Federal Court  Cour fédérale

Date: 20200615

Docket: T-1359-07

Citation: 2020 FC 690

Toronto, Ontario, June 15, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] Just over six months ago, the Plaintiff, Canadian Pacific Railroad Company [CPR], brought a motion to exclude two expert reports including Frank Urban's [Urban Report]. The tables have now turned, in that the Defendant, Her Majesty the Queen [Crown], has moved to strike two expert reports that CPR contends rebut different aspects of the Urban Report. The Crown argues that as CPR's rebuttal reports from Drs. Klein and Aharonian [collectively, the Reports] are not responsive to the Urban Report, they should be excluded. Simply stated, this motion raises a single issue – whether the Reports should be allowed into trial.

[2] After reading the various reports and other motion materials, I conclude the two challenged Reports constitute proper responding evidence, because they provide a response to the subsidy issue, which forms a crucial part of the Crown's estoppel defence. The Urban Report squarely addresses subsidies. Given its admission through the previous motion, as long as CPR's Reports respond to it, they too should be admitted: what's sauce for the goose is sauce for the gander. My reasons for dismissing this motion to strike the two Reports will follow this brief background to the motion.

I. Background to this Motion

[3] In the underlying litigation, CPR claims an exemption from federal taxation over a portion of its historical main line running from Northern Ontario to the Pacific arising, in part, from a contract between the Crown and the unincorporated predecessor of CPR. Clause 16 of the contract reads:

> The Canadian Pacific Railway, and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances as required and used for the construction and working thereof and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established …

[4] CPR contends that Clause 16 has never been repealed, amended, abrogated or overwritten. Therefore, its tax exemption [Exemption] remains valid and in force as a contractual, constitutional and statutory right, exempting CPR from income, large corporations, fuel, and carbon taxes or charges that relate to CPR's main line across Canada (as opposed to its branch lines, which separate off the main line to service local communities and industries). The Crown denies the claim and, as one of its defences, argues estoppel. For greater detail on the

broad parameters of the litigation, see *Canadian Pacific Railway Company v Canada*, 2019 FC 1531 [*CPR 2019*] at paras 3-13.

[5] In the Fall of 2019, the Crown filed the Urban Report to "address the gaps" in CPR's discovery answers, and stated that his report "will be on how liability for income tax and fuel tax has been used as a computational element for railway regulatory costing" through the payment of subsidies by the Crown to CPR, focusing primarily on the period from 1979 through 1996.

[6] CPR moved to exclude the Urban Report, as well as an expert report in chief by Dr. James W. Ely Jr. In *CPR 2019*, I dismissed that motion because (i) the Urban Report provided important context regarding the subsidies and the parties' behaviour leading up to the taxation years in controversy, satisfying the legal test for the introduction of expert evidence (see paras 14 and 32-37); and (ii) its exclusion would prejudice the Crown's ability to advance a fair and full defence (see para 39). I also allowed in the Ely Report, which has not since been the subject of any challenge.

[7] Subsequently, the parties entered into a consent order [Order] which included the following three steps regarding expert reports:

A. Dec 20, 2019 - Defendant to serve amended expert report of Mr. Urban

B. Feb 28, 2020 - Plaintiff to serve reply expert reports to Urban/Ely

C. Apr 10, 2020 - Defendant to serve surrebuttal expert reports

[8] Following from the Urban Report submitted by the Crown in Step A, CPR responded by filing the Reports contemplated in Step B, the admission of which are being challenged in this motion. The first of the two Reports, written by Dr. Kurt Klein, a Canadian agricultural economist, provides the historical and economic context surrounding the subsidy regimes addressed in the Urban Report and sets out the policy purposes underlying these regimes [Klein Report].

[9] The second impugned report, written by Dr. Matthew Aharonian, a financial economist, analyzes the subsidy regimes from an economic perspective and opines on whether the subsidies provided to CPR resulted in a net economic gain at the expense of the Crown [Aharonian Report].

[10] The Crown now objects to the Reports filed pursuant to the Order in response to the Urban Report (the Crown did not object to the Ely response). Step C – any surrebuttal from the Crown in reply to the Reports – has been put in abeyance, pending the outcome of this motion.

II. Issue Raised and Analysis

[11] The Crown argues that the Reports are not responsive to the Urban Report and as a result should be struck. In analysing this issue, I will address the following three questions:

1. What is the nature of the impugned opinion evidence?
2. What is the applicable law?
3. Should the (a) Klein and (b) Aharonian Reports be admitted?

