

SUPREME COURT OF NOVA SCOTIA

Citation: *Lamey v. Bennett*, 2025 NSSC 315

Date: 20250822

Docket: *PtH*, No. 514654

Registry: Sydney

Between:

Carla Suzanne Lamey

Applicant

v.

Troy Bennett, Karyn Ann Colwell, 3316407 Nova Scotia Limited, E & R Langille
Contracting Limited,
and Port Hawkesbury Paper Limited Partnership

Respondents

Judge:	The Honourable Justice Patrick Murray
Heard:	July 4, 2025, in Port Hawkesbury, Nova Scotia
Counsel:	Roseanne Skoke, for the Applicant Harvey Morrison, K.C., for the Respondent, Port Hawkesbury Paper Limited Partnership Colin Piercey, K.C., for the Respondent, E&R Langille Contracting Limited Hector MacIsaac, for the Respondent, Troy Bennett & 3316407 Nova Scotia Limited

By the Court:

INTRODUCTION:

[1] This is a motion to determine the validity of the Notices of Objection to the Admissibility of affidavit evidence and an expert report or alternatively for an order that the Notices of Objection to the report be heard by the Judge hearing the Application in Court, which notices are as follows.

- a) The Notice of Objection to admissibility of E&R Langille filed October 11, 2022;
- b) The Notice of Objection to admissibility of E&R Langille filed April 17, 2023;
- c) The Notice of Objection to admissibility of E&R Langille filed October 25, 2023; and
- d) The Notice of Objection to admissibility of the Respondent Port Hawkesbury Paper LP (“PHP”) dated October 31, 2023.

[2] The motion by E&R Langille Contracting Limited (E&R) was filed February 25, 2025, seeks to exclude portions of the affidavits of the Applicant, Carla Lamey, sworn August 10, 2022, specifically paragraphs 33, 72, and 74. In addition E&R seeks to exclude paragraphs 5 and 6 of Ms. Lamey’s affidavit sworn March 13, 2023.

[3] These motions arise from a claim in trespass by the Applicant, Carla Lamey, upon her lands at MacIntyre Mountain, Inverness County, as alleged. Ms. Lamey seeks compensation and damages for the alleged trespass from the Respondents. She

has filed an Application in Court against the Respondents for their respective roles as alleged. The Respondents contest the Application in Court.

[4] In the same motion E&R (Langille) seeks to exclude portions of certain portions of the expert report of Peter Boudreau dated March 10, 2023, and filed March 19, 2025. Langille's original motion under *Rule 55.10* was filed on November 8, 2023. Specifically, the paragraphs sought to be excluded by Langille are paragraphs 12, 13, 22, 27-29, 30, 31, 32, 46, 48, 52, 62, 65, 69, and 79. In total there are objections to (16) sixteen paragraphs in the Boudreau report.

[5] In support of these motions the Respondent Langille has cited Civil Procedure Rules 1.01, 5.13 and 5.16, Rule 26B, 26B.03, 26B.04 and 26B.05, *Rule 55*, 55.10 and such further Rules as are relevant. E&R has filed the affidavit of Dylan A.F. MacDonald sworn February 24, 2025, in support of its motion.

[6] The motion filed by Port Hawkesbury Paper Limited Partnership (PHP) on February 27, 2025, is similar to that filed by Langille. Of particular note in PHP's motion is the Notice of Objection and Admissibility filed by PHP on October 31, 2023, and the Motion to exclude paragraphs of the Expert Report of Peter Boudreau pursuant to a Notice of Motion under *Rule 55.10* filed November 14, 2023.

[7] Specifically, PHP objects to paragraphs 12, 19, 22, 46, 48, 50, 52, 55, 60, 61, 64, 69, 71, 77, 79, and 82-84, of the Boudreau report for a total of 18 objections.

[8] The Respondent PHP has cited *Civil Procedure Rules* 1.01, Rule 5, 5.13 and 5.16, Rules 26Bm 26B.03, 26B.04 and 26B.05, Rule 55, and Rule 55.10, in support of these motions. In addition, the affidavit of Harvey Morrison, K.C. sworn February 25, 2025, is filed in support of PHP's motion.

[9] The Applicant, Carla Lamey, contests these motions. She filed a Notice of Contest to the Notices of Objection to the Admissibility of the Expert Report of Mr. Boudreau, a Forest Technician, on January 2, 2024.

[10] In addition, Carla Lamey filed a Notice of Interim Motion dated December 20, 2023, on January 2, 2024. In that motion the Applicant sought among other things, a hearing date for the Notices of Objection to Mr. Boudreau's report and a hearing to request an adjournment of the Application in Court scheduled to be heard January 22 to 25, 2024 in Port Hawkesbury.

[11] The request to adjourn the hearing dates was made by the Applicant on the basis that the criminal proceeding and prosecution related to the civil proceeding was still pending and considered relevant at that time by the Applicant.

[12] The Applicant's interim motion was scheduled on an expedited basis, and heard on January 4, 2024, before Justice Timothy Gabriel.

[13] Justice Gabriel granted an adjournment "without day" of the Application in Court scheduled for January 22 to 25, 2025. He ruled that new hearing dates would be set following the final determination of the criminal proceedings. He further advised that counsel may apply to the Court for a case management conference.

[14] I shall return to discuss Justice Gabriel's Order issued on May 1, 2024.

[15] As directed by the Court at a case management conference held on March 25, 2024, Ms. Lamey and E&R Langille would file briefs due April 30, 2024, with respect to the Notices of Objection to the Applicant's August 10, 2022, and March 13, 2023, affidavits. Mr. Piercey filed a brief response on May 5, 2025, in reply to the Applicant's submission received May 1, 2025. It was directed by the Court that the Motion to Strike affidavit evidence would be pursuant to *Rule 27*.

[16] In Langille's motion to strike, the Applicant Ms. Lamey relies upon the evidence as set forth in her affidavits sworn May 4, 2022, August 12, 2022, and supplementary affidavit of March 13, 2023.

