Court of Queen's Bench of Alberta

Citation: ANC Timber Ltd v Alberta (Minister of Agriculture and Forestry), 2019 ABQB 653

2019 ABQB 653 (CanLII)

Date: 20190819
Docket: 1803 23023
Registry: Edmonton

Between:

ANC Timber Ltd.

Plaintiff

- and -

Her Majesty the Queen in Right of Alberta (Minister of Agriculture and Forestry)

Defendant

Reasons for Decision
of the
Honourable Madam Justice J.E. Topolniski

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Introduction

[1] All too often, affidavits tendered in support of motions for interim relief are littered with impermissible evidence.

[2] This striking motion casts light on the limits to hearsay evidence on interim motions, the presentation and treatment of what may not be intended as, but can, in fact, be expert opinion evidence, and the potential pitfalls of relying on affidavits prepared for a process other than that actually before the Court.

The Motion to Strike

[3] The Minister of Agriculture and Forestry (Minister) seeks an Order striking portions of and entire affidavits filed in support of ANC Timber Ltd.'s (ANC) motion for an interim injunction and/or interim stay of a forestry directive (Directive). The Directive was issued by the Minister on June 1, 2018; judicial review of the Directive is scheduled for February 28, 2020 (JR). The Directive primarily concerns restrictions on ANC's ability to harvest timber under the terms of a forest management agreement (FMA). Its issuance followed a protracted study by the Government of Alberta (GOA) on the protection of certain endangered caribou herds.

[4] ANC's view is that all of the alleged offending evidence is proper and permissible, and in any event, any potential defects were cured by further affidavits made after the Minister's initial striking motion.

[5] The Minister also filed an amended motion seeking to strike much of the new evidence.

The Procedural History

[6] A brief overview of the history of the case, and particularly this motion, is required.

[7] In December 2017, ANC sued the Minister claiming $250,000,000.00 for alleged breaches of the FMA.

[8] In late November 2018, ANC applied for the JR seeking, among other things, a permanent injunction precluding the Minister from enforcing the Directive.

[9] After an unsuccessful bid to obtain regulatory approval to harvest trees in an area contemplated by the FMA, but prohibited by the Directive, ANC filed a motion on April 9, 2019 seeking an interim injunction to stop the Minister from enforcing the Directive, and permitting ANC to conduct its forestry activities without regard to the Directive. ANC later amended its motion to also seek an interim stay of the Directive.

[10] The interim injunction/stay motions indicated that ANC would rely on two affidavits sworn by Jim McCammon in support of the JR: the first made on November 29, 2018 (November Affidavit), and the second on April 9, 2019 (April Affidavit). (A motion to determine if ANC will be granted leave to rely on the November and April Affidavits for the JR will be heard on November 9, 2019.)

[11] The November and April Affidavits are voluminous, totalling 1576 pages; 1530 of which are the exhibits.

[12] The Minister responded with a motion to strike some 43 paragraphs of the two Affidavits as well as numerous exhibits on the grounds that the evidence is either irrelevant, unnecessary, hearsay, argument and/or conclusion, or expert opinion evidence. The impugned exhibits include third-party reports (Third-Party Reports), 49 newspaper articles, a journal article, and maps and summaries prepared by unidentified sources.

[13] Notwithstanding ANC's view that the Third-Party Reports are permissible hearsay under *Rule* 13.18(b) of the *Alberta Rules of Court* that simply "buttresse[d] Mr. McCammon's evidence", it responded to the Minister's motion by filing new affidavits deposed to by the Third-Party Report authors; Messrs. Hilts, Gooding, and Dr. Andison. (ANC's initial position was that the new affidavits were made "solely [to] address the Minister's complaint that he would not otherwise, in his view, have an opportunity to cross-examine the authors". ANC later expanded its position to argue that although the new affidavits were not intended to be "expert reports", they nevertheless comply with all requirements for the admissibility of expert evidence.)

[14] The Minister followed suit with an amended motion to include striking the new affidavits on the basis that they were inadmissible expert opinion. (ANC later conceded that the Affidavits of Mr. Hilts and Dr. Andison should be struck.)

[15] Next, on May 24, 2019, Mr. McCammon made a third affidavit that adds some new information (particularly about his credentials), but mainly repeats some of his earlier evidence and, as candidly acknowledged by ANC, 'patches up' some of the impugned evidence (May Affidavit). The Minister does not object to the May Affidavit.

The Issue

[16] The only issue is whether the impugned evidence is properly admissible evidence, or whether it is frivolous, irrelevant or improper information that should be struck under *Rule* 3.68(4)(a): *Alberta Rules of Court*, Alta Reg 124/2010.

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The Overarching Principles

a. The fundamental rules of evidence apply

[17] The rules of evidence are engaged on an interim motion. In the absence of express statutory authorization or exclusionary rule, the summary and interlocutory nature of an interim motion does not relieve a litigant of compliance with the rules of evidence.

[18] At the most basic level, the rules of evidence require that evidence must be useful in tending to prove a fact relevant to the issues in the case (necessary), and reasonably reliable to be admissible (reliable). Necessity and reliability are both fluid and interrelated factors. For example, if the evidence is highly reliable, then necessity may be relaxed, and if the necessity factor is high, reliability may be relaxed: Paciocco, David and Stuesser, Lee, *The Law of Evidence, 7th ed* (Toronto: Irwin Law, 2015) (**Paciocco)** at 139. The indicia of reliability do not change whether the case is a civil or criminal case: ***Jung v Lee Estate***, 2006 BCCA 549.

[19] Even admissible evidence may be excluded if its probative value is outweighed by its prejudicial effect: ***Mitchell v Canada (MNR),*** 2001 SCC 33 at para 30. In this regard, prejudice is not restricted to evidence that works against a party's interest. It can also arise from evidence that potentially undermines an accurate result, or complicates, frustrates, or degrades the process, and includes adverse practical consequences such as the undue consumption of time, unfair surprise, the creation of distracting side issues, and a potential to confuse the trier of fact: **Paciocco** at 42-43 citing ***R v S(DG)*** (2013), 299 CCC (3rd) 454 at para 25 (MBCA).

[20] The purpose of affidavit evidence is to place the *necessary facts* before the court: ***Alberta Treasury Branches v Leahy***, 1999 ABQB 185 at para 84 (***ATB v Leahy***). There is, however, some flexibility for contextual purposes in that assertions of fact may be part of the narrative for the purpose of assisting the Court in understanding the relevance of a particular fact and the relationship between facts: ***ATB v Leahy*** at para 84; ***Banff Transportation & Tours Inc v Buchan***, 2002 ABQB 423 at para 17.

[21] Typically, affidavits must be sworn on the basis of personal information. However, the *Rules of Court* allow hearsay evidence on a motion for interim relief if it is accompanied by a statement providing the source of the evidence and the deponent's belief in its truth: *Rule* 13.18(1)(b) and 13.18(2). Notwithstanding this, the Court is not mandated to accept such evidence: ***Silver Recovery Systems of Canada Ltd v WMJ Metals Ltd*** (1989), 103 AR 252, 1989 CanLII 3352 (Master); ***Schaffhauser Kantonalbank v Chmiel***, 1988 ABCA 149.

b. The quest for efficacy should not override the Court's gatekeeper role

[22] Litigants are obliged to employ processes for the proportional, timely, and cost-effective resolution of claims: ***Hryniak v Mauldin***, 2014 SCC 7; *Rule* 1.2. The Court's task is to facilitate those ends.

[23] *Rule* 3.68(4)(a) allows litigants to seek to have offending evidence struck from affidavits. As evidenced by the unfolding of this motion, it can be a costly process - not only in terms of monetary and judicial resource costs, but also in terms of the costs to access timely relief. Nevertheless, the quest for expediency should not override a litigant's procedural remedies, or fundamental evidentiary requirements.

[24] On a striking motion, Veit J observed that although courts may not have the luxury of time to embark upon striking all offending evidence from an affidavit, "the counsel of perfection

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for courts would be to allow no material before a judge sitting in chambers or at trial that could not be placed before a jury": ***Bank of Montreal v Lysyk***, 2002 ABQB 837 at para 30 (***Lysyk***).

[25] The Court in ***Dulong v Merrill Lynch Canada Inc*** (2006), 80 OR (3d) 378, 2006 CanLII 9146 (SC) (***Dulong***) observed this on wrestling with the admission of certain expert evidence at trial, at para 9:

> ... in civil cases…the path of least resistance in matters such as these seems to be to admit the evidence and then compensate for any of its weaknesses by attaching less weight to the opinion. But such an approach is an abdication of the proper function of a trial judge and was explicitly rejected by Binnie J in *R c J (J-L)*, [2000] 2 SCR 600 at p. 613:
>
> > …The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

[26] Other Courts have expressed the contrary view. For example, when faced with an application to strike a new affidavit (permissibly) filed on an appeal of a Master's decision, Clackson J ruled that although the affidavit contained inadmissible evidence, there was nothing to be gained by striking it. Rather, the offending evidence could be ignored, thereby avoiding the pejorative connotation associated with striking: ***Sucker Creek First Nation v Canada (Attorney General)***, 2013 ABQB 199 at para 22.