1. *The nature of the impugned evidence*

[12] A threshold issue arises with respect to the nature of the Reports: are these Reports responding or reply evidence? This will determine the applicable rules of evidence. CPR submits the Reports are responding rather than reply evidence. I agree.

[13] First, I observe the description contained in the Order referenced above at paragraph 7 uses the misnomer "reply" in Step B. The parties concede that when they drafted this language in setting the schedule leading up to the trial (now set to begin in early October 2020), their intention was to follow the usual three-step sequence, namely (a) expert evidence in chief, (b) responding (sometimes referred to as rebuttal) expert evidence, and (c) reply (sometimes referred to as surrebuttal) expert evidence.

[14] While the Crown relied on various cases that ruled on the principles of reply evidence in its Written Representations, in its oral presentation it conceded the Reports should be reviewed under the criteria for responding (or rebuttal), and not reply (or surrebuttal) expert evidence. This

concession, for which counsel should be commended, helped to focus submissions during the hearing of this motion.

[15] I will now turn to the law on responding evidence, and show why the scope of rebuttal is significantly broader than reply evidence.

2. *What is the applicable law?*

[16] Little is set out in the *Federal Courts Rules*, SOR/98-106 [Rules] specific to responding expert evidence, other than that pre-trial conference memoranda shall be accompanied by "all documents that are intended to be used at trial that may be of assistance at the pre-trial conference, including all affidavits or statements of expert witnesses" (Rule 258(4)). These memoranda "shall include any known objection to the requisitioning party's proposed expert witness that could disqualify the witness from testifying and the basis for the objection" (Rule 262(2)). I note, however, the Rules are more specific for the timing of expert reports in the context of simplified actions (see Rules 299(1.1)/(1.2)/(3)). More specific rules also exist in other federal law contexts, for example Rules 77(1)/(2)/(3) of the *Competition Tribunal Rules*, SOR/2008-141, which stipulate filing and service for the filing of primary, responding and reply expert reports.

[17] The parties also noted that Federal Court jurisprudence contains scant commentary on the bounds of 'responding' expert evidence with one or two recent exceptions (see for instance, *Loblaws v Columbia Insurance Company*, 2019 FC 961 [*Loblaws*], discussed below). Rather, the Federal Courts have produced more commentary on 'reply' expert evidence.

[18] Procedure in the provinces tends to be more specific on the subject of expert reports, including on their timing. The parties to this motion relied on case law from courts in British Columbia, Alberta, and Nova Scotia. Underlying this case law are provincial rules of civil procedure that provide specific timelines for serving expert testimony.

[19] The relevant timelines in this case were created by the Order. Nevertheless, the principles that arise from the provincial case law remain applicable to defining the nature and scope of responding/rebuttal reports generally. The provincial jurisprudence is consistent with the limited case law in this Court that establishes properly served responding/rebuttal reports are broader than reply/surrebuttal reports (for commentary on the latter, see the leading case of *Halford v Seed Hawk Inc.*, 2003 FCT 141 [*Halford*], discussed below).

[20] First, in terms of the Alberta jurisprudence, the Crown relies on *Pocklington Foods Inc v Alberta (Provincial Treasurer)*, [1994] AJ No 550 (QB) at para 31 [*Pocklington Foods*], where Justice McDonald of the Court of Queen's Bench stated that "rebuttal is not limited to a narrow attack on the alleged defects of the theory of the expert, but may consist of rebutting the expert's own theory".

[21] *Sherstone v Westroc Industries Ltd*, 2000 ABQB 787 [*Sherstone*] involved the simultaneous filing of expert reports. Justice Rooke (as he then was), noted the difference from three-part sequential filing of expert reports paragraphs 8 and 27:

> A sequential process would have allowed for the plaintiff (or the party having the onus, if other than the plaintiff) to file expert opinions, the defendant to file reply expert opinions (setting out the defendant's experts' opinions and rebuttal of the plaintiff's experts'

> opinions), and then the plaintiff to file rebuttal expert opinions (solely in rebuttal to the defendant's experts' opinions).
>
> …
>
> However, this does not mean that a rebuttal report can only be filed if a primary report has also been filed on the same subject, or that the rebuttal report must be tied word for word to the primary opinion to which it responds. It must be, however, as the dictionary definitions state, limited to refuting the prior opinion and providing background and reasoning so as to refute; it should not provide alternative theories.