[17] In her brief filed May 2, 2025, Carla Lamey states the motion to strike by correspondence (and the Notices of Objection filed by E&R) are contested, stating

that the subject paragraphs are relevant to both issues of liability and damages. She provided her responses to the Objections in a chart containing the subject paragraphs, the impugned wording, and Ms. Lamey's responses.

[18] Regarding the motion by E&R and PHP to exclude paragraphs of Peter Boudreau's expert report, Ms. Lamey filed a further brief on June 30, 2025.

[19] Ms. Lamey submits that Justice Gabriel's January 4, 2024, ruling was that the Respondents' objections to admissibility filed pursuant to *Rule* 55.10 would not be heard as they were filed past the finish date. The Applicant argues this is a valid and binding decision.

[20] She says the Respondent E&R could have appealed that ruling, an interlocutory decision, but they did not. As a result, the Applicant submits the issue is now *res judicata* and cannot be heard.

[21] In the alternative, should the Court decide to proceed to hear the motions (by E&R and PHP) to exclude portions of the Boudreau report, then those issues should be determined by the trial judge at the hearing yet to be set.

[22] I shall first address the motion to strike Affidavits by E&R Langille.

Motion to Strike by E&R Langille – Affidavits of C. Lamey

[23] Rule 39.04(1) permits a judge to strike an Affidavit containing information that is not admissible or evidence that is not appropriate to the Affidavit.

[24] I have reviewed the briefs submitted by the Applicant and E&R Langille. The Applicant submits the evidence in her affidavits are based on fact or on her own knowledge, information, and belief, with the source of the information relied upon by her being identified.

[25] There is disagreement between the parties on whether hearsay evidence can be admitted in the Affidavits.

[26] Ms. Lamey says “the motion to strike aims to shelter the Respondent, E&R from communication” between her and the broker regarding the remainder of the wood roadside.

[27] Mr. Piercey for E&R submits that hearsay is not admissible in an application in court because the Rules say the laws of evidence apply to them. There is discretion to allow hearsay, he says but only on interlocutory motions which this is not. I concur that Rule 22.15 does permit hearsay in certain instances on motions.

[28] Both parties have relied on the leading decision of *Waverly (Village) v. Nova Scotia (Acting Minister of Municipal Affairs)*, 1993 NSCC 71, and the additional authorities referred to in their briefs.

August 10, 2022 – Supplementary Affidavit of C. Lamey

[29] **Paragraph 33** – *Troy Bennett, 3316407 Nova Scotia Limited and E&R Langille have been unjustly enriched to my detriment and have profited from the rape of lands without my consent or any benefit or compensation to me or my lands.*

[30] In this paragraph the Applicant states the Respondents were unjustly enriched to her detriment, further alleging how this occurred, i.e. from the “rape of her lands without her consent or any form of compensation.”

[31] The objection of E&R is that this statement is in the nature of a plea or submission, and that the same objection applies to paragraphs 5 and 6 of the Applicant’s second supplemental affidavit.

[32] The response of the Applicant is that the foundation for paragraph 33 is well established in the preceding paragraphs 25 to 32. Ms. Lamey further states, it is not merely a submission but “the reality of what the Applicant experienced.”

[33] A fundamental rule established by *Waverly (Village) v NS (Minister of Municipal Affairs)*, 1993 NSSC 71 is that an affidavit must not take on the flavour of a plea or submission.

[34] This submission goes to the heart of what the Court must decide, on the evidence in the preceding paragraphs, and all other admissible evidence. It is both conclusionary in nature and is a substantive issue to be determined by the trial judge.

Ruling – Paragraph 33 is Inadmissible.

[35] **Paragraph 72** – *I am advised by Stephen Cole, broker for Haynes, that Ronald Langille advised Steven Cole that Langille’s filed a lien on the wood product, and it could not be moved to market.*

[36] In this paragraph the Applicant states what she was told by a Mr. Steven Cole, about what Ronald Langille said to Mr. Cole. It mentions that Mr. Cole is a broker, and that E&R filed a lien that prevented wood product from “going to market” or words to that effect.

[37] The objection is that it is hearsay being offered for the truth of the contents, for which the Applicant has no firsthand knowledge.

[38] Ms. Lamey submits the statement is reliable and should not be struck, stating it is a direct communication from Mr. Cole to her. The preceding paragraphs she argues set out the basis of what is said (paragraphs 69, 70, and 71) as well as paragraphs 3(i)(a)(b)(c), 3(ii), and 3(iv) of her supplementary affidavit.

[39] Even if reliability was established as submitted, I find that necessity has not been proven. The sound source of the evidence would be from Mr. Cole himself.

[40] Apart from these reasons, E&R Langille submits that the Court's discretion to allow hearsay pursuant to *Rule* 22.15 is limited to interlocutory motions of which this is not. The issue is not procedural in nature but goes to the merits of the Application in Court.

Ruling – Paragraph 72 is Inadmissible.

[41] **Paragraph 74** – *There was further delay in moving the wood to market as Haynes in discussion with the Respondent Langille made demands for terms and conditions to be met before Haynes could broker the market of wood.*

[42] In this paragraph the Applicant refers to a discussion between the broker Haynes and the Respondent Langille regarding certain terms and conditions.

[43] The objection of E&R is that it involves oral statements or communication made to persons other than in testimony in the proceeding as proof of the assertions therein.

[44] The Applicant agrees to delete the reference to the discussion allowing the opening words of the paragraph to remain such that the paragraph will read:

“There was a further delay in moving the wood to market.”

[45] The court concurs with this redaction.

Ruling – Paragraph 74 is Admissible in part, subject to redaction.

March 13, 2023, Supplemental Affidavit

[46] **Paragraph 5** – *The efforts made to market the remaining wood products were frustrated by E&R Langille resulting in economic loss.*

[47] In this paragraph the Applicant alleges that her efforts to market wood were frustrated by the Respondent E&R Langille. The objection by E&R is that the statement is in the nature of a plea and contrary to the law in *Waverly (Village)*.