[27] Mindful of a litigant's *right* to seek a striking Order, and the tension caused by the quest for expediency and existing burdens on the Courts, I agree with the views expressed in ***Lysyk*** and ***Dulong***.

ANC's Concessions

[28] Before and during the hearing, ANC conceded that multiple paragraphs or portions thereof, and several exhibits should be struck. It also conceded that the affidavits of Mr. Hilts and Dr. Andison should be struck (concessions).

[29] The concessions are listed in "Appendix A".

Assessing the Disputed Evidence

[30] With that backdrop, I will assess the admissibility of the disputed evidence by category: argument and/or conclusion, relevance, hearsay, and opinion evidence. Where more than one category of inadmissibility is asserted, I will address other asserted grounds if the Minister does not prevail on the first.

[31] Generally, I will not comment if the Minister indicated satisfaction with a concession.

1. Argumentative and/or conclusory evidence is impermissible

[32] Affidavits must not contain argument or conclusions: ***ATB v Leahy*** at paras 84-85.

[33] Briefly, I have struck the following on the basis of the evidence being argumentative and/or conclusory:

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a. November Affidavit

- Paragraphs 76 and 96 (and any exhibits referenced);
- Portions of paragraphs, 17-19, 21, 23, 37, 63, 98, and 104;
- Exhibit 44.

b. April Affidavit

- Portions of paras 25, and 40.

[34] Details of the disputed evidence, my findings, and any resulting redactions are set out on "Appendix B".

2. Irrelevant evidence is impermissible

[35] Relevance is explained in ***R v White***, 2011 SCC 13 at para 36:

> … In order for evidence to satisfy the standard of relevance, it must have "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence" … [citations omitted]

[36] Evidence must pertain to a material issue in the case, however, even if it meets the fundamental requirements, it may be caught by an exclusionary rule. However, as noted above, there is some flexibility to permit evidence that provides context for assertions of fact as part of the narrative. Contextual evidence must be of assistance to the Court in understanding the relevance of a particular fact and the relationship between facts.

[37] In this case, the material issues are whether an interim stay or interim injunction is appropriate pending determination of the JR, and whether the *Proceedings Against the Crown Act*, RSA 2000, c P-25 precludes injunctive relief.

[38] For the purposes of the injunction/stay, the evidence must relate to the three components of the test enunciated in ***RJR MacDonald Inc v Canada (Attorney General)***, [1994] 1 SCR 311 at 334: a "serious issue" to be tried (for a prohibitive injunction) or "strong prima facie case" (for a mandatory injunction), irreparable harm, and weighing the balance of convenience.

[39] Not surprisingly, there is no evidence on the impact of the *Proceedings Against the Crown Act*.

a. Lack of mention in written submissions does not equate to irrelevance

[40] The Minister argues that ANC's failure to mention certain of the disputed evidence in its written submissions is indicative of irrelevance.

[41] Given the extensive written submissions in this case, that may seem curious, but the mention, or the lack thereof, of evidence in a party's brief does not determine relevance.

November Affidavit

[42] After redaction of argumentative language, para 23 reads:

> *As early as the date of execution of the 1989 FMA, the Minister knew that the ANC forest management area overlapped with the habitat of the Little Smoky caribou herd (the "Little Smoky Herd") and the A La Peche caribou herd (the "A La Peche Herd"), and,*

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> *more importantly, was aware that the herds were considered to be an endangered or threatened species.*

[43] ANC urges that this is relevant because it shows how long it took for the GOA to make its plan for endangered or threatened caribou.

[44] While the relevance of this paragraph is not immediately obvious, it might be a factor on weighing the balance of convenience. Accordingly, it remains and will be assessed in the substantive motion.

[45] After the concessions, para 39 reads:

> *The Minister failed to engage in any meaningful bilateral consultation with ANC and did not complete its caribou range plan by the end of 2013. It also did not provide any compensation to ANC pursuant to paragraph 6(3) of the 2009 FMA.*

[46] The Minister contends that an alleged failure to engage in meaningful conversation or pay compensation has no bearing on the issues. ANC argues that it shows the duration of the caribou planning.

[47] Again, while the relevance of this paragraph is not immediately clear, it might have bearing on the balance of convenience, and will be assessed in the substantive motion.

[48] In para 76, the affiant quotes extensively from and attaches a letter sent by ANC to the Minister on October 16, 2018. The letter post-dates the Directive. It sets out ANC's arguments against the Directive on a variety of grounds.

[49] Evidence of ANC's ex-post facto arguments against the Directive and positioning are irrelevant to any material issue. As such the paragraph and corresponding exhibit are struck.

[50] The November Affidavit has multiple paragraphs speaking to a long-expired FMA (paras 8-11) and regulatory authorizations that have no obvious bearing on the issues (paras 46, 47 and 51, 52).

[51] ANC candidly admits that it was "efficient" to rely on the whole of the November Affidavit prepared for the JR, and that these provisions address long-expired matters. That said, ANC contends that it is still helpful evidence to show the parties' long relationship, which it will address in the context of the balance of convenience.

[52] While the nature of the relationship could (and should) have been summed up in a few sentences, since context can be relevant, I will not strike these paragraphs. This decision is not to be taken as condonation of expediency over succinctness.

[53] Mindful that cost is always an issue (more so for some litigants than others), the practice of relying on affidavits made for another proceeding can, as is demonstrated in this case, be a time and money waster for everyone except the short-cutting party.

3. Hearsay Evidence

a. Compliance with Rule 13.18(2) is mandatory

[54] The Minister argues that paragraphs 39 and 56 of the April Affidavit and the corresponding exhibits should be struck for failure to comply with *Rule* 13.18(2) (requiring the

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affiant to depose to the source of any hearsay information and make a statement of belief in its truth).

[55] It is beyond debate that paras 39 and 56 of the April Affidavit are non-compliant with *Rule* 13.18 (b). It is also beyond debate that ANC patched up the error by the May Affidavit. Although it might seem pointless to strike these paragraphs in that circumstance, I nevertheless do.

b. There are limits to hearsay under Rule 13.18(1)(b)

[56] The Minister argues that the November and April Affidavits contain impermissible hearsay, including:

- newspaper articles (49);
- a journal article;
- a report prepared by Hinton Wood Products (HWP Report); and
- a report prepared by FORCORP (FORCORP Report).

[57] ANC urges that everything is permissible because *Rule* 13.18(1)(b) allows it and the only question is what weight should be given to this evidence. It further urges that any problem with this evidence was cured by the May Affidavit and Mr. Gooding's Affidavit.

[58] As noted, the existence of *Rule* 13.18(1)(b) does not require the Court to accept hearsay evidence on an interim motion. Indeed, simply admitting such evidence without scrutiny on the basis of facial compliance with the *Rule* impairs the fundamental notion of a fair fact-finding process.

[59] It may be helpful to begin with a review of the basic principles governing how hearsay evidence is scrutinized.

[60] The defining features of hearsay evidence are the introduction of a statement for the proof of its contents and lack of a contemporaneous opportunity to cross-examine the declarant: ***R v Khelawon***, 2006 SCC 57 at para 35 (***Khelawon***). The purpose of the general exclusionary rule for hearsay evidence is to address "the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination": at para 35.

[61] The assessment for admitting hearsay evidence is predicated on it being necessary and reliable: ***R v Khan***, [1990] 2 SCR 531; ***R v Smith***, [1992] 2 SCR 915. Put another way, if a statement is necessary *and* there is sufficient trustworthiness, it should be considered regardless of its hearsay form: **Paciocco** at 135, ***Khelawon*** at para 62.

[62] Threshold reliability can be met if there are adequate substitutes for traditional safeguards relied upon to test the hearsay evidence: ***R v B(KG)***, [1993] 1 SCR 740; ***Khelawon*** at para 63.

[63] The context and impact of the hearsay evidence must also be considered in assessing its admissibility. This includes the seriousness of the case, the importance of the evidence, and the consequences to the parties and costs or efforts to secure the original evidence: **Paciocco** at 130.

[64] Even if it is admissible, hearsay can be excluded if its probative value is outweighed by its prejudicial effect. Again, prejudice can arise from the evidence potentially complicating, frustrating, or degrading the process, including adverse practical consequences like the undue

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consumption of time, unfair surprise, the creation of distracting side issues, and potential to confuse the trier of fact.

