; emphasis in original deleted; pp. 1099–1100.]
>
> (citing *Duncan and Neill on Defamation* (1978), at p. 62)

I note, parenthetically, that *Duncan and Neill* subsequently reformulated proposition (d) to say: "Could any fair-minded man honestly express that opinion on the proved facts?"; *Duncan and Neill on Defamation* (2nd ed. 1983), at p. 63 (emphasis added). In my respectful view, the addition of a qualitative standard such as "fair minded" should be resisted. "Fair-mindedness" often lies in the eye of the beholder. Political partisans are constantly astonished at the sheer "unfairness" of criticisms made by their opponents. Trenchant criticism which otherwise meets the "honest belief" criterion ought not to be actionable because, in the opinion of a court, it crosses some ill-defined line of "fair-mindedness". The trier of fact is not required to assess whether the comment is a reasonable and proportional response to the stated or understood facts.

[61] Once these factors are established, the plaintiff may defeat the defence by establishing that the defendant acted with malice: *WIC* at para. 52. Malice is an indirect or improper motive not connected with the purpose for which the defence exists: *WIC* at para. 1.

[62] The underlying rationale for permitting the defence of fair comment is to strike the appropriate balance between freedom of expression and the protection of individuals' reputation: *Grant* at para. 41.

[63] In *Grant* at paras. 52–54, the Court set out the importance of freedom of expression in the context of public interest and debate:

[52] By contrast, the first two rationales for free expression squarely apply to communications on matters of public interest, even those which contain false imputations. The first rationale, the proper functioning of democratic governance, has profound resonance in this context. As held in WIC Radio, freewheeling debate on matters of public interest is to be encouraged, and must not be thwarted by "overly solicitous regard for personal reputation" (para. 2). Productive debate is dependent on the free flow of information. The vital role of the communications media in providing a vehicle for such debate is explicitly recognized in the text of s. 2(b) itself: "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" (emphasis added).

[53] Freedom does not negate responsibility. It is vital that the media act responsibly in reporting facts on matters of public concern, holding themselves to the highest journalistic standards. But to insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate. The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed. Verification of the facts and reliability of the sources may lead a publisher to a reasonable certainty of their truth, but that is different from knowing that one will be able to prove their truth in a court of law, perhaps years later. This, in turn, may have a chilling effect on what is published. Information that is reliable and in the public's interest to know may never see the light of day.

[54] The second rationale -- getting at the truth -- is also engaged by the debate before us. Fear of being sued for libel may prevent the publication of information about matters of public interest. The public may never learn the full truth on the matter at hand.

[64] Fair comment can include statements that are "deduction, inference, conclusion, criticism, judgment, remark or observation, which is generally incapable of proof": *WIC* at para. 26.

[65] In order for fair comment to apply, there must be a factual foundation underlying the comment. In *Mainstream* at para. 25, this Court applied the analysis in *WIC*:

[25] In *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, Mr. Justice Binnie agreed with this Court 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" (para. 34). He also stated, at para. 31:

> 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 [the] comment.

[66] The Court in *Mainstream* also discussed the linkage required between the comment and the supporting facts as elaborated upon in *Channel Seven Adelaide Pty. Ltd. v. Manock*, [2007] HCA 60:

[27] In the course of their reasons, the majority of the Court commented on the required linkage between the comment and the supporting facts:

> [49] … a sufficient linkage between the comment alleged and the factual material relied on can appear in three ways: the factual material can be expressly stated in the same publication as that in which the comment appears (ie by "setting it out"); the factual material commented on, while not set out in the material, can be referred to (ie by being identified "by a clear reference"); and the factual material can be "notorious". Those propositions are supported by other authority in Australia, England, South Africa, Hong Kong and the United States.
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> [Emphasis added; endnotes omitted.]

The phrase "by a clear reference" in the above passage comes from *Odgers on Libel and Slander*, 6th ed. (1929) at 166, which was quoted with approval in *Kemsley v. Foot*, [1952] A.C. 345 at 356 (H.L.). I should note that *Channel Seven Adelaide* was not cited to us at the hearing of this appeal, and I infer that it was also not cited to the trial judge.

[67] The trial judge summarized the law on fair comment as referred to above, and Taseko has not raised an issue with respect to the legal test he applied.

[68] Taseko argues that there was an insufficient substratum of fact to support the defamatory comment that it was guilty of filing a SLAPP. Additionally, it argues that the allegation of corrupt and dishonourable motives is not warranted by the facts.

[69] The trial judge made the following finding with respect to fair comment in relation to the fourth and fifth articles:

[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.

[70] When the fourth and fifth articles are considered in the context of the first three, (which were all on the website and did not require a dedicated reader to search and discover), it is clear that the trial judge did not commit a palpable and overriding error. The subject of the comment, a proposed open pit mine, is clearly a matter of public interest. The factual foundation is established, and a person could hold an honest opinion based on that factual foundation that the lawsuit was indeed to stifle debate over the construction of the proposed mine. I would not give effect to this argument.

[71] Taseko submits that even if the elements of fair comment are established, it demonstrated that the WCWC acted with express malice.

[72] The trial judge carefully examined the evidence of the three witnesses for the WCWC who were involved either in writing the articles, or responding to Taseko's complaints about the articles. He found that each was a proponent of the environment with a genuine interest in the matter. At para. 141, he concluded:

[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.

[73] This finding is supported by the evidence referred to the by trial judge, and it cannot be said that he committed an overriding or palpable error in coming to this conclusion.

[74] Given my conclusion that the trial judge did not err in applying the fair comment defence, it is not necessary to address the question of qualified privilege.