[48] The Applicant consents to removal of the allegations that it was E&R Langille that frustrated the efforts. I have considered whether these words being removed, changes or alters its character as a plea or submission.

[49] In addition, the term “frustrated” as in “frustration,” is a legal term in contract law signifying the contract in question was unable to be performed.

[50] Having earlier excluded evidence (paragraph 33) where the Applicant submitted her statements reflected the reality of what occurred I have decided to

admit paragraph 5 without the reference to E&R as consented to by the Applicant. Unlike paragraph 33, paragraph 5 in my view does not usurp the Court's role.

[51] I accept that Ms. Lamey does have personal knowledge coupled with her own belief as to what she observed.

Ruling – Paragraph 5 is Admissible in part with the words “by E&R Langille” redacted.

[52] **Paragraph 6** – *The representations made by Langilles to Haynes Inc., including claims for a lien; imposing terms and conditions for sale and negotiating with Haynes' representative to my exclusion had interfered with the sale of the product.*

[53] In this paragraph the Applicant refers to representations made by Langille to Haynes concerning certain claims for lien, terms and conditions of sale and negotiation that interfered with the sale of wood product.

[54] The Applicant consents to striking paragraph 6. In doing so, the Court notes that Ms. Lamey intends to rely on other evidence including communication from Stephen Cole, upon which I have made rulings on admissibility in paragraphs 72 and 74 of this motion.

[55] Those rulings stand in and do not alter my ruling on Paragraph 6 below.

Ruling – Paragraph 6 is struck and deemed inadmissible.

Motions to Strike by E&R Langille and PHP

Res Judicata

[56] Ms. Lamey's Counsel argues that the motions to strike the Boudreau Report, cannot be heard, as the matter is res judicata because Justice Gabriel decided on January 4, 2024, that the motions would not be heard. The Applicant's submission is as follows:

The Applicant, Carla Lamey, respectfully submits that Justice Gabriel's January 4, 2024, ruling that the Respondents Objections to Admissibility, filed pursuant to *CPR 55.10*, would not be heard as they were filed past the finish date is a valid and binding decision. The Respondents could have appealed that interlocutory decision. They did not. That issue is now res judicata.

[57] In her submission the Applicant states the reason for Justice Gabriel's decision is that the Notices of Objections were filed after the finish date. She also states that in fact his Lordship made such a decision.

[58] The Applicant filed a Notice of Interim Motion on December 21, 2023, seeking an adjournment of the Application in Court scheduled to be heard on January

22- 26, 2024. In addition to the adjournment request the Applicant sought an order of direction from the Court in relation to:

- a) The hearing of the Notice of Objection and Admissibility of Peter Boudreau, Forest technician Report, which is contested.

[59] Given the short amount of time between the motion and the hearing date a conference was arranged on an expedited basis and set for January 4, 2024, before Justice Gabriel.

[60] The main issue at that time, was the adjournment sought because the criminal proceeding was still pending, and the Applicant considered this was relevant, particularly on the issue of damages.

[61] I have reviewed the record of January 4, 2024. Without paraphrasing or repeating his decision, Justice Gabriel considered the issue of prejudice and also noted that the criminal proceeding had earlier been flagged as a potential issue.

[62] E&R Langille and PHP have both stated Justice Gabriel did not make a finding that the Notices of Objections would not be heard because of lateness. They submit that in fact the Court ruled that the Application was adjourned “without day.” Counsel were required to apply to the Court to schedule new hearing dates.

[63] The Court also indicated any party may apply at any time to the Court for a case management conference. The Court directed the parties to request a further date assignment conference, and that would include having the Notices of Objection dealt with in advance of the new hearing date for the Application.

[64] “Res Judicata” means that the issues or matter before the Court have already been adjudicated and cannot be relitigated. It is a matter that has already been decided.

[65] I am not satisfied that the Respondent’s Objections to Admissibility are res judicata, because no ruling was made either in the Court’s decision, or in the Order issued on March 1, 2024, by Justice Gabriel.

Past the Finish Date

[66] Civil Procedure Rule 5.16(1) requires a party who wishes to object to an averment, an exhibit, or a part of either in an affidavit, to file a notice of objection to admissibility before the finish date.

[67] The Boudreau Report is attached to the Affidavit of Mr. Boudreau, sworn March 10, 2023, as an Exhibit to the Report filed March 14, 2023.

[68] Ms. Lamey states an advance motion can be made under Rule 55.10 if a Notice of Objection is filed *before* the finish date. In this case Ms. Lamey argues the Respondents, E&R and PHP did not comply with Rule 16, as the Notices were filed *after* the finish date of August 4, 2023, as contained in the Order for Directions issued by Justice Gogan on May 24, 2023.

[69] She further submits that the Boudreau Report must still meet the test for admissibility as set out in *WBLI*, which she says must be determined by the trial judge (or Application Judge) and not in advance of trial.

[70] The Notices of Objection of E&R and PHP were filed on October 25, 2023, and October 31, 2023, respectively. They were therefore filed *after* the finish date of August 4, 2023, previously set.

[71] The Notice of Motion by E&R under Rule 55.10 seeking to exclude certain paragraphs of the expert report was filed November 8, 2023.

[72] The Notice of Motion by PHP under Rule 55.10 seeking to exclude certain paragraphs of the expert report was filed November 14, 2023.

[73] For the following reasons I have concluded that the motions to strike are entitled to be heard, notwithstanding the filing of them after August 4, 2023.

[74] Rule 5.17 (now 5.19) states a failure to complete a pre-hearing procedure that causes prejudice may be dealt with under Rule 88 – Abuse of Process.

[75] Justice Gabriel addressed the issue of prejudice in granting the Order adjourning the Application. In terms of prejudice, it was the Applicant that sought the adjournment, resulting in the Application being adjourned without day.

[76] The Respondents argue that the finish date then became meaningless. Rule 5.17 (in effect at that time) stated that the finish date in an Application in Court, is 60 days before the hearing of the Application.