[22] Even though *Sherstone* took a more limiting approach to responding evidence than many of the other decisions raised, it nonetheless allowed some latitude. Indeed, at the hearing of this motion, the Crown acknowledged that *Sherstone* appeared to be an outlier, in that it is more restrictive than many of the cases since. For instance, the Crown referred to *Wade v Baxter*, 2001 ABQB 812 [*Wade*] where the Queen's Bench wrote at paragraph 71:

> To summarize, a practical matter one party should generally file their expert reports first. Generally it is the party who bears the burden of proof on the issue. The other party then files a rebuttal report. There is nothing wrong with that report raising new theories to explain the phenomenon under discussion. The concept of a "rebuttal" report should not be so narrowly construed that the rebutting expert must accept the way the original expert has defined the question. Even if a rebuttal report raises some new information, the other party has 60 days to react. Given that by definition all parties have experts retained and briefed, it will usually be possible for the primary expert to comment on the new dimensions to the issue. At any time an adjournment is available to a party who is truly surprised, and costs are always a possible remedy as well. There will be occasions when the rebuttal report really does venture into whole new areas of discussion and explanation. In those cases they should be treated as late original reports. However, where a medical practitioner simply offers an alternative method of treatment of a known injury, that in my view does not mean it is no longer a rebuttal report.
>
> [Emphasis added.]

[23] In *Wade*, and several of the other provincial cases, the litigation involves personal injury. The experts often provide medical opinions. In *Wade*, the responding expert suggested a knee replacement, rather than the post-accident treatment suggested by the original expert. The Court allowed in the evidence as an alternate method of treatment, determining that it fell properly within the domain of a rebuttal report.

[24] The other significant point of law mentioned in *Wade* at paragraph 71 above, is that where the onus of proof on a particular matter lies with the defendant, the plaintiff is not required to respond until the issue is actually put in issue by the defendant's evidence, at which point responding evidence is permitted. This is best illustrated in two British Columbia Court of Appeal cases, the first being *Sterritt v McLeod*, 2000 BCCA 318 [*Sterritt*] at paragraphs 28-29:

> The difficulty below, in my opinion, arose from a failure to appreciate that the evidence which a plaintiff adduces after a defendant has put in his case, commonly called reply or rebuttal evidence, is of two sorts. One is evidence going to an issue the burden of proof of which lies upon the defendant. The other is simply evidence responsive to some point made in the oral evidence of the witnesses called by the defendant.
>
> In the former, the plaintiff has no obligation to adduce any evidence on the issue until the defendant's case has gone in when he then has a right to answer if he considers there is anything to answer. If he does address that issue in his own case, he cannot generally address it again, for he would then be splitting his case. As to splitting one's case, see *Allcock, Laight & Westwood Ltd. v. Patten*, [1967] 1 O.R. 18 (Ont. C.A.).

[25] In a second British Columbia Court of Appeal case that considered onus, the Court found the trial judge's refusal to admit the plaintiff's rebuttal expert evidence to be an error: in *McPhee v British Columbia (Minister of Transportation and Highways)*, 2005 BCCA 139

[*McPhee*], the defendants bore the burden of proving their defence of contributory negligence (at paragraph 51):

> As the appellant called no evidence concerning his speed, he would not be splitting his case by calling evidence in rebuttal on the question of speed. A plaintiff is not obliged to call as part of his case, evidence on an issue the burden of which is on the defendant. But if he calls any evidence on such an issue, he must exhaust his evidence on the point.

[26] The Crown submits that these appellate cases do not assist CPR, because they turn on specific rules of civil procedure in British Columbia. I disagree. The general principles cited in *Sterritt* and *McPhee* on the rules pertaining to the scope of rebuttal evidence stand as good law, as has been demonstrated by the reliance on them by Courts in other jurisdictions (see, for instance, *Doucet v Spielo Manufacturing Inc.*, 2008 NBQB 413 at para 21; *Marshall (Litigation Guardian of) v Annapolis (County) District School Board*, 2009 NSSC 375 at paras 20 and 22; and *Elgert v Home Hardware Stores Ltd.*, 2010 ABQB 66 at para 26). In any event, the comments cited above from *Sterritt* and *McPhee* were not tied to a particular rule of civil procedure, but rather were related to general principles on the admissibility of responding (rebuttal) expert reports.