[65] In ***Michel First Nation v Canada (Minister of Indian Affairs and Northern Development)***, 2007 ABCA 59, the Court of Appeal refused to allow in research evidence on historical matters relating to aboriginal rights where the research was conducted by someone other than the deponent. In relation to other documents, the Court noted at para 10: "There is no explanation as to why [the affiant] (as opposed to the authors of such documents) is in the best position to put those documents forward".

[66] In ***Lameman v Canada (Attorney General)***, 2006 ABCA 392 (***Lameman***), the same court reached a different conclusion, noting the question of admissibility of a historian's report appended to an affidavit was an objection "of form only, lacking any practical effect": para 42. The result is not surprising given that the objecting party had earlier consented to this method of introducing the report, and had chosen to cross-examine the author (who the Crown produced voluntarily).

c. The newspaper articles are not permissible hearsay

[67] Like all of the affiant's other hearsay evidence, the newspaper articles are covered by his blanket statement attesting to his belief in the truth of the hearsay. There is no disclaimer to the contrary for the newspaper articles.

[68] Paragraph 95 of the November Affidavit reads:

> *The devastation of pine forest in B.C. has been directly linked to Mountain Pine Beetle. Attached and marked as Exhibit "50" are numerous newspaper articles from B.C. regarding the forest fires and the impact of Mountain Pine Beetle in that province.*

[69] After ANC's concessions, exhibit 50 is comprised of 49 newspaper articles, the lion's share of which are found under Tab "C", and which opens with a page bearing the banner: "Prepared by Library and Information Services, for the use of [ANC's] lawyers and staff only".

[70] All but 5 of the articles are published in local newspapers (the *Kamloops Daily News*, the *Prince George Citizen*, the *Vancouver Sun*, the *Vancouver Province*, and the *Vancouver Courier*). They are from an extended period of time: 1981(4), 1999 (4), 2000 (3), 2001 (20), 2003 (11), 2004 (2), 2005 (1), and 2018 (2).

[71] The articles are authored by a host of writers. In many cases, the authors quote interviewees, experts, and lay persons alike. They cover a wide-range of mountain pine beetle related topics; from forest fires to the B.C. softwood lumber industry's plea for government funding, and differing views on the efficacy of suppression by logging.

[72] Paragraph 28 of the April Affidavit refers to and exhibits a 2018 article from the *Grande Prairie Daily Herald Tribune*.

[73] In ***Public School Boards' Association v Alberta (Attorney General)***, 2000 SCC 2, Binnie J raised serious concerns about the propriety of newspaper articles as evidence at para 14:

> I held in the previous order that the two newspaper articles sought to be adduced by the PSBAA do not constitute "legislative fact." The two columns represent the opinion of two individuals writing in daily newspapers who may or may not have the underlying

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> facts straight and whose opinions may or may not be valid. The authors cannot be cross-examined. The contents are apparently controversial. No basis has been made out by the applicants for admission of this material. It will therefore be rejected. [Cited from CanLII]

[74] Like Fradsham PCJ found in ***R v Meadowbrook Management Ltd***, 2001 ABPC 245 at para 25 (***Meadowbrook Management***), I do not read Justice Binnie's observation as meaning that all newspaper articles must always be rejected. Rather, the Court must always be alive to concerns about their relevance and accuracy.

[75] The motion in ***Meadowbrook Management*** concerned judicial notice. The Court declined to consider news articles, noting that some were opinion, or opinion mixed with alleged fact, a problem compounded by the inability to determine if the authors had expertise, or if the material was reliable. The Court also found that the information was controversial and there were questions of relevance, and further, that as some were authored by local writers, it would have been possible to have them subjected to cross-examination.

[76] Some decisions support the view that in, limited circumstances, news or media reports may be admitted into evidence.

[77] ***Chamberlain v Surrey School District No 36*** (1998), 60 BCLR (3d) 311, 1998 CanLII 6723 (SC) is a judicial review case. The Court conducted a threshold reliability assessment concerning newspaper articles introduced *not* for the truth of their contents, but only to prove that what was reported as statements made by involved parties in interviews was said. The conclusion was that unlike expressions of opinions, views or editorial commentary, factual reports, statements and quotations *attributed to and made by the involved parties* were admissible. Their weight hinged on their quality, and their internal and external consistency.

[78] In a *Mareva* injunction case, ***Bennett Estate v Islamic Republic of Iran***, 2012 ONSC 5886 (***Bennett Estate***), the Court said this at para 56:

> To be sure news articles, computer searches and evidence from the experiences in another jurisdiction may not be the most conclusive or probative sources of evidence. Injunctive relief however is not required to be sought on a standard of certainty. Establishing a strong *prima facie* case is not so onerous. I am satisfied based on the information from the Plaintiffs' sources, combined with the expert opinion of Professor Zandi and evidence of the U.S experience, that the Plaintiffs have established a strong *prima facie* case that Iran has assets in the two properties that could possibly be used to enforce the U.S Judgment. This conclusion of course can be challenged by the Defendants on the return of the motion.

[79] The expert's affidavit was accompanied by an "Acknowledgement of Expert's Duty" that acknowledged the deponent's obligation to provide fair, objective and non-partisan opinion evidence restricted to his defined area of expertise, and attached his resume. The US experience referenced was that American courts had previously ruled that Iran shielded assets in the manner described by the expert.

[80] ***Bennett Estate*** exemplifies threshold reliability derived from the presence of adequate substitutes (described in ***B(KG)*** and ***Khelawon***) for the traditional safeguards to test hearsay.

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[81] In ***Cambie Surgeries Corporation v British Columbia (Medical Services Commission)***, 2016 BCSC 1390 the Court struck a paragraph of an affidavit quoting from and exhibiting a newspaper article. In ***R v Felderhof***, 2007 ONCJ 345, the Court struck news articles as they were not proof of their contents.

[82] Here, there is nothing to establish the reliability of the hearsay, and in many instances, the double or triple hearsay. There are other concerns:

> i. Relevance is questionable given the age of all but a few articles;
>
> ii. The articles are replete with opinion evidence and there is no way to be confident the author, or the person attributed, has expertise.
>
> iii. The articles are prejudicial in that they create a distraction and an undue consumption of time. Although said in the context of a discussion on expert evidence, the Supreme Court's observation in ***Masterpiece Inc v Alavida Lifestyles Inc***, 2011 SCC 27 at para 76 resonates:
>
> > …I think it is timely to recall that litigation is costly. Courts must fulfil their gatekeeper role to ensure that unnecessary, irrelevant and potentially distracting expert and survey evidence is not allowed to extend and complicate court proceedings...

[83] There is a growing trend for litigants to conduct research on the internet and attach what spews forth to an affidavit without regard to its propriety. Any notion that this is appropriate or helpful is misplaced.

d. The Minister now consents to the journal article

[84] At paragraph 21 of the April Affidavit, the affiant quotes from an article written by Barry Cooke and Allan Carroll, *Predicting the risk of mountain pine beetle spread to eastern pine forests: Considering uncertainty in uncertain times*, published in Forest Ecology and Management 396 (2017) 11-25. The affiant describes the authors as mountain pine beetle experts, and attaches the article as an exhibit.

[85] The May Affidavit expands on what was said in the April Affidavit, and explains that the article was published in an "authoritative" publication in the field of forest ecology. The article is again exhibited.

[86] The Minister objected to the April Affidavit, but not the May Affidavit.

[87] The Minister carefully crafted his many objections to ANC's evidence, and provided very thorough written and oral submissions for his striking application. Barring the need to assess conflicting material, it is not for the Court to interfere with the Minister's decision to now consent to the identical information in the May Affidavit.

e. Four maps in the HWP Report are permissible hearsay; the balance is not

[88] For context, paras 18 and 19 of the April Affidavit should be read together:

> ***18***. ***Jasper National Park is a case study of the devastation caused by MPB.*** *Jasper National Park has approximately 200,000 ha of pine stands. When MPB emerged in Jasper National Park, Parks Canada implemented minor, sporadic control activities.* *In 2013, Jasper National Park had 122 ha of infested pine stands [:] (-0.06%). The*

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infestation increased to 6,250 ha in 2014 (-3.13%), [and] 21,600 ha in 2015 (-10.8%),[and] 48,600 ha in 2016[.] (-24.3%), 93,155 ha in 2017 (46.58%), and 162,850 ha in 2018 (81.43%). In 5 years, the infestation increased from 0.06% of all pine trees to 81% of all pine trees. Between 2017 and 2018 (a one year period), the infestation increased by approximately 75 percent.