[77] In Mr. Harvey Morrison’s affidavit filed in support of the PHP motion, he addresses in some detail his client’s efforts to have the objections to admissibility heard by Justice Gogan prior to the finish date. It had been her direction he said that she would hear the motions.

[78] In paragraph 11, Mr. Morrison refers to a settlement conference held on June 16, 2023. In paragraph 12 he refers to an email sent July 31, 2023, seeking directions specifically on how the motions related to the Boudreau Report should proceed. A reply was received from the Court on September 8, 2023.

[79] I find the adjournment request and Notice of Interim Motion filed in December 2023, made the earlier finish date, redundant at the very least.

[80] The Court recognizes the Applicant is not responsible for the inability to reschedule the motions. It further recognizes that the Applicant may have had good reason to seek the adjournment.

[81] The Court must weigh the entire circumstances, including that the issue of the criminal proceeding had earlier be raised. By analogy if a trial date is adjourned Rule 4.17 requires reconsideration of the trial dates. This would very likely result in a new finish date being established. Rule 5.13(4)(m) states that a finish date is to be set at the Motion for Directions. The setting of a new finish date, if any, would likely be done when the new hearing dates are scheduled.

[82] I find that Rule 5.16(1) (now 5.17(1)) does not prevent these motions from being heard, in these circumstances.

Motions to Strike, Expert Report – The Governing Principles.

[83] Attached as Appendix “A” is Civil Procedure Rules 55.04 and 55.10.

[84] I accept and agree with the Applicant’s submission that the law requires substantive objections to the admissibility of an expert report to be considered by the trial judge and not by way of an advance ruling in an interlocutory motion or proceeding.

[85] In the recent case of *MacDonald v. NSTU Group Insurance Trustee*, 2025 NSSC 102, Hoskins, J. ruled upon the limited nature of a Rule 55.10 motion, which essentially is whether an expert's report conforms to the requirements of Rule 55.04 as stated in paragraph 2 of *MacDonald*:

The purpose of a motion under Rule 55.10 is to determine whether the impugned report sufficiently conforms to the formal requirements of Rule 55, not to determine admissibility. Further, the caselaw indicates that the motion should not be brought for tactical reasons. Rather, the party alleging that the report is defective is required to notify the party who filed it "in a reasonable time", allowing the deficiency to be addressed without impacting the trial timeline. That was not done in this case. The reports were filed more than four months before the motion was filed, which was little more than four months before the scheduled commencement of the trial.

[86] In this case, the Court must consider whether to strike the impugned paragraphs from the Report based on the Civil Procedure Rules and the laws of evidence. The Respondents PHP and E&R each argue that the case of *WBLI*, decided by Justice Pickup in 2012, permits the Court in certain instances to rule upon substantive aspects of an expert report in advance of the trial or hearing. It is apparent, it would be rare to do so and would surely require a complete record before the motions judge. Specifically, the Respondents cite paragraph's 74, 79, 96 and 97 of the 2012 *White Burgess Langille* decision.

[87] For example, Justice Pickup stated at paragraphs 74 and 97:

74. Lastly, the practice in this court has been to address issues with expert opinions before the trial judge and not on interlocutory motions. This does not

necessarily mean that the Rules exclude such motions, but there is a paucity of cases dealing with preliminary challenges to an expert's opinion evidence.

97. In summary, a textual, contextual, and purposive interpretation of Rule 39 and Rule 55 supports the conclusion that a party may bring an interlocutory motion to challenge an expert's affidavit on the basis that it is inadmissible in whole or in part.

[88] In its submission PHP states that while there are substantial evidentiary grounds for rejecting the opinion, those grounds exist together with the formality requirements of Rule 55. In oral argument PHP's legal counsel stated:

What the Boudreau report is is a compilation of extracts 4 from affidavits and other reports. It is not — it's — and 5 then is says, these findings and conclusions which I draw 6 from affidavits from different parties, and then comes up 7 with, hey, presto, in paragraph 69, Here's my opinion, that 8 it's completely divorced from anything in the report. So 9 under Rule 55.04, you have to provide details and a full 10 explanation of your opinion. And, with respect, reciting 11 extracts from an affidavit or many affidavits and then 12 offering a conclusion that says, based on my 40-plus years of 13 experience, I can — it's my opinion X and Y is the measure of 14 damages is not a proper opinion under Rule 55. So that's, 15 that's the essential point that PHP is trying to make.

[89] In its oral argument E&R's legal counsel, Mr. MacDonald stated:

The Respondent, E&R Langille, brings this motion in pursuit of what it says is a just, speedy, inexpensive, and comprehensive means of resolving the issues in this matter as they relate to expert evidence. It's important to note that E&R Langille is not specifically requesting that the Boudreau report be thrown only out, but rather is asking this court to circumscribe what exactly Mr. Boudreau – what it would be appropriate for him to provide expert evidence on.

[90] E&R submits this is a case where an advance ruling can be made, in order to provide certainty and flexibility as intended by Rule 5.16(1).

[91] In the rulings below I have used the word “admissible” or “inadmissible.” I consider this to be a conformity motion under Rule 55.10 and have therefore proceeded to rule on the impugned paragraphs in that respect. I have taken a narrow view of Rule 55.10.

[92] Where it is more obvious, I have stated that a particular objection is a matter exclusively for the trial judge thereby recognizing the existing state of the law on admissibility of expert evidence.

[93] To the extent that any of my rulings amount to more than or are outside of conformity under Rule 55 (several grounds are often cited for each objection), I have done so under the authority of *WBLI*. These objections have been outstanding for some time, the Court has been asked to rule individually on paragraphs in the Boudreau Report. In my view this is in keeping with Rule 1.01.

[94] In this case I have also considered the various authorities provided to the Court by the parties in the Briefs and Books of Authorities.

Motion by E&R Langille - Objections to Peter Boudreau’s Report

[95] In the Notice of Objection filed October 25, 2023, the Respondent made objections to the Expert Report filed on behalf of the Applicant Carla Lamey.