[27] The Crown, in its Reply to CPR's Written Representations, cites *Luedecke v Hillman*, 2010 BCSC 1538 [*Luedecke*] to support the proposition that the principles outlined in *Sterritt* and *McPhee* are tied to British Columbia's civil procedure. While a responding report can be broader than just a critical analysis of an expert's methodology as in the case of a surrebuttal, the rebuttal must nonetheless be "responsive" to the expert evidence (*Luedecke* at para 52).

[28] Again, I find this consistent with the law as articulated through the jurisprudence above on responding evidence, which can be greater in scope than the more restrictive reply (or surrebuttal) evidence. The law on reply evidence was cogently summarized by Justice Pelletier of this Court, of which he was then a member, at paragraph 15 of *Halford*:

> 1- Evidence which is simply confirmatory of evidence already before the court is not be allowed.
>
> 2- Evidence which is directed to a matter raised for the first time in cross examination and which ought to have been part of the plaintiff's case in chief is not be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.
>
> 3- Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not be be admitted.

[29] However, even with this summary of law fencing in the more restrictive boundaries of reply expert evidence, Justice Pelletier added an exception: “To these principles, I add one further. Evidence which is excluded because it should have been led as part of the plaintiffs' case in chief will be examined to determine if it should be admitted in the exercise of my discretion”.

[30] *Halford* has been followed in numerous cases, including recently in *Amgen Canada Inc v Apotex Inc*, 2016 FCA 121 at para 12, *Janssen Inc v Teva Canada Limited [Janssen]*, 2019 FC 1309 at para 16, as well as earlier this year, in *Bauer Hockey LTD v Sport Maska Inc*, 2020 FC 212 at para 15 [*Bauer*], where Justice Grammond also noted the distinction between a responding report being challenged, and a reply report, at paragraph 33.

[31] As mentioned above, the later stage of its receipt, in addition to the rule against case-splitting, means the rules on reply evidence are more restrictive than for responding evidence (see, for instance, *Sterritt* and *McPhee*). However, where a plaintiff chooses not to lead evidence on an issue, and has that right when the onus to do so lies with the other party, case splitting is not a concern, unlike in the context of reply evidence. That describes the scenario here, where CPR had the right to respond, rather than an obligation to lead on the ground covered by Mr. Urban.

[32] In short, CPR does have a burden in this case – to prove that it is entitled to the Exemption. The Crown, however, bears the burden of advancing any defences, including that of estoppel which it has raised as one of three equitable defences. To succeed on the estoppel defence, the Crown will have to establish that CPR made a representation, and she relied on that representation to her detriment (detrimental reliance): Bruce MacDougall, *Estoppel*, 2nd ed (Toronto: LexisNexis Canada Inc, 2019) at 394. The Urban Report was adduced to discharge the burden of proving estoppel and detrimental reliance. It is therefore a primary expert report.

[33] The Klein and Aharonian Reports were produced for the purpose of responding to the primary Urban Report. The Reports are not reply expert evidence and therefore the principles in cases from *Halford* through to *Bauer*, are not applicable here.

[34] Again, the parameters for responding expert evidence are broader than what is permitted for reply expert evidence. And it is those parameters of responding expert evidence that I must apply to the Reports in evaluating whether they pass muster and should be admitted for the

purposes of the upcoming trial. Synthesizing the law discussed above, including in *Pocklingon*, *Wade*, *Sterritt* and *McPhee*, the four principles that must be considered in evaluating the acceptability of a responding expert report are that:

i. a plaintiff is not obliged to call primary expert evidence on an issue the burden of which lies with the defendant; if the plaintiff, however, choses to do so, it must exhaust any evidence on the point, lest the case be split;

ii. the notion of a "response" or "rebuttal" is not to be applied in such a narrow sense so that the responding expert must accept the way the primary expert has defined the question; a responding report may also include background and incidental information, and need not be tied word for word to the primary expert report. Fairness is maintained due to the opportunity for reply (or surrebuttal) report;

iii. there will nonetheless be occasions where a rebuttal (or part of it) is not responsive to the primary opinion, veering into non-responsive areas, thereby exceeding its proper domain, and as a result all or part of the report may be determined to be inadmissible; and

iv. the Court retains the discretion to admit any non-conforming sections of the responding expert report, taking into consideration any prejudice that will result to the other side from its admission.

[35] With these principles in mind, I will now look at the first of these Reports to determine whether it meets the parameters of responding evidence.