19. The MPB epidemic in Jasper National Park demonstrates how quickly MPB can spread with no Level 1 or Level 2 control efforts. *A copy of a PowerPoint presentation prepared by Hinton Wood Products ("Hinton WP"), which is owned by West Fraser, regarding the MPB* ***epidemic*** *in Jasper National Park is [four maps prepared by the governments of Alberta and Canada are] attached and marked as Exhibit "C".* [Emphasis added by the Court]

[89] The Minister's contention that the information in the last two sentences of paragraph 18 came from the report referenced in paragraph 19 is undisputed. It is also backed by a review of the report.

[90] There is support for the notion that internet materials may be admissible if certain conditions are met – a well-known and disclosed source (to assess objectivity of the person posting the material), and information that is capable of verification: ***ITV Technologies Inc v WIC Television Ltd***, 2003 FC 1056, aff'd 2005 FCA 96, ***Sutton v Sutton***, 2017 ONSC 3181 at paras 87-88.

[91] Included in Exhibit "C" are four maps bearing banners of the GOA (1) and Parks Canada (3). Coincidentally, one of the maps (at p 12) is also exhibited in the May Affidavit to support the affiant's statement about Mountain Pine Beetles in Jasper National Park for the years 2015-2016. It is the only map that discloses the figures (2015-2016) cited in para 18 and repeated in the May Affidavit. These maps are admissible and will be assessed for weight in due course. Otherwise, the evidence is inadmissible because:

i. The evidence shows that Hinton Wood Products is a division of West Fraser Mills Ltd. There is no evidence that either are directly involved in ANC.

ii. The person who created the PowerPoint presentation is unknown. In this case there is no ability to determine if he or she is an objective, reliable, and trustworthy source.

[92] In the result, the underlined portions of these paragraphs are inadmissible. The bolded portions are addressed in the context of disputed opinion evidence.

f. The FORCORP Report is not permissible hearsay

[93] Paragraphs 89-92 of the November Affidavit quote from and exhibit a report prepared by an entity called FORCORP, which is relied upon for the truth of its contents.

[94] ANC's position is that this is permissible hearsay evidence introduced solely to inform and/or support the affiant's personal knowledge.

[95] Again, *Rule* 13.18 does not do away with fundamental evidentiary rules and requirements. For example, an affiant cannot depose to a belief in the truth of hearsay evidence that is privileged. Similarly, an affiant cannot give hearsay opinion evidence without establishing its admissibility.

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[96] Returning to first principles, the existence of Mr. Gooding's Affidavit (made after the Minister's striking motion), and his deposing to being an author of the FORCORP Report, indicates that the hearsay was unnecessary.

4. Opinion Evidence

[97] ANC's primary position is that neither Messrs. McCammon nor Gooding were tendered as, nor should they be considered as, giving expert opinion evidence. However, if Mr. Gooding's Affidavit is an expert's "report", ANC has substantively complied with the procedural requirements under the *Rules* for its admission.

[98] Affidavits must not contain opinions other than permissible lay opinions: ***ATB v Leahy*** at paras 84-85.

[99] Presumptively, opinion evidence is inadmissible, subject to a few exceptions; the most important being expert opinion evidence on matters requiring specialized knowledge: ***White Burgess Langille Inman v Abbott and Haliburton Co***, 2015 SCC 23 at paras 14-5 (***White Burgess***). However, there are "opinions" that are merely compilations of ordinary observations, and they are admissible even through a lay witness: ***Graat v The Queen***, [1982] 2 SCR 819 (***Graat***).

[100] The law of evidence performs an overall cost/benefit analysis of opinion evidence, comparing the benefits to the potential harm to the trial process that may flow from the admission of the evidence: ***White Burgess*** at para. 24.

a. The evidence is not lay opinion

[101] "There is no absolute inadmissibility of lay opinions": ***Resource Well Completion Technologies Inc v Canuck Completions Ltd***, 2014 ABQB 209 at para 18 (Master). For example, lay opinion evidence on certain subjects such as age, emotional state, plight or condition of persons or objects, certain questions of value, estimates of speed and distance, or a person's state of intoxication are admissible: ***Dow Chemical Canada ULC v Nova Chemicals Corp***, 2015 ABQB 401 at para 11 (***Dow Chemical***); ***Graat*** at 835.

[102] Romaine J summarized the rules for lay opinions in ***Dow Chemical*** at para 10:

> From these basic principles, the lay opinion evidence rule has been developed:
>
> > Lay witnesses may present their relevant observations in the form of opinions where:
> >
> > > They are in a better position than the trier of fact to form the conclusion;
> > >
> > > The conclusion is one that persons of ordinary experience are able to make;
> > >
> > > The witness, although not expert, has the experiential capacity to make the conclusion; and
> > >
> > > The opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively

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> without resort to conclusions (*Law of Evidence* at 197-198).

[103] The line between "fact" and "opinion" is not always clear, and discerning which it is can be a difficult exercise: ***Graat*** at 837, **Paciocco** at 206-207. **Paciocco** suggests that given this difficulty, courts should resort to the criteria in ***R v Mohan***, [1994] 2 SCR 9, as they offer a flexible measure of admissibility that explores credentials, probative value, and prejudice: at 207.

[104] In ***Graat***, the issue was whether police officers could opine on the accused's level of impairment. At 835-836, the Court applied first principles to resolve the question:

> Admissibility is determined, first, by asking whether the evidence sought to be admitted is relevant. This is a matter of applying logic and experience to the circumstances of the particular case. The question which must then be asked is whether, though probative, the evidence must be excluded by a clear ground of policy or of law.

[105] After ruling that the evidence was admissible as lay opinion, the Court added these caveats, at 839-840:

> First, in every case, in determining whether an opinion is admissible, the trial judge must necessarily exercise a large measure of discretion. Second, there may be a tendency for judges and juries to let the opinion of police witnesses overwhelm the opinion evidence of other witnesses. Since the opinion is admitted under the "compendious statement of facts" exception, rather than under the "expert witness" exception, there is no special reason for preferring the police evidence over the "opinion" of other witnesses. As always, the trier of fact must decide in each case what weight to give what evidence. The "opinion" of the police officer is entitled to no special regard. Ordinary people with ordinary experience are able to know as a matter of fact that someone is too drunk to perform certain tasks, such as driving a car. If the witness lacks the relevant experience, or is otherwise limited in his testimonial capacity, or if the witness is not sure whether the person was intoxicated to the point of impairment, that can be brought out in cross-examination. But the fact that a police witness has seen more impaired drivers than a non-police witness is not a reason in itself to prefer the evidence of the police officer.

[106] ***R v Hamilton***, 2011 ONCA 399 also speaks to sorting factual evidence from opinion where telephone company employees testified that the relationship between a cell phone tower and location of a cell phone is governed by a general, but not invariable, rule that the signal from the sending cell phone bounces off the tower closest to the party who makes the call. Rejecting the notion that this was expert opinion evidence, the Court found it to be a matter of factual detail upon which the carrier based its billing practices. It also found that the employees had the knowledge and experience to testify about the matter without having to understand the rule's scientific and technical underpinnings, or have an engineering degree.

[107] Noteworthy also is the Court's observation that while admissibility of this "general rule" was once considered expert opinion evidence, it no longer was because of its prevalence in criminal law cases. The Court also noted that if the employees had ventured to opine on more precise details such as the location of a cell phone when a particular call was made or received, that might well be opinion evidence, and subjected to the ***Mohan*** criteria: at paras 277- 280.

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[108] Although the list of lay opinion evidence is not closed, none of the alleged opinion evidence in this case meets the threshold for admissibility as lay opinion or "experiential fact".

b. The evidence is not that of "a witness with expertise"

[109] In ***Kon Construction Ltd v Terranova Developments Ltd***, 2015 ABCA 249 the issue was whether an employee and principal of a defendant gave "expert evidence" on surveys and programs employed in designing a residential subdivision.

[110] The Court of Appeal found that the two witnesses had expertise, and while their expert opinions may have justified some of their choices, it did not render their evidence inadmissible as expert evidence. At para 35, the Court described three potential categories of "witnesses with expertise", who can in some respects be witnesses of fact, and in other respects opinion witnesses:

> (a) Independent experts who are retained to provide opinions about issues in the litigation, but were not otherwise involved in the underlying events. This is the category of expert witness contemplated by *White Burgess* and *Mohan*.
>
> (b) Witnesses with expertise who were involved in the events underlying the litigation, but are not themselves litigants. An example is the family physician in a personal injury case who is called upon to testify about his or her observations of the plaintiff, and the treatment provided.
>
> (c) Litigants (including the officers and employees of corporate litigants) who have expertise, and who were actually involved in the events underlying the litigation.