[96] Below are the subject paragraphs with my decision on their admissibility. In considering each objection I have considered the submissions of the parties including the Civil Procedure Rules and caselaw provided on the admissibility of expert reports.

[97] The majority of E&R Langille's objections relate to unnecessary legal opinion given by Mr. Boudreau. E&R asserts that certain portions constitute submission, are outside his qualifications or constitute hearsay being stated for its truth.

[98] The Respondent submits these paragraphs should be excluded because:

1. They are principally unnecessary and usurp the role of the trier of fact.
2. They contain hearsay relied upon for the truth of its contents, without stating the sources, and
3. The opinions stated are beyond the scope of Mr. Boudreau's purported expertise.

Reason for Decision - E&R's Motion to strike the Boudreau Affidavit/Report

[99] **Paragraph 12** - *No monies have been paid to date by E&R Langille Contracting Limited.*

[100] The objection is that this constitutes unnecessary legal opinion, providing legal interpretation. This could also be described as a factual finding based on the expert's review of the materials provided. *Rule 55.04(2)* refers to "material facts assumed to be true and material facts found by the expert." These are permitted as long as the finding is within the area of expertise of the author of the Report, and there is a basis for it in the Report.

[101] Mr. Boudreau's research included reviewing disclosure documents, delivery slips, and invoices and statements of payment. The trial judge will be the ultimate arbiter of the facts at trial. I find an expert can arrive at a factual conclusion in his analysis and provide opinion in his area of expertise. It is not strictly legal in nature.

Ruling – Paragraph 12 is Admissible

[102] **Paragraph 13** - *No stumpage agreement exists for the harvesting and sale of forest fibre products from the lands of Carla S. Lamey.*

[103] The objection here is that this constitutes legal opinion, is argumentative, and is in the nature of a submission. I find what constitutes a stumpage agreement could fall within the specialized knowledge of a forestry technician and also that it may be of assistance to the trier of fact to have evidence of that point for the Court's ultimate

determination on the legal issue in dispute. Similar to the reasons given in my ruling on **paragraph 12** this is a fact relied upon by the expert.

Ruling – Paragraph 13 is Admissible

[104] **Paragraph 22** - *That this agreement disqualified landowner for silviculture funding for five years after harvesting completed.*

[105] The objection to this paragraph is that it constitutes legal opinion and is in the nature of plea and submission. This is arguably information that is unique to the forestry industry and may be outside the knowledge of the trier of fact, even though it deals with the legal effect of an agreement.

[106] In essence however, it involves a legal interpretation of a Declaration that is relevant and to some extent usurps the role of the trial judge. For the record I do not view this as a submission but I find it should not be admitted.

Ruling – Paragraph 22 is Inadmissible

[107] **Paragraph 27** - *H.C. Haynes was contracted by Carla Lamey to market all the remaining inventory.*

[108] **Paragraph 28** - *Initially, contact was made with Andrew West by Peter Boudreau and full disclosure provided. Stephen Cole was assigned the marketing.*

[109] **Paragraph 29** - *Stephen Cole had direct contact with E&R Langille to facilitate marking of wood.*

[110] There are several objections to these paragraphs including that they constitute legal opinion with Mr. Boudreau opining in particular on whether or not a contract existed between H.C. Haynes and the Applicant. Those are objected to on the basis that they are submissions and outside the stated qualifications of Mr. Boudreau.

[111] In the report at paragraph 26, Mr. Boudreau states he was responsible to “provide full disclosure to H.C. Haynes to proceed to brokerage of wood roadside.” In addition, as part of his research, the author had communications with Haynes and reviewed the wood brokerage delivery statements.

[112] I find the information provided in these paragraphs is within the personal knowledge of Mr. Boudreau. I do not find they are necessarily legal opinion, plea, or submission. Rulings on whether a binding legal contract existed is still within the purview of the trial judge. Mr. Boudreau states only that H.C. Haynes was hired by the Applicant.

Ruling – Paragraphs 27-29 are Admissible.

[113] **Paragraph 30** - *Langille claimed there was a lien on the wood product roadside and interfered with marketing.*

[114] The objection is that this statement constitutes hearsay, sought to be admitted for its truth. E&R says Mr. Boudreau has no personal knowledge and this is not within the scope of his expertise. I find the words stating that Langille “interfered with marketing” to be conclusionary and usurp the role of the trial judge.

[115] His report states that Mr. Boudreau was involved with the brokerage of the wood roadside and would have some knowledge of this (para. 26c). I believe it to be within the scope of his expertise as it pertains to Forest Harvesting and Contractual Harvesting.

Ruling – Paragraph 30 is Admissible with redaction of the words “and interfered with marketing.”

[116] **Paragraph 31** - *Effectively, Carla Lamey becomes the contractor managing the sale of the forest fibre products. This affords Ms. Lamey entitled to compensation as a contractor.*

[117] This objection relates to unnecessary legal opinion and a statement on entitlement to compensation which E&R states is improper and inadmissible. I find

this clause to constitute fact and opinion that informs the trier of practice unique to the forest industry. The Applicant submits this is relevant to the issue of damages.

Ruling – Paragraph 31 is Admissible

[118] **Paragraph 32** - *Carla S. Lamey accepted a brokerage contract with H.C. Haynes Inc., Clifton, Nova Scotia on May 23, 2022.*

[119] The objection by E&R is that this statement is unnecessary legal opinion, is outside the qualifications of Mr. Boudreau, and amounts to a submission.

[120] I find this paragraph represents a factual finding based on the expert's analysis. Experts are permitted to offer opinion based on their specialized knowledge which may include inferences drawn from materials provided to them. This clause constitutes both fact and opinion.

[121] The trade off is a risk/benefit analysis. If the facts relied upon in the opinion are not established at trial, this will affect the weight, if any, to be given to the report.