Costs

[75] The WCWC sought special costs on the basis that the lawsuit was a SLAPP. The trial judge awarded special costs on a different basis, and not one sought by the WCWC. He found that if there were to be special rules for costs relating to a SLAPP, that was a matter for the Legislature to establish, pointing to the brief period of time when this province had anti-SLAPP legislation: *Protection of Public Participation Act*, S.B.C. 2001, c. 19, as repealed by *Miscellaneous Statutes Amendment Act, 2001,* S.B.C. 2001, c. 32, s. 28.

[76] In awarding special costs, the trial judge set out Taseko's pleadings at para. 185:

[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.

The trial judge observed that Taseko maintained this position at trial. Taseko says it only sought regular costs at trial.

[77] The trial judge relied on the "*Report of the Federal Review Panel*", subtitle "*New Prosperity Gold-Copper Mine Project*", dated October 31, 2013 from the panel reviewing New Prosperity that concluded that the first proposal would have significant environmental impacts ("2013 Report"). In his view, once the 2013 Report was released, Taseko should have withdrawn its claim for punitive damages and special costs, and it should have done so by December 1, 2013.

[78] Taseko argued that it objected to the admission of the 2013 Report, and that its objection was never ruled on. As a result, it says it was an error for the trial judge to found special costs on the basis of the issuance of the 2013 Report.

[79] A review of the transcripts shows that Taseko is incorrect in suggesting that the objection was not ruled on. The 2013 Report was marked as exhibit 18 by the WCWC during the cross-examination of John McManus. Taseko did not object to the marking of the exhibit or in its use to cross-examine Mr. McManus.

[80] The WCWC cross-examined different witnesses with reference to the 2013 Report at least three other times. Taseko also relied on the 2013 Report in cross-examining a WCWC witness.

[81] Taseko cites its closing submissions in the transcript to assert that it objected to the 2013 Report's admissibility. On a close reading, the closing submissions do not speak to the admissibility of the 2013 Report at all. The submission argues the 2013 Report does not give rise to any issue estoppel in favour of the defendants. Taseko also argues that since the 2013 Report succeeded the alleged defamation it could not be used to defend against the allegations.

[82] Taseko argues that the trial judge could not import the conclusions of the 2013 Report into his reasons, nor rely on findings within it. However, the trial judge did not rely on its findings for the purpose of his conclusion with respect to whether the articles were defamatory or fair comment. He relied on the 2013 Report to determine whether the continuing conduct of Taseko was deserving of rebuke on the basis that it continued its serious allegations against the WCWC when an independent body had come to the same or similar conclusions with respect to the environment damage of Taseko's proposal. The trial judge did not use the 2013 Report to find facts in relation to the defamation claim itself.

[83] The trial judge applied the following test for an order for 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:
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> > ... 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.
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> [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.).

[84] A trial judge's award of costs is entitled to considerable deference, and will only be interfered with if the judge failed to exercise that discretion judicially or exercised it on a wrong principle: *Baiden v. Vancouver (City)*, 2010 BCCA 375 at para. 18.

[85] In my view, the trial judge erred in principle in ordering special costs.

[86] Assuming that the 2013 Report was properly before him, it was irrelevant to the issue of special costs based on a continued plea for punitive damages.

[87] The trial judge concluded that by continuing to seek punitive damages after the release of the 2013 Report, Taseko's conduct was reprehensible and ordered special costs. The difficulty with this conclusion is that he missed a step in the analysis, and thereby committed an error in principle warranting appellate intervention. Punitive damages are based on a finding of malice. Malice defeats fair comment. The trial judge concluded that two of the five articles were defamatory, but that fair comment applied as a defence. In order to find that continuing the plea of malice was reprehensible, the trial judge needed to find that there was no merit in that plea. He did not. Instead, he devoted several pages to analyzing the allegation of malice in relation to his finding of fair comment with respect to the two defamatory articles (at paras. 128-143). He could not, therefore, order special costs on the basis that the pleading seeking punitive damages should have been withdrawn.

[88] The decisions in the British Columbia Supreme Court conflict to some degree on whether special costs are available following a finding that a lawsuit is a SLAPP. Some decisions have awarded special costs for successful applications to strike pleadings for disclosing no cause of action or for being vexatious under R. 9-5(1)(a) or (b) [formerly R. 19-24] of the *Supreme Court Civil Rules*, and for summary dismissals, where the chambers judge finds the case to be a SLAPP at an early stage in the litigation: see *Fraser v. Saanich*, [1999] B.C.J. No 3100 (S.C.); *Scory v. Krannitz*, 2011 BCSC 936; *Scory v. Krannitz*, 2011 BCSC 1344; and *MacMillan Bloedel Ltd. v. Galiano Conservancy Assn.* (1994), 2 B.C.L.R. (3d) 99 (S.C.). On the other hand, such claims for special costs have also been rejected without a properly pleaded and proven counterclaim formally identifying the SLAPP as an abuse of process: see *Hemming v. Newton*, 2006 BCSC 1748; *Canwest Mediaworks Publications Inc. v. Murray*, 2009 BCSC 391; and *Home Equity Development Inc. v. Crow*, 2002 BCSC 1747.

[89] Some of those cases were cited during oral argument before us. However, whether the trial judge was correct in concluding that special costs are not available for SLAPP lawsuits was not properly engaged before us. The WCWC maintained an argument that they were entitled to special costs on the basis that the lawsuit was a SLAPP. The trial judge did not find that the lawsuit was a SLAPP, and he did not find that Taseko had an improper collateral purpose in filing the defamation claim. Without such a finding, there was no basis for the trial judge to conclude that special costs should be ordered in this case, assuming without deciding that special costs are indeed available on the basis that a lawsuit is a SLAPP.

Conclusion

[90] I would allow the appeal only to the extent of setting aside the order for special costs. The WCWC will have its regular costs in the trial court. Given the divided success, each party will bear its own costs on the appeal.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Goepel"