

SUMMARY: Section 7 of the Canada Evidence Act limits the number of expert witnesses to five per party, not five per issue. Where a statute allows for leave to call additional experts, the limit applies per party and can be increased with leave of the court. The court has discretion to grant leave to call more than five experts after considering relevant factors such as the nature and complexity of the case.

The case involves claims by First Nations groups regarding alleged treaties with the imperial government in the mid-1800s. The trials are expected to be lengthy, involving many witnesses and historical documents on complex issues like geography, anthropology, and indigenous culture. The Songhees plaintiffs seek leave to call 12 expert witnesses, and are supported by the Esquimalt plaintiffs. British Columbia objects citing overlapping and unnecessary expert evidence.

The issues are whether leave should be granted to the Songhees plaintiffs to call more than five expert witnesses under Section 7 of the Canada Evidence Act and the interpretation of the limitation of "five expert witnesses" under Section 7 - whether it applies per issue or per party.

Court Rationale

The court interpreted Section 7 of the Canada Evidence Act as limiting the number of experts to five per party, not per issue. Allowing experts per issue would likely lead to excessive segmentation of issues. Where a statute allows leave to call additional experts, the limit applies per party.

The court considered the complex nature of the case, involving historical treaties and indigenous rights, as well as the anticipated length of the trial. While some duplication among expert evidence could not be avoided, the court found that granting leave to call 12 experts would not amount to an abuse under Section 7 and was necessary to fully explore the issues.

The application by the Songhees plaintiffs was allowed. They were granted leave to call 12 expert witnesses at the trial. Costs were reserved to be dealt with later.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sam v. British Columbia*,
2016 BCSC 86

Date: 20160121
Docket: 09-5146
Registry: Victoria

Between:

**Chief Robert Sam and Councillors Gary Albany, Edward Norman George,
Nick Albany, Frank George and Ronald Sam, acting on their own behalf
and on behalf of all other members of the Songhees Nation
and the said Songhees Nation**

Plaintiffs

And:

**Her Majesty The Queen in Right of the Province of British Columbia
and the Attorney General of Canada as representing
Her Majesty the Queen in Right of Canada**

Defendants

- and -

Docket: 12-1561
Registry: Victoria

Between:

**Seenupin (Chief Andrew Thomas) and Councillor Barbara Lecoy,
acting on their own behalf and on behalf of all other members of
the Esquimalt Nation and the said Esquimalt Nation**

Plaintiffs

And:

**Her Majesty The Queen in Right of the Province of British Columbia, as
represented by the Attorney General of British Columbia,
Her Majesty The Queen in Right of Canada as represented by
the Attorney General of Canada**

Defendants

Before: The Honourable Mr. Justice Bracken

Reasons for Judgment

Counsel for the Plaintiffs: M. Frey, R. Morahan, M. Wehrung
and C. Villeneuve

Counsel for the Attorney General of Canada
as representing Her Majesty The Queen in
Right of Canada: C. Cameron and M. French

Counsel for Her Majesty The Queen in
Right of the Province of British Columbia: H. Gwillim, C. Robb
and K. Tyler

Counsel for the Esquimalt Nation: S. Kelliher, D. Redman and R. Neary

Place and Date of Trial/Hearing: Victoria, B.C.
December 2, 3 and 14, 2015

Place and Date of Judgment: Victoria, B.C.
January 21, 2016

[1] The plaintiffs apply pursuant to the *Canada Evidence Act*, R.S.C. 1985, c. C-5, for leave to call more than five expert witnesses at the trial of this action. The action is one of two actions to be heard at the same time. Both actions are brought by members of First Nations groups who claim to be the beneficiaries of treaties that were allegedly made between the imperial government and the plaintiffs in the mid-1800s. The trials are expected to take several months and the court will hear many witnesses and will be required to review numerous historical documents.