Ruling – Paragraph 32 is Admissible

[122] **Paragraph 46** - *Remediation of the forest harvesting activity is in question as the declaration accepted by PHP for land clearing harvest disqualifies landowner for five years for silviculture funding.*

[123] The objection here is that paragraph 46 constitutes legal opinion. For reasons similar to those expressed in paragraph 22 herein this statement is conclusionary in nature and falls within the domain of the trial judge.

Ruling – Paragraph 46 is Inadmissible

[124] **Paragraph 48** - *The reclamation of the land and environmental exposure because of clear cutting requires redress.*

[125] The objection to this statement is that it constitutes legal opinion and is unnecessary because it opines on whether the Applicant is entitled to redress.

[126] The Applicant submits this statement is an important consideration on the issue of damages which is a relevant issue in the Application in Court.

[127] The court finds that while the statement is conclusionary, it is a statement of opinion pertaining to redress of the land and pertains to standards within the forestry industry.

Ruling – Paragraph 48 is Admissible

[128] **Paragraph 52** - *This conversion is absurd as the cost alone would be prohibitive along with the geographic location and decades of work required for conversation as the probability of success of this conversion is very low.*

[129] In this paragraph Mr. Boudreau gives a definitive statement of his opinion on the prospects of a blueberry operation if the land were converted for these purposes.

[130] The objection is that the author is unqualified to provide such a statement as per the statement of qualifications in his expert report and should be struck.

[131] There is attached to the objection a “Wild Blueberry Fact Sheet” (Tab 16/17) consisting of material pertaining to the growth and harvesting a blueberry flower/planting.

[132] In the report this opinion is included in the section Remediation and Reclamation.

[133] I find that this statement is potentially helpful to the trier of fact. Excluding it at this stage is premature, as that would prevent the expert from being cross-examined/challenged on his qualifications and 40 years of experience in the forestry industry at the hearing of the Application. The trial judge will determine decide this.

Ruling – Paragraph 52 is Admissible

[134] **Paragraph 62** - *E&R Langille Contracting Limited removed 244.4 tonnes of hardwood fuelwood to company woodyard without Carla S. Lamey’s consent.*

[135] The objection to this statement is that it constitutes hearsay and is outside the scope of the expert's knowledge.

[136] I concur that such a statement on such an important issue as the Applicant's consent must be by way of direct evidence.

Ruling – Paragraph 62 is Inadmissible

[137] **Paragraph 65** - *After notice of action and injunction, date posted May 6, 2022, E&R Langille Contracting Limited did not assist in the timely removal of existing forest fibre products left roadside.*

[138] The Respondent E&R objects to this statement regarding whether assistance was provided in the timely removal of products on the basis that it is both hearsay and outside the qualifications of the expert.

[139] I find this statement to be within the knowledge of the author on the basis of his responsibilities as a forest technologist as set out in paragraph 26 of the report, which included providing disclosure to H.C. Haynes related to brokerage of wood roadside.

Ruling – Paragraph 65 is Admissible

[140] **Paragraph 69** - *It is my opinion based on my experience as a forest technologist 40 years experiences working in the industry that a forest trespass and/or timber theft often a settlement agreement calls for a penalty of double stumpage or 2/3 of total sale price with 1/3 remaining for the harvesting costs taking away the profit for the transgression of forest trespass or theft of wood fibre products with a purchased value of \$302,579.74.*

[141] The objection to this paragraph is that Mr. Boudreau is providing unnecessary legal opinion on the issue of damages. E&R Langille say it is also in the nature of a submission.

[142] I find this statement relevant and necessary to assist the trier of fact. It provides a methodology (as required by Rule 55.04.04(2)(b)) for determining appraisal damages in the unique industry of forest management. The burden of proving reliability remains with the Applicant. I do not find it constitutes a submission as much as it is a finding of a material fact based on the expert analysis.

[143] As stated in *Ferris v. Scotia Life Insurance Company*, 2018 NSSC 216, a statement that goes to the very issue to be determined is not an issue of compliance with the form set out in Rule 55.04. (para. 12 of *Ferris*)

Ruling – Paragraph 69 is Admissible, subject to final determination at trial.

[144] **Paragraph 79** - *Effectively, Carla Lamey has assumed the role of contractor managing the sale of the forest fibre products. This affords Ms. Lamey entitlement to compensation as a contractor for the sale of 1,102 tonnes of forest fibre products left roadside.*

[145] The objection here is that the author has stated a legal conclusion about compensation, which is a matter for the Court to determine.

[146] I would agree the Court is capable of determining entitlement to compensation, but an opinion on quantum and liability in this particular field would be of assistance to the trier of fact in this case.

Ruling – Paragraph 79 is Admissible

PHP Objections – Expert Report of Peter Boudreau

Paragraph 12 - *No monies have been paid to date by E&R Langille Contracting Limited.*

[147] PHP's reason for objection is that this is a factual conclusion for determination by the Court and is unnecessary, therefore it should not be admitted.

[148] The Applicant submits PHP's motion is aimed at compliance with Rule 55.10 and is therefore a conformity motion. Relying on *MacDonald v NSTU Group*

Insurance Trustee, 2025 NSSC 102, she says advance rulings are not intended to deal with substantive objections which is the function of the trial judge. (*MacDonald*, at para. 7)

[149] I find this is a fact upon which the expert relies upon for his opinion. The ultimate trier will make a final determination, however an expert must be able to find material facts or state facts assumed to be true as stated in paragraph 55.10 (2)(b).

Ruling – Paragraph 12 is Admissible

Paragraph 19 - PHP accepted Declaration – Land Clearing Harvest Operations dated January 24, 2022, under landowner Harry Lamey for the lands under PID#50016666 at location MacIntyre Mountain Road, Inverness, Nova Scotia. Signed January 21, 2022, countersigned by HP on January 24, 2022.

[150] PHP's grounds for objection to this paragraph is the same as for paragraph 12, that it constitutes an unnecessary factual conclusion and is therefore inadmissible.

[151] The Declaration in question is, on its face, signed by PHP. I find simply that this is an inference drawn from the document by the author of the Report that he found to be relevant to his opinion.