3. *The Reports*

a) The Klein Report

[36] The Crown submits the Klein Report should not be admitted, describing it as a stand-alone report on the history of grain transportation policy in Canada from 1897 to 1996, which fails to address any unanticipated position in the Urban Report. Thus, all Dr. Klein's points could have been dealt with in a primary expert report. The Crown further submits that in various places

in its discovery answers it had fully apprised CPR of its view that the grain subsidy programs described in the Klein Report compensated CPR for the movement of western grain and in particular for taxes related to those movements.

[37] I neither agree with the Crown's characterization of the Klein Report, nor the conclusion it reaches. The Klein Report provides a historical and policy context omitted by the Urban Report. This will serve as a useful background to understand Mr. Urban's opinions regarding the subsidy regimes the Crown has put in issue in its estoppel defence. Excluding this report could prejudice CPR in addressing the equitable defence argument, as well as the alleged detrimental reliance suffered by the Crown.

[38] To be more specific, Dr. Klein traces the history of the need for railway subsidies to the 1897 Crow's Nest Pass Agreement, where CPR agreed to maintain certain rates on the transport of grain forever, known as the Crow Rates, in exchange for funds from the Federal Government to build a branch line to the mineral-rich Kootenay Valley. Dr. Klein describes that by the 1950s, the Crow Rates had become uneconomic for the railways, that CPR was forced to operate inefficiently at high average costs, and that many branch lines operated for the purpose of hauling grain became unprofitable. Dr. Klein explains why the government enacted the *National Transportation Act* in 1967, which created a policy framework by which railways were required by law to maintain uneconomic branch lines, but would be compensated via subsidies under the *Railway Act* [*RA*] for their variable costs of doing so.

[39] Dr. Klein also explains why he feels the *RA* and the *Western Grain Transportation Act* [*WGTA*] were enacted not to enrich the railways, but rather to compensate them for bearing significant costs arising from Canada's national agricultural policy, and the subsidies were intended only to make CPR "whole" for these losses, not to provide a windfall.

[40] Turning back to the primary expert, the impact of the *RA* and *WGTA* subsidies was the basis for the Urban Report, and forms the backdrop to its conclusions. While the Klein Report does not respond in a word for word fashion to the Urban Report, its historical and policy context fills gaps left by Mr. Urban. A responding report may indeed include incidental background (see, for instance, *Loblaws* at para 98). In my view, the Klein Report therefore satisfies the criteria for a responding report.

[41] As mentioned briefly above, the Crown also makes what I will term a procedural argument, namely that due to what CPR learned through the pleadings and the discovery process, the Klein Report is really a late-filed primary report: CPR should have anticipated the arguments and filed the report at the outset.

[42] This argument is a red herring premised on the basis that Dr. Klein's is a reply report. First, "anticipating" argument is in the domain of reply evidence, and whether the party replying is trying to "split its case" (for a full explanation of this concept within the context of reply expert evidence, see *Bauer* at paragraphs 21-24 and 39).

[43] Here, the complete answer to whether Dr. Klein's is truly a responding report derives from the onus issue. This action has proceeded, like most others, with a sequential filing of expert reports. The main issue raised in the primary report from Mr. Urban, and addressed in the responding Reports, is subsidies. The Crown claims it relied to its detriment on these subsidies, leading to their defence of estoppel.

[44] The jurisprudence discussed above (including *Wade, Sterritt* and *McPhee*) clearly establishes that a primary report should be served by the party which has the onus of proof on the particular issue the primary report addresses. The onus to raise defences to CPR's claims rests on the Crown. This includes establishing detrimental reliance as part of its estoppel defence. The Crown has provided no authority to oppose the existing jurisprudence, or to support its position that CPR had an obligation to proactively seek expert opinions to counter estoppel, or any of its other equitable defences.

[45] Quite the opposite, I find CPR had every right to await the details of the Crown's position, which were raised in disparate sections in the discoveries, and in two paragraphs of the pleadings (Amended Statement of Defence at paragraphs 1(f) and 30). Even had the defence been expansively aired prior to the Urban Report, the onus would not have shifted away from the Crown. CPR may have conceivably decided to file the Reports by anticipating what the defence would look like, but it is quite apparent why it chose not to do so. That was its right.

[46] For all the reasons above, I find that the Klein Report satisfies the parameters of a responding report.

b) The Aharonian Report

[47] The Crown also submits the Aharonian Report should be excluded for non-responsiveness because CPR "has belatedly decided that since the Defendant may now be able to specify the nature and quantum of its detriment, and that a response is required to show there was no detriment after all". It submits the Aharonian Report should have been provided as a primary report.