[111] The Court explained the categories at paras 36-38:

> The first category of "independent experts" must always be qualified by the trial judge under the *Mohan* procedure, and advance notice of their opinions must be given under the *Rules of Court*. External witnesses who are not so qualified are not permitted to give opinion evidence requiring specialized expertise. External expert witnesses are expected to display a basic level of independence and objectivity.
>
> It is sometimes argued that the evidence of witnesses in the second category is not "opinion" evidence: *Westerhof* at paras. 60-1. To some extent they are testifying about what they observed, and what they actually did. In that sense, they are not opinion witnesses. On the other hand, it is challenging for them to explain why they acted as they did without engaging their professional expertise. For example, the family doctor cannot explain why he or she endorsed any particular treatment without expressing a medical opinion about it. It is difficult to set the boundary between what they did and their expert opinions about what should have been done. Where witnesses with expertise (who are not litigants) are to testify about events within the scope of their expertise, it is generally prudent to have them formally qualified as expert witnesses, particularly when they propose to express opinions on collateral issues like the employment prospects of the patient. Further, the overall objective of comprehensive disclosure found in R. 5.1(1)(c & d) supports the pre-trial disclosure of the opinions of participating experts.

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> The final category of litigant-witnesses with expertise does not fall neatly into the *White Burgess* and *Mohan* analysis. First of all, it is unnecessary to prove that such a witness is "impartial, independent, and unbiased" as discussed in *White Burgess*. Litigants are no longer disqualified as witnesses because of their obvious interest in the case.

[112] Neither affiant here fits into the second or third category of witnesses. Although Mr. McCammon is a former ANC employee, his employment ended well before the Directive and hence, the underlying events. In the result, I must apply the ***Mohan*** criteria as refined in ***White Burgess***.

c. Expert evidence is permissible on interim motions

[113] It is trite that expert evidence is permissible on interim motions: ***Lameman*** at para 23.

[114] *Rule* 6.11 allows expert evidence in affidavit form.

d. The tendering party bears the onus of establishing admissibility

[115] The party tendering expert opinion evidence bears the onus of establishing its admissibility.

[116] An affiant's potential exposure to Questioning does not shift the onus.

e. The regime for admitting expert evidence should parallel that for trial

[117] Part 5, Division 2 of the *Rules of Court* sets out a formal regime for the admission of expert evidence at trial. In ***Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc***, 2018 ABCA 305, the Court discussed the procedure at para 25:

> ...The *Rules of Court* require advance notice of the qualifications of the expert, and the nature of the opinion evidence: R. 5.34. Before the witness's evidence is received, the trial judge will examine the expert's qualifications, and determine the scope of the admissible opinion. The trial judge will also determine if the necessary objectivity and impartiality are present, ensuring that the expert can discharge his or her obligations to the court. Once that threshold is crossed, the expert's report and opinion are introduced in evidence in chief, and the expert is subject to cross-examination.

[118] Alberta Courts have taken various approaches to the introduction of expert opinion evidence in applications short of trial.

[119] ***Kerich v Victoria Trail Physiotherapy Ltd***, 2017 ABQB 471 (Master) involved a summary dismissal motion (which is final relief) with expert evidence. Master Schlosser, Q.C. noted the following, at para 18:

> Expert evidence ought to be approached in this setting as it would at trial. In other words, the Court needs, at a minimum: the qualifications of the expert, (so that the Court can determine the admissibility and the scope of the opinion); the information and assumptions on which the opinion is based (sometimes put to the expert as a set of hypothetical facts that the litigant hopes will be proved); and, a summary of the expert opinion. It is appropriate that both the substance of the expert's opinion and the expert report itself be included. If an expert's affidavit is tendered under 6.11(1)(a), it should conform to Form 25, at a minimum.

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[120] In ***McCarty v McCarty***, 2016 ABQB 91, Renke J noted the "slim record", which included a report authored by a well-known Edmonton chartered business valuator (attached as an exhibit to one of the party's affidavits), on which he was to make his decision. The other party did not object to the admissibility of the report, but did challenge its conclusions.

[121] Satisfied with the expert's impartiality, and his ability to discern the foundations for her opinion, Renke J considered the report, noting at para 38:

> Regardless, my job is to come to the conclusions that I can, given the evidence provided, the constraints on fact-finding should affidavits conflict, and the urging of rule 1.2 and *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) to work toward the proportional, timely, and cost-effective resolution of claims.

[122] In ***DME v RDE***, 2015 ABQB 47, Graesser J recognized the proper way to introduce expert evidence on an interim motion, which is to have the purported expert swear an affidavit qualifying him or herself to give expert opinion evidence and then providing the opinion and the back-up for it under oath: at para 71.

[123] Ultimately deciding that there were special circumstances to allow a psychologist's report (the facts reported were not "particularly contested", the report was more focused on facts about the child's need to have someone to talk to, and his desire to live with his father), the Court cautioned, at para 76:

> My conclusion here should not be considered as precedent setting. There are cases where the court has rejected an expert report used in chambers applications because it is not properly put forward. Sometimes, it is not necessary to hold the parties to strict compliance with the *Rules of Court* or rules of evidence. This is one of those situations.

[124] The *Rules* are silent about expert evidence on motions. (Perhaps they should be amended.) However, I conclude that any expert evidence ought to be introduced as it would at trial: the proposed expert's qualifications and scope of opinion should be precisely defined, and the substance of their opinion clearly expressed. Doing so will not only avoid surprise, it will also avoid any call for judicial sleuthing or intervention.

[125] There should be no distinction between motions for interim or final relief.

f. The evidence is expert opinion

[126] Expert evidence is allowed "on matters requiring specialized knowledge": ***White Burgess*** at para 15. In ***R v Bingley***, 2017 SCC 12 (***Bingley***) the Supreme Court reaffirmed the purpose of the framework for admissibility noting, at para 13:

> The modern legal framework for the admissibility of expert opinion evidence was set out in *Mohan* and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), [2015] 2 SCR 182. This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into "trial by expert" and that the trier of fact maintains the ability to critically assess the evidence: see *White Burgess*, at paras 17-18. The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.

[127] The Court in ***Bingley*** also observed that "[t]he boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized": para 17.

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[128] Similarly, in ***White Burgess***, the Supreme Court explained the importance of the gatekeeper role at paras 12 and 16:

> … we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D.D.* at para. 16: *R.D.D.*, 2000 SCC 43 (CanLII), 2 S.C.R. 275, at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, flawed, forensic scientific opinion has played a prominent role in miscarriages of justice": para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.*, at para. 106; see the Right Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007)
>
> …
>
> ...The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

[129] The expert evidence analysis is divided into two stages. First, it must first meet the four ***Mohan*** factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. If it does, the Court then weighs the potential risks and benefits of admitting the evidence against the benefits: ***White Burgess*** at paras 23-24.

[130] In this case, none of the disputed evidence was tendered as a 'classic' expert report by which the witness opines on or makes inferences about facts otherwise in evidence (i.e. "The defendant failed to meet the standard of care because…"). Rather, it is a case of witnesses providing "facts" of their own (i.e. "Mountain pine beetles destroy trees. As this results in lost profits and forest fires, logging is required to suppress the beetles' destructive effects").

[131] Excluding the computer modelling research actually conducted by Mr. Gooding, even though the "facts" may ultimately be observational, they do not arise directly from the witnesses' observations.

[132] The witnesses are relying on hearsay from others (i.e. their professors, conference lecturers, or research reported by others), all of which can, and likely does have built-in opinions. It is perfectly acceptable (and commonplace) for an expert witness to rely on hearsay such as information that is "common knowledge" within the expert's profession from others' (learned) works to formulate their opinion. This requires that they are qualified as experts and the scope of their qualifications is precisely defined. Otherwise, there can be no confidence in the reliability of the information they relied upon in reaching their conclusions.

[133] ANC chose not to propose the exact nature or scope of Messrs. McCammon's and Gooding's expertise. In the result, I am left to determine those things based on the available

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evidence, the nature of this application, and the remedy sought. I have concluded that there is no discernable prejudice to the Minister by my doing so, particularly given the correlation of the subject of the opinions to the issues.

[134] I begin by addressing the first three ***Mohan*** factors: necessity, relevance and exclusionary rules. Unless stated otherwise, my findings apply to the November, April, and Gooding Affidavits. Next, I address the fourth factor, "properly qualified expert" for each witness and rule on their evidence.

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Step one – Mohan - Threshold requirements

Necessity

[135] An opinion is "necessary" when it provides information that is "likely to be outside the experience and knowledge of a judge or jury": ***Mohan*** at 23; ***R v Abbey***, [1982] 2 SCR 24.

[136] Apart from limited evidence that I might take judicial notice of (i.e. the hazards of forest fires), I am not equipped to draw inferences about the nature and effect of mountain pine beetle risks to forests, or the caribou that live in the forests. The evidence is therefore necessary.