[152] The obvious concern is with the word “accepted.” Whether PHP accepted the declaration will ultimately be for the trier of fact to determine. An expert’s findings may be found to be erroneous by the Court in its ultimate determination.

Ruling – Paragraph 19 is Admissible

Paragraph 22 - *That this agreement disqualified landowner for silviculture funding for five years after harvesting completed.*

[153] PHP’s objection to this statement is two-fold:

- i) Mr. Boudreau is not qualified to give it.
- ii) The effect of this document is within the exclusive province of the Court and is therefore unnecessary.

[154] I concur that the legal effect of the document is within the province of the trial judge as it involved a legal interpretation.

Ruling – Paragraph 22 is Inadmissible

Paragraph 46 - *Remediation of the forest harvesting activity is in question as the declaration accepted by PHP for land clearing harvest disqualifies landowner for five years for silviculture funding.*

[155] PHP’s reason for objection is on the basis that:

- 1) Mr. Boudreau is providing legal opinion on the effect of the Declaration and,
- 2) He is not qualified to give such an opinion.

[156] I concur with PHP that it is for the Court to make this determination and that it is not an issue that is outside the knowledge of the Court.

Ruling – Paragraph 46 is Inadmissible

Paragraph 48 - *The reclamation of the land and environmental exposure because of clear cutting requires redress.*

[157] PHP's objection here is that the expert provides an opinion about an issue that is one of the ultimate issues to be decided in the Application. In addition, the Respondent argues Mr. Boudreau is not qualified to give it, and in any event, it is an issue that falls within the exclusive province of the Court.

[158] The Applicant submits this is an integral part of the report related to the issue of damages should that become relevant. I find that statement is not necessarily within the knowledge of the trier of fact and could assist the trier of fact as it relates to a standard within the forestry industry.

Ruling – Paragraph 48 is Admissible

Paragraph 50 - *This declaration enabled the purchase of biomass chips to be clearcut from the land, including tops and limbs of trees for biomass.*

[159] PHP's reason for objecting to this statement is that it is a legal conclusion for which the author is not qualified to give and therefore not admissible.

[160] Ms. Lamey has argued that substantive objections are for the trial judge to determine and therefore should not form part of an advance ruling.

[161] PHP submits in relation to this and other objections that the case law does not preclude an advance ruling on expert reports, citing *White, Burgess, Langille and Inman*, 2012 NSSC 2010. In that decision Pickup, J. stated:

96. I am satisfied that where all relevant trial evidence can be placed before a motions judge and full submissions made, there is no reason why an advanced ruling on admissibility of an expert's evidence cannot be given. The purpose of the Rules is for the "just, speedy, and inexpensive determination of every proceeding" (Rule 1.01). In my view, justice requires, as Cullity, J. held in *Andersen*, that such a remedy be reserved for the clearest of cases; however, if a complete record is before the motions judge, and a clear case exists, speedy and inexpensive determinations of proceedings would be thwarted if admissibility had to wait until trial. These requirements will likely only appear when the challenge is to the reliability of the expert and to the qualifications of his/her evidence.

[162] It is clear Justice Pickup's analysis focused on the interaction between Rule 39 (affidavits) and Rule 55.10 as in that case the expert's report was contained entirely within an affidavit, a unique circumstance.

[163] PHP says it is possible to challenge substantive admissibility of an expert report before trial, where as noted, “all relevant trial evidence can be placed before a motions judge and full submissions made.”

[164] I find this statement of Mr. Boudreau is one that is within the province of the trial judge and to some extent infringes upon the judge’s role in the Application.

Ruling – Paragraph 50 is Inadmissible

Paragraph 52 - *This conversion is absurd as the cost alone would be prohibitive along with the geographic location and decades of work required for conversation as the probability of success of this conversion is very low.*

[165] The basic objection of PHP is that providing opinion on the viability of blueberry cultivation is outside the scope of the author’s qualifications.

[166] I do not agree. Cultivation, conversion, in harvesting of the land, could well fall within Mr. Boudreau’s field of expertise, based on his 40 years of experience. Admission of the evidence at trial will allow its weight to be determined. It is potentially helpful to the trier of fact, and the expert may be cross-examined on his qualifications at that time.

Ruling – Paragraph 52 is Admissible

Paragraph 55 - *To my knowledge this property PID # has never had an onsite audit to affirm as reasonable conversion of these 300 acres to blueberries by PHP.*

[167] For reasons similar to that given above for paragraph 52, I find this paragraph to be admissible. There is information a “Fact Sheet” included in the report on this subject.

Ruling – Paragraph 55 is Admissible

Paragraph 60 - *PHP issued this job #35000147 dated January 24, 2022, upon receiving declaration of land clearing allegedly signed by Harry Lamey, not the landowner Carla S. Lamey.*

[168] PHP argues this paragraph contains a factual conclusion and is not a proper matter for expert evidence, but rather for the Court to determine.

[169] I find the document speaks for itself in large measure. It is not an unreasonable inference made by the author of the Report in support of his opinion.

Ruling – Paragraph 60 is Admissible

Paragraph 61 - *PHP paid E&R Langille Contracting \$173,949.30 for wood fibre products harvested from Carla S. Lamey’s property without her knowledge.*

[170] PHP objects to this statement because it constitutes both a factual and legal conclusion which is material and for the exclusive determination by the Court.

[171] In this report, Mr. Boudreau discusses i) the research he performed (Part 1, pg. 1), ii) his job responsibilities as a forest technologist (para. 26, pg. 5) and iii) attaches his Curriculum Vitae.

[172] Included therein is a review of invoices and statements to E&R Langille, Troy Bennett and his number company. Mr. Boudreau also reviewed wood delivery slips to PHP but does not mention invoices and statements to PHP.

[173] I find the foundation for this statement to be lacking in the Report. The finding of whether the products were harvested with or without her knowledge is a substantive one and should be made by the judge hearing the application.