[48] In so arguing, the Crown on the one hand contends the Aharonian Report is non-responsive, and on the other, that it is, albeit late. This internally inconsistent position cannot stand. Dr. Aharonian's report either properly responds to the Urban Report, or it does not. Both statements cannot be true.

[49] What Dr. Aharonian opines on is whether the subsidies discussed in the Urban Report provided CPR with a net economic benefit, and the impact on the Crown. He describes the differences between the costs recoverable under the *RA* and *WGTA* subsidy regimes, and explains the concept of economic profit, which he argues will indicate whether the branch lines were uneconomic, or the subsidies made CPR "whole".

[50] Specifically, Dr. Aharonian explains that this policy required the incorporation of amounts in respect of taxes within the formula used to calculate the subsidies and that the subsidies received under the *RA* and *WGTA* formed part of CPR's general taxable income. Dr. Aharonian goes on to explain that because these taxes were ignored in the calculation of subsidies prior to 1979, they did not compensate CPR on an after-tax basis. Rather, he posits that

adjusting the amount of the subsidies to account for taxes payable was necessary in order to make CPR "whole" and return it to zero economic profit. Dr. Aharonian further opines that grossing up subsidies during the *WGTA* era did not overcompensate CPR, even in years when its tax liability was nil.

[51] Dr. Aharonian also critiques Mr. Urban's estimated amount of the subsidies provided to CPR in respect of taxes between 1979 to 1996, a key conclusion of the primary report. Dr. Aharonian explains why he feels that Mr. Urban's totals are "not informative", his estimates "are subject to significant estimation error due to lack of data", and his assumptions and estimates "do not provide any insight as to whether the subsidies provided CPR any net benefit at the expense of the federal government".

[52] In light Mr. Urban's primary report, the Aharonian Report constitutes a proper responding report for the same reasons as Dr. Klein's: it is necessary to help the Court understand the subsidy regime the Crown has raised as part of its estoppel defence, and provides CPR's perspectives on these payments. The response does not need to fit the primary report like a glove: Dr. Aharonian as the responding expert can provide his own theories as to how the calculations should be conceived and computed and does not need to respond to Mr. Urban's every word.

[53] Even if I were to take the view that parts exceed the proper domain of an expert report, which I do not, the Crown will not be prejudiced by its admission. Rather, it will have every

opportunity to disagree with Dr. Aharonian's financial analysis in its surrebuttal. Indeed, excluding the Aharonian Report would result in prejudice to CPR.

III. Conclusion

[54] I do not find that that either of the Reports fall outside the scope of proper responding or rebuttal evidence. Rather, both reports provide background information and responses to the Urban Report – Dr. Klein from a historical and policy perspective, and Dr. Aharonian from an economic one. Despite raising some new concepts, those rebut the Urban Report. They are thus properly described as responsive.

[55] CPR had no obligation to file these Reports first given that the onus to raise the defence lies with the Crown. Thus, to exclude the Reports would deprive CPR of its right to provide a full answer to the estoppel defence. Conversely, the Crown will suffer no prejudice through their admission: it always had, and retains, the right to a full reply to the Reports through the surrebuttal already outlined in the trial schedule.

[56] Finally, to bring this decision full circle to where it began, in *CPR 2019*, I observed that ultimately, whether Mr. Urban's report holds up under the rigour of cross-examination, and its weight against other testimony, will be decided in light of the full body of evidence presented at trial. The same principle applies to this motion: excluding the Reports before the Court has the opportunity to understand them in their broader context of trial is premature. The importance assigned to them can only be assessed in light of other positions submitted, and evidence

tendered. This particularly holds true in this case, where there are no live fact witnesses to events that occurred nearly a century and a half ago. Just as with Drs. Ely and Urban, the decision to admit the responding Reports of Drs. Klein and Aharonian in no way signals their ultimate persuasiveness.

ORDER in T-1359-07

THIS COURT ORDERS that:

1. This motion is dismissed.

2. The Klein and Aharonian Reports will both be admitted.

3. Costs are awarded to the Plaintiff (CPR).

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1359-07
STYLE OF CAUSE:	CANADIAN PACIFIC RAILWAY COMPANY V HER MAJESTY THE QUEEN
PLACE OF HEARING:	HEARD VIA VIDEO CONFERENCE IN TORONTO, ONTARIO
DATE OF HEARING:	JUNE 2, 2020
ORDER AND REASONS:	DINER J.
DATED:	JUNE 15, 2020

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