Relevance

[137] For the purpose of this aspect of the admissibility exercise, relevance means the evidence has, as a matter of human experience and logic, a tendency to make the existence or non-existence of a fact in issue more or less likely than it would be without that evidence. It is a low threshold that reflects the inclusionary bias of the rules of evidence: ***R v Abbey***, 2009 ONCA 624 at para 82, leave to appeal denied [2010] 2 SCR v (note) (SCC) (***Abbey***).

[138] Mr. Gooding's FORCORP Report speaks to mountain pine beetle concerns affecting the province of Alberta, specifically addressing several regions, and predicts outcomes for a twenty-year period.

[139] Relevance for this case concerns only the region affected by the Directive for the roughly six-month period between the hearing of the interim injunction motion and the JR.

[140] I conclude that Mr. McCammon's evidence is relevant.

[141] The FORCORP Report is relevant insofar as it speaks to the geographic region impacted by the Directive for the relevant period.

No exclusionary rule

[142] There is no exclusionary rule engaged.

A properly qualified expert

[143] Specialized expertise may be based on formal education and experience in a recognized discipline (i.e. science). Typically, this formal education and experience is supported by experimentation and peer-reviewed literature or on practical experience (i.e. mechanical repairs).

[144] Expert witnesses are not barred from assisting the court with their special knowledge simply because they are not trained in the underlying science of the field. Such knowledge is required only if the science is novel: ***Bingley*** at para 22.

[145] Where it is clear that the ***Mohan*** criteria are established, and there is no question that the probative value of the evidence outweighs its prejudicial effect, the Court is not obliged to hold a *voir dire* to determine the admissibility of the evidence as that "would be otiose, if not absurd, not to mention a waste of judicial resources": ***Bingley*** at paras 27-28. (***Bingley*** concerned drug recognition evidence from witnesses who had studied and applied what they were taught to the circumstances of the case. Whether the logic is applicable to cases where a witness only applies expert evidence of a scientific nature that was studied and was certified for is a question for another day.)

[146] In ***White Burgess***, the Supreme Court held that the threshold for admissibility of expert evidence flows from the expert's duty to be fair, objective, and non-partisan and noted at para 49:

> This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[147] In ***Abbey***, the Ontario Court of Appeal also noted the two-step process for admitting expert evidence at paras 78-79:

> It is helpful to distinguish between what I describe as the preconditions to admissibility of expert opinion evidence and the performance of the "gatekeeper" function because the two are very different. The inquiry into compliance with the preconditions to admissibility is a rules-based analysis that will yield "yes" or "no" answers. Evidence that does not meet all of the preconditions to admissibility must be excluded and the trial judge need not address the more difficult and subtle considerations that arise in the "gatekeeper" phase of the admissibility inquiry.

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> The "gatekeeper" inquiry does not involve the application of bright line rules, but instead requires an exercise of judicial discretion. The trial judge must identify and weigh competing considerations to decide whether on balance those considerations favour the admissibility of the evidence. This cost-benefit analysis is case-specific and, unlike the first phase of the admissibility inquiry, often does not admit of a straightforward "yes" or "no" answer. Different trial judges, properly applying the relevant principles in the exercise of their discretion, could in some situations come to different conclusions on admissibility.

Mr. McCammon

[148] Mr. McCammon is a registered forester with some 40 years' experience in the field. A long-term ANC employee, he was involved with implementing sustainable forest management practices associated with harvesting, reforestation, wildlife management and integrated forest management approaches. Since the mid-2000's he was the lead manager actively dealing with the mountain pine beetle risk, and had a lead role in trying to secure government funding to control mountain pine beetle. He also worked collaboratively with the GOA to develop the "Healthy Pine Strategy". On his departure from ANC in 2015, Mr. McCammon has worked as a consultant providing business development and forest management services for clients in western Canada.

[149] Mr. McCammon has the expertise and experience to be qualified as an expert in the field of forestry generally. I am not satisfied that his experience qualifies him as an expert on mountain pine beetles or mountain pine beetle suppression. In this regard, I am not confident of threshold reliability, which is an essential component for admissibility of expert evidence: ***Abbey ONCA*** at para 142; Ontario, *Inquiry into Pediatric Forensic Pathology in Ontario, Report: Policy and Recommendations, vol. 3* (Toronto: Queen's Printer, 2008) at 494-496.

[150] Besides Mr. McCammon's expert qualifications, I must also determine whether he can uphold the expert's duty to be fair, objective, and non-partisan.

[151] There is a paucity of evidence on the issue of Mr. McCammon's partiality. Typically, and at minimum, a proposed expert makes a declaration of impartiality. Not surprisingly, there is no such declaration in this case.

[152] Mr. McCammon has ties to ANC through his long period of employment. Alone, that may be insufficient to defeat this threshold requirement, since the mere fact of a relationship does not automatically render the proposed expert's evidence inadmissible.

[153] Because exclusion at the threshold stage should only occur where there is a clear unwillingness or inability of an expert to provide fair, objective and non-partisan evidence, I must find that the low threshold for admissibility is met.

Mr. Gooding

[154] Mr. Gooding was tendered as an expert witness as an alternative argument.

[155] A senior partner of FORCORP, a natural resource consulting firm, Mr. Gooding is a professional forester who holds a Masters degree of science in forestry. He is a member of and former president of the College of Alberta Foresters. He has experience in forest management, including forecasting the spread of mountain pine beetle in Alberta. While his CV suggests that his work is mainly for forest industry clients, he has also worked on projects initiated by or in

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collaboration between industry and local or provincial governments. He is presently involved in an ongoing project for landscape modeling to support the development of woodland caribou range plans for the GOA.

[156] I am satisfied that Mr. Gooding's education and experience qualifies him to give expert opinion evidence on the impact of mountain pine beetles, and predicting the spread of mountain pine beetles using computer modeling.

[157] I turn next to assessing his partiality.

[158] As with Mr. McCammon, there is no statement of partiality. However, unlike him, there is at least some evidence which sheds some light on his partiality insofar as the making of the FORCORP Report.

[159] As noted, the exclusion of a proposed expert at the threshold stage should only occur where there is a clear unwillingness or inability of an expert to provide fair, objective and non-partisan evidence. This low threshold for admissibility is met.

[160] I turn to assess whether admissibility of the evidence is sufficiently beneficial to the process to warrant admission despite the potential harm to the process that may flow from it.

Step Two – Gate-keeping - Weighing the competing considerations

[161] This stage of the enquiry requires weighing the costs and benefits of admitting the evidence, which in this peculiar circumstance, is a more challenging exercise than normal.

Mr. McCammon

[162] On the benefit side of the ledger, the evidence is, in ANC's view, essential for it to establish irreparable harm and that the balance of convenience weighs in its favour. On the cost side is the complete want of evidence on the critical issue of expert's partiality, reliability concerns, and the potential prejudice arising from the 'distraction factor'.

[163] I conclude that the costs of admitting the following evidence outweighs the benefits; the following is inadmissible:

November Affidavit

- Paras 95-96
- Para 104 reads:

If the Forestry Framework was being followed and respected, the majority of available merchantable stands of timber would be harvested in very different areas and time periods when the stands are mature and operable, consistent with the approved Spatial Harvest Sequence. ***Instead, the Forestry Directive restricts ANC's ability to enter into substantial areas within the Caribou Management Zone for up to 90 years****, by which time much standing timber will be lost due to over-maturity, death, snow and windstorms, fungal infections (butt rot), disease, insect (MPB, spruce budworms and bark and boring beetles) or forest fire.*

- The underlined words are inadmissible opinion. (The bolded words are argumentative and seek to interpret a document that speaks for itself. However, the Minister does not take umbrage with them.)

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- Para 86:

The Forestry Directive terminates the Healthy Pine Strategy ***without explanation*** *and within a region that is at very high risk of infestation by MPB. The termination of the Healthy Pine Strategy puts ANC's timber resources at serious risk of loss due to infestation followed by extreme risk of forest fire. Obviously, a forest devastated by wildfire substantially impacts the availability of timber for any commercial purpose, severely impacts the habitat for caribou (and many other species of animal), is dangerous to people, puts communities and public infrastructure at risk, and the cost of fighting wildfires can be significant to the province.*

- The bolded words are argumentative and/or conclusory, but the Minister takes no objection to them. The last sentence is more argumentative than opinion. That said, given that it might qualify for the doctrine of judicial notice, which is a doctrine of common sense, I elect *not* to strike it: ***Meadowbrook Management*** at paras 5-8.