Ruling – Paragraph 61 is Inadmissible

Paragraph 64 - *Langille Contracting Limited commenced clear-cutting operations on January 10, 2022, from these woodlands under direction of PHP Declaration Land Clearing allegedly signed by Harry Lamey under job #3500147 and endorsed by PHP January 22, 2022, in the clear cutting of 110.55 acres, more or less.*

[174] Rule 55.19(2)(b) requires the expert to provide “a full explanation of the reasons for the opinion including material facts assumed to be true and material facts found by the expert...”

[175] PHP’s objection is primarily that this statement is both a legal and factual conclusion and not necessary because it falls within the exclusive province of the Court. PHP says it is not proper and beyond Mr. Boudreau’s qualifications.

[176] I find this statement to be a material fact to be determined when all of the evidence at the hearing of the Application has been received by the trial judge.

Ruling – Paragraph 64 is Inadmissible

[177] **Paragraph 69** - *It is my opinion based on my experience as a forest technologist 40 years experiences working in the industry that a forest trespass and/or timber theft often a settlement agreement calls for a penalty of double stumpage or 2/3 of total sale price with 1/3 remaining for the harvesting costs taking away the profit for the transgression of forest trespass or theft of wood fibre products with a purchased value of \$302,579.74.*

[178] For ease of reference, I find the reason for this objection is similar to that made to paragraph 69 by E&R Langille and that my reasons given there in paragraphs 140 to 143 herein shall apply to PHP's objection.

Ruling – Paragraph 69 is Admissible subject to final determination by the trial judge.

Paragraph 71 - *Carla S. Lamey has no purchase agreement for forest fibre products with PHP from her lands.*

[179] Unlike paragraph 13, this statement merely refers to “purchase agreement” and not “stumpage agreement.” This may well mean the same thing. Paragraph 13 was found to be admissible as a fact found by the expert based on the analysis within his field of expertise.

[180] In the answer to the stated objection, I do not agree that it is unnecessary but rather is potentially helpful to the trial judge.

[181] Further, the trial judge may decide to accept some, part, or none of the expert opinion.

Ruling – Paragraph 71 is Admissible

Paragraph 77 - *In my 40+ years experience of cruising, appraising, and valuing woodland, wood products and stumpage (the price paid for standing trees) paid to landowner by agreement generally equated to 1/3 of the sale price of products harvested and marketed. Harvesting costs account of 1/3 of sale price of harvested products. Profit for the endeavor 1/3 of sale price of harvested products which may be adjusted to account of fluctuations due to quality, quantity, harvestability markets, distance to markets, and forest products.*

[182] PHP's objection to this statement is founded in Mr. Boudreau lacking the qualifications to give it. In the statement itself, Mr. Boudreau outlines his experience that included pricing for stumpage, appraising and valuing woodland over a period of 40 years.

[183] It is also necessary in my view, to assist the trier of fact, as the subject matter falls within a specialized area of expertise.

[184] What weight will be accorded will depend on whether the experience extends to the sale of products on Cape Breton Island, in my respectful view.

Ruling- Paragraph 77 is Admissible

Paragraph 79 - *Effectively, Carla Lamey has assumed the role of contractor managing the sale of the forest fibre products. This affords Ms. Lamey entitlement to compensation as a contractor for the sale of 1,102 tonnes of forest fibre products left roadside.*

[185] PHP's reason for objection is that this is a finding that should be reserved for the judge presiding over the application and usurps the Court's role.

[186] As in paragraph 31, wood left roadside and compensation for it, falls within a field of knowledge specific to the forest industry, in my respectful view.

[187] I would agree, the Court can determine entitlement to compensation, but an opinion on quantum and liability in this particular field would be of assistance to the trier of fact in this case.

Ruling – Paragraph 79 is Admissible

Paragraphs 82 to 84

Paragraph 82 - *The Declaration Land Clearing Harvest Operations must be set aside and declared void to allow proper forest management practice under the guidance of a sustainable forest management plan.*

Paragraph 83 - *Ungravelled roads were recommissioned with machinery for the purpose of access and harvesting. Draining concerns will arise as a result of clearing of all forest ground cover causing greater short-term runoff at the very least. The renewed access roads should be gated to prevent further unauthorized visitation and potential illegal dumping.*

Paragraph 84 - *The gravel or rock pit exposed through excavation of topsoil and ground cover while unsightly now is of a small enough to be negligible in damage. The unauthorized excavation however did expose this property asset for future consideration potentially.*

[188] PHP's objection is that these paragraphs deal with damages that should be awarded. Therefore, it is up to the Court, and not the expert, to make these determinations.

[189] Further, PHP says they are inadmissible because there is no, or insufficient factual support for the conclusions.

[190] I find paragraphs 83 and 84 to be highly relevant and contain specialized knowledge which could benefit the trier of fact. The clauses do not state the amount of damages.

[191] I accept PHP's argument with respect to paragraph 82.

Ruling – Paragraph 82 is Inadmissible. Paragraphs 83 and 84 are Admissible.

Conclusion

[192] **Motion to Strike - C. Lamey Affidavits**

- *August 10, 2022-Affidavit*
 - Paragraph 33 is inadmissible.
 - Paragraph 72 is inadmissible.
 - Paragraph 74 is admissible (with redaction) such that it will read “There was a further delay in moving the wood to market.”
- *March 13, 2023, Supplemental Affidavit*
 - Paragraph 5 is admitted in part with the words “by E&R Langille” redacted.
 - Paragraph 6 is struck and deemed inadmissible.

[193] **Motion to Strike - Boudreau Report - E&R Langille – Objections**

- Paragraphs found admissible: 12, 13, 27-29, 30 (with redaction), 31, 32, 48, 52, 65, 69, and 79.
- Paragraphs found inadmissible: 22, 46, and 62.

[194] Motion to Strike – Boudreau Report - PHP Objections

- Paragraphs found admissible: 12, 19, 48, 52, 55, 60, 69, 71, 77, 79, 83, and 84.
- Paragraphs found inadmissible: 22, 46, 50, 61, 64, and 82.

Murray, Patrick J.