April Affidavit

- Paras 25-26
- After redactions, paras 18 -19 read:

18. Jasper National Park is a case study of the devastation caused by MPB. Jasper National Park has approximately 200,000 ha of pine stands. When MPB emerged in Jasper National Park, Parks Canada implemented minor, sporadic control activities. Jasper National Park had infested pine stands: 21,600 ha in 2015 and 48,600 ha in 2016.

19. The MPB epidemic in Jasper National Park demonstrates how quickly MPB can spread with no Level 1 or Level 2 control efforts. 4 maps prepared by the governments of Alberta and Canada are attached and marked as Exhibit "C".

The underlined words are inadmissible.

Mr. Gooding

[164] Mr. Gooding's FORCORP Report states that it was made in collaboration with eleven forest industry companies, and that the GOA was a funder. I take little comfort in the GOA being named as a funder. Without more, this does not translate to GOA participation. Funding a project does not imply anything more than giving money. That said I can take some comfort from the report's statement that the GOA participated in an industry/government program developed in 2010, the Central Region MPB Plan, which requires annual reporting, and that the report is the eighth annual report.

[165] Considering the evidence, the nature of the motion, and the remedy sought, the benefit side of the ledger has that this is important evidence for assessing if there is irreparable harm, and perhaps, for weighing the balance of convenience. On the cost side is the want of a statement of partiality. To some extent, the information gleaned from the report alleviates this concern. As to prejudice, the GOA's involvement in the program for which the report was prepared, alleviates concerns of prejudice to the Minister.

[166] I conclude that the benefit of admitting this evidence outweighs the cost.

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[167] Insofar as it is relevant, the Gooding Affidavit is admissible.

Costs

[168] The parties may speak to costs within 30 days if they are unable to agree.

Heard on the 8th and 12th days of July, 2019.
Dated at the City of Edmonton, Alberta this 19th day of August, 2019.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

David M Hawreluk, Kevin Lynch, Katherine J Fisher, and Jenna Vivian
of Bennett Jones LLP
for ANC Timber Ltd.

Vivienne M Ball and Lisa Semenchuk
of Justice and Solicitor General
for the Minister of Agriculture and Forestry

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Appendix A –ANC's Concessions

[1] ANC concedes that the following should be struck:

i. The affidavits of Raymond Hilts and Dr. David Adison.

ii. From the November Affidavit

a) Paragraphs 37, 77-79, 96, and 105.

b) Exhibits 50, Tab B and 53 (ANC conceded Exhibits 51-52 ought to be struck during the hearing)

c) These underlined words:

- Para 19: *In the event, however, that the Minister is entitled to withdraw land pursuant to paragraph 6(1), ANC is entitled to compensation pursuant to paragraph 6(3):*
- Para 20: *Pursuant to the 1989 FMA and the 2009 FMA, ANC was granted broad rights to conduct...*
- Para 21: Pursuant to paragraph 8 of the 2009 FMA, the Minister reserved certain rights over the forest management area, however, those rights are limited...
- Para 39: *Despite the agreement that was reached, the Minister failed to engage in any meaningful bilateral consultation with ANC and did not complete its caribou range plan by the end of 2013. It also did not provide any compensation to ANC pursuant to paragraph 6(3) of the...*
- Para 48: *Despite the DFMP Final Approval Decision and the approval of the 2014-2019 General Development Plan, on May 7, 2014, the Minister sent a letter to ANC withdrawing its rights to harvest timber in various areas of the ANC forest management area, stating...*
- Para 60: *On June 2, 2016, the Minister issued a Draft Little Smoky and A La Peche Caribou Range Plan (the "Draft Range Plan") which sets out short and long term plans to support the caribou population, including requiring minimal forestry activity within the Caribou Range for at least the next 50 years in order establish an undisturbed habitat of at least 65% of the Caribou Range. This objective would severely and negatively impact ANC's ability to "establish, grow, harvest and remove timber thereon on a perpetual sustained yield basis" as set forth in the 2009 FMA, is in breach of the one year moratorium, and is contrary to the Ground Rules, the DFMP Final Approval Decision, and the various General Development Plan approvals. A copy of the Draft Range Plan is attached and marked as Exhibit "29".*
- Para 66: *On December 19, 2017, the Minister released to the public a Draft Provincial Woodland Caribou Range Plan (the "DPWCRP"). The DPWCRP does not contain any commentary Of information regarding how or when ANC will obtain access or approval to harvest within the Caribou Management Zone and no information or indication as to when a Caribou Range Plan or a Caribou Range Recovery Plan will be finalized. A copy of the DPWCRP is attached and*

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marked as Exhibit "36". Despite the significant amount of time that has passed, neither the Draft Range Plan nor the DPWCRP have been finalized or approved by the Government of Alberta. Given the protracted history, I believe it is possible, if not likely, that the Draft Range Plan and DPWCRP in their current version will never be finalized or approved.

- Para 87: *Sound forestry practices require that high-risk pine stands be harvested to reduce risk and to stop the advancement of MPB. Paragraph 25(6) of the 2009 FMA states*
- Para 98: *ANC estimates that approximately 1,500 wells have been drilled in the Caribou Range. Attached and marked as Exhibit "51" is a map showing only the roads and oil and gas facilities and infrastructure within the Caribou Management Zone. Attached and marked as Exhibit "52" is a map applying a 500 m forestry buffer or "disturbance zone" around these areas, which is how "disturbance" is defined pursuant to the Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou), Boreal population, in Canada — 2012. As can be seen, without accounting for any areas where timber has been harvested, approximately 97% of the Caribou Range is considered to be "disturbed" caribou habitat. Even if no timber is harvested within the Caribou Range for the next 50 — 100 years, it is virtually impossible to expect that the Caribou Range will achieve 65% non-disturbance. In other words, the Forestry Directive is likely to be futile in its attempt to achieve its objective, while causing serious and irreparable harm to ANC. It is also entirely contrary to paragraph 7(5) of the 2009 FMA which states that the "primary" use of ANC's forest management area is to "establish, grow, harvest and remove timber".*
- Para 103: *It is my understanding that the Forestry Directive is an attempt to create a 65% "undisturbed" habitat for caribou. It does not, however, reflect proper, proven and accepted forest management practice, is not consistent with the 2009 FMA or the Alberta Forest Management Planning Standard, and will result in a much higher risk to the forest and to caribou.*

iii. From the April Affidavit:

a) Paragraphs 18-19, 21, 39, and 57;

b) These underlined words:

- Para 14: *In reliance on the Minister's approval of the 2011 DFMP and in seeking the approval of the FHPs, ANC entered these blocks and completed all of its necessary field work including "ribboning off" the perimeter of each harvesting block so that the operators would know where to harvest trees in Compartments 7-07, 7-10 and 7-14. Contrary to the Minister's approval of the 2011 DFMP and the approved GDPs, the Minister has "reversed course" and has now ...*
- Para 24: *Compartments 7-08W, 7-10 and 7-13 are referred to as inactive holding zones, which means ANC cannot, as a result of the Forestry Directive, conduct Level 2 treatments and the GOA will no longer carry out Level 1 activities in these compartments to control and manage the risk of epidemic MPB spread.*

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There is no logical reason for the GOA to prevent ANC from being able to manage the MPB epidemic and saving and/or harvesting the trees within its forest management area. The Minister's refusal to allow ANC to do so is also contrary to paragraph 25(6) of the 2009 FMA, which states:

- Para 40: *As can be seen at Exhibit 51 and Exhibit 52 of the First Affidavit, and as explained at paragraph 98 of the First Affidavit, approximately 97% of the Caribou Range is already considered "disturbed" caribou habitat due to industrial disturbance that does not include tree harvesting. Even if no timber is harvested within the Caribou Management Zone for the next 50-100 years, it is impossible to expect that the Caribou Range habitat will achieve 65% non-disturbance given the GOA's ongoing policy to approve other industrial developments within the Caribou Management Zone.*

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Appendix B – Argumentative and/or Conclusory Evidence

[1] The Minister contends that certain portions of the November and April Affidavits are argumentative or conclusory. Unless otherwise stated, ANC's response is that the provision concerns factual information that is based upon the affiant's personal information and/or understanding.

[2] Where partial paragraphs are struck for being argumentative or conclusory, the offending words are underlined. If there is another ground for striking, the words are bolded.

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[3] In part, para 17 reads:

> *In order to provide assurance and security to ANC that it had sufficient land base from which to harvest timber to maintain its operations, the Minister agreed to limited rights to withdraw any of the forest management area granted to ANC. Paragraph 6(1) of the 2009 FMA [Forest Management Agreement] states...*

[4] The first sentence is argumentative. It is also conclusory as it interprets the FMA.

[5] Para 18 reads:

> *Pursuant to paragraph 6(1), and [I]n accordance with ANC's negotiated expectation and understanding with the Minister regarding the protection of its land base and access to timber, the Minister is not entitled to withdraw any lands from ANC's forest management area if the reason for doing so is to preserve wildlife habitat.*

[6] ANC is entitled to speak to its understanding and expectation; however, the underlined words are a matter for argument.

[7] In part, para 19 reads:

> *In order to provide assurance and security to ANC that it had sufficient land base from which to harvest timber to maintain its operations, the Minister agreed to limited rights to withdraw any of the forest management area granted to ANC. Paragraph 6(1) of the 2009 FMA [Forest Management Agreement] states...*

[8] ANC contends that this language simply conveys a factual statement, however, I disagree. This language interprets the FMA, and is both argumentative and conclusory. The quote from the FMA that follows is, of course, permissible.

[9] Para 21 reads in part:

> *Pursuant to paragraph 8 of the 2009 FMA, the Minister reserved certain rights over the forest management area, however, those rights are limited.*

[10] These words interpret the FMA. They are a matter for argument and are conclusory.

[11] Para 23 reads:

> ***As early as the date of execution of the 1989 FMA, the Minister knew that the ANC forest management area overlapped with the habitat of the Little Smoky caribou herd (the "Little Smoky Herd") and the A La Peche caribou herd (the "A La Peche Herd"), and, more importantly, was aware that the herds were considered to be an endangered***

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> ***or threatened species***. *Notwithstanding, the Minister entered into the 1989 FMA and the 2009 FMA.*

[12] The last sentence is argumentative and is struck. The bolded words are a question of relevance.

[13] Para 37 reads:

> *Following receipt of the Draft DFMP Approval Decision and the letter dated May 6, 2013, ANC expressed significant concerns to the Minister regarding the limitations on ANC's right to harvest timber within 46% of its forest management area. These limitations were entirely contrary to the 2009 FMA and the entirety of the bargain, understanding, and commitment that ANC had made and received from the Government of Alberta, and would have serious implications with respect to ANC's operations.*

[14] Citing ***Renfrew Insurance Ltd v Donald***, 2012 ABQB 228, ANC urges that it is information within the affiant's knowledge. I agree that that case supports the notion that it is permissible for an affiant to speak to anticipated harm in the context of an interim motion such as this: see para 43. In the result, only the underlined words, which are argumentative and conclusory, are struck.

[15] In part, para 63 reads:

> *The 7-07 FHP and the 7-14 FHP complied entirely with Section 3.4.1 of the Ground Rules. Accordingly, pursuant to the Ground Rules, it was mandatory for Alberta Agriculture and Forestry ("AAF") to accept and approve both FHPs. Notwithstanding, on January 16, 2017, AAF sent a letter rejecting both FHPs. The letter states:*

[16] ANC contends that apart from being information within the affiant's knowledge, it is part of the narrative. I conclude that the language exceeds the bounds of contextual narrative, and is argumentative and conclusory.

[17] Para 76 states:

> *On October 16, 2018, ANC sent a letter to Mr. Tapp that states, in part....*

[18] A recitation of eight paragraphs of the letter follows, and the paragraph concludes with these words:

> *A copy of the letter is attached and marked as Exhibit "44". ANC has not received a response to this letter.*

[19] ANC contends that the quotes from and the exhibited letter itself (which is not tendered for the truth of its contents) demonstrates what transpired after the Directive. I disagree. The portion of the quote from the letter and the letter are facially argumentative.

[20] Further, subject to a document adduced to prove only a fact that a statement was made, a document that is not tendered for the truth of its contents is not relevant: ***Lysyk*** at para 8. I also find that it is irrelevant as it merely argues ANC's *ex-post facto* position. While irrelevant evidence could have been (as can most if not all other categories of the impugned provisions) addressed as a matter of weight, the Minister has elected to seek to have them struck. He was entitled to do that.

[21] This paragraph and Exhibit 44 are struck.

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[22] Para 96 reads:

> *I do believe that the Forestry Directive is inconsistent with the MPB Action Plan, MPB Management Strategy and MPB infestation Management Responsibilities, and is contrary to paragraph 25(6) of the 2009 FMA, the DFMP Final Approval Decision, and sound, sensible, and responsible forestry practice.*

[23] ANC urges that it is simply information within the affiant's knowledge derived from his experience and review of the exhibited documents. Further, it is "necessary, if not expected, for [it] to express such a view in support of its application" and that exclusion of the provision would be "problematic if not fatal". I disagree. The language is facially argumentative and conclusory.

[24] After the concession, para 98 reads in part:

> *ANC estimates that approximately 1,500 wells have been drilled in the Caribou Range.* ***Attached and marked as Exhibit "51" is a map showing only the roads and oil and gas facilities and infrastructure within the Caribou Management Zone. Attached and marked as Exhibit "52" is a map applying a 500 m forestry buffer or "disturbance zone" around these areas, which is how "disturbance" is defined pursuant to the Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou), Boreal population, in Canada —2012.*** *As can be seen, without accounting for any areas where timber has been harvested, approximately 97% of the Caribou Range is considered to be "disturbed" caribou habitat.*

[25] The Minister contends that the last sentence is argumentative or conclusory while ANC argues that it is a statement of fact based upon the affiant's interpretation of maps to reach his conclusions. There are additional concerns about the source of (prepared by unnamed persons) and utility of the maps (Exhibits 51-52). As with some other impugned evidence, the May Affidavit expands upon what is said in this paragraph. It is not objected to.

[26] ANC candidly acknowledges that failing to name the source of the maps is a "deficiency", and in argument on the repeated provision found at para 40 of the April Affidavit conceded that the exhibits should be struck, but the affiant's estimate of 97% disturbance to caribou habitat should remain.

[27] Having struck the exhibits, there is nothing to found the estimate of "disturbed" caribou habitat.

[28] Accordingly, all but the first sentence is struck.

[29] After the concessions, para 103 reads:

> *It is my understanding that the Forestry Directive is an attempt to create a 65%"undisturbed" habitat for caribou.*

[30] There is nothing offensive about what remains.

[31] Para 104 reads:

> ***If the Forestry Framework was being followed and respected, the majority of available merchantable stands of timber would be harvested in very different areas and time periods when the stands are mature and operable, consistent with the approved Spatial Harvest Sequence.*** *Instead, the Forestry Directive restricts ANC's ability to enter into*

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> *substantial areas within the Caribou Management Zone for up to 90 years*, ***by which time much standing timber will be lost due to over-maturity, death, snow and windstorms, fungal infections (butt rot), disease, insect (MPB, spruce budworms and bark and boring beetles) or forest fire.***

[32] ANC contends that this is neither argumentative nor opinion evidence about the ultimate issue to be determined on JR, but rather, facts that are part of the narrative concerning irreparable harm. However, I agree with the Minister to the extent that the unbolded portion of the last sentence interprets the Directive, and is therefore argumentative. The bolded portions are addressed in the category of opinion evidence.

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[33] After the concessions, para 25 reads:

> ***The compartments within ANC's forest management area that are at most risk for MPB are the Outside Series 1 Compartments****. The Forestry Directive and the GDP Decision completely prevent ANC from conducting any harvesting of trees in Series 2 to 10 for the next 10 to 90 years.* ***Harvesting trees throughout the forest management area, including within the Caribou Management Zone, is necessary to suppress the MPB epidemic. The MPB epidemic is an urgent issue that has the potential to cause immediate catastrophic damage and destroy vast amounts of available conifer supply (and caribou habitat) within ANC's forest management area.***

[34] As with other portions of the impugned evidence that interpret the Directive, the second sentence should be struck. The balance of the paragraph is generally discussed in the context of opinion evidence.

[35] After the concessions, para 40 (which repeats para 98 of the November Affidavit) reads:

> ***As can be seen at Exhibit 51 and Exhibit 52 of the First Affidavit, and as explained at paragraph 98 of the First Affidavit, approximately 97% of the Caribou Range is already considered "disturbed" caribou habitat due to industrial disturbance that does not include tree harvesting.***

[36] My findings concerning para 98 of the November Affidavit equally apply to this provision.

[37] Para 56 reads:

> *The A La Peche and Little Smoky caribou herds are two of the four* ***stable*** *herds in Alberta. While all other caribou herds in Alberta are at risk, the Forestry Directive affects the A La Peche and Little Smoky caribou herds within the Caribou Management Zone inside ANC's forest management area.* (emphasis in original)

[38] ANC argues that this complaint has been remedied by the addition of para 12 of the (unopposed) May Affidavit, and concedes that it can be struck. The Minister disagrees, urging that the affiant's failure to comment on other at-risk caribou herds noted on the DPWCRP (Exhibit 36) is fatal.

[39] I conclude that the Minister's concerns are matters to be fleshed out at the injunction hearing, and assigned whatever weight is warranted.

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