[2] The application is supported by the Esquimalt plaintiffs. Canada takes no position and British Columbia is opposed to the application. The Songhees seek leave to call 12 experts at the trial dealing with liability and damages issues.

[3] Our civil rules are silent on any maximum number of expert witnesses; the British Columbia statute, the *Evidence Act*, R.C.B.C. 1996, c. 124, is similarly silent on number, and its expert provisions explicitly do not apply to court actions.

Section 7 of the *Canada Evidence Act* ("the Act") states:

Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding.

Thus, s. 7 of the Act limits a party to “not more than five” expert witnesses, at least “without the leave of the court or judge or person presiding.”

[4] The limitation to five experts has been interpreted as a restriction of the number of experts that may be called per issue and the number of experts that may be called per party. There seems to be greater consensus that the Act restricts the number of experts to five per party. Overall, the authorities have taken the more conservative interpretation, in part because provisions such as s. 7 of the Act allow for leave to apply for experts in excess of the stated number. That is, where a provision allows for leave, the limit is considered to apply per party, and can be increased with leave of the court.

[5] Few cases consider the Act directly. Rather, most of the cases consider a similar provincial evidence statute or consider s. 7 through the filter of a line of Federal Court decisions together with an interim Federal Court Rule that provides guidance for leave to exceed the maximum.

[6] The more generous interpretation that applies s. 7 of the Act as a limit to a stipulated number of experts per issue is said to spring from *Fagnan v. Ure Estate*, [1958] S.C.R. 377, where Cartwright J. adopted these words summarizing a lower court on another action:

Upon the proper interpretation of section 10 of the *Alberta Evidence Act*, 1910, 2nd sess., ch. 3, in the event of a trial or inquiry involving several facts, upon which opinion evidence may be given, a party is entitled to call three witnesses to give such evidence upon each of such facts, and he is not limited to three of such witnesses for the whole trial.

[7] It should be noted that the *Alberta Evidence Act* at the time of *Fagnan* also capped the number of experts without providing any discretion for a court to grant leave to exceed the stated number.

[8] To say that *Fagnan* is part of a line of case law interpreting the allotment of experts generously is itself to be too generous. If there is such a line, it is a short one. I am aware of only five cases where the court has interpreted the limit in that manner. Three of these, including *Fagnan*, derive from Alberta, the first and third cases being *Scamen v. Canadian Northern Railway Co.* (1912), 6 D.L.R. 142, 5 Alta. L.R. 376 (C.A.) and *Hamilton v. Brusnyk and Demchuk* (1960), 28 D.L.R. (2d) 600, [1960] A.J. No. 68 (S.C.). A further two are New Brunswick criminal appeal decisions cited by counsel for Songhees in their notice of application: *R. v. Eatman* (1999), 222 N.B.R. (2d) 120 (C.A.), and *R. v. Higgins* (1979), 28 N.B.R. (2d) 20 (C.A.), which was referred to in *Eatman*.

[9] I note that the New Brunswick appeal court paid no attention to the essential difference between *Fagnan*'s context (Alberta's then statutory provision with no room for leave) and the context of other statutes -- Canada, Ontario, Manitoba and New Brunswick's own civil evidence statute among them -- which contained provisions allowing leave to apply to call additional experts.

[10] Attempts have been made to use the per issue interpretation in pharmaceutical actions at Federal Court. Those actions feature significant scientific issues and high stakes.

[11] In *Altana Pharma Inc. v. Novopharm Ltd.*, 2007 FC 1095, the court took a more restrictive approach. At para. 55 of that case the court interpreted s. 7 of the Act to apply to "the case as a whole." Phelan J. read the intention of s. 7 as being to "prevent abuse, trouble, expense and delay caused by excessive use of expert evidence." He conversely saw the "by issue" argument as "[creating] the very mischief which the provision was intended to cure."

[12] In 2010, three years after *Altana*, the Federal Court introduced Rule 52.4, which explicitly limits the number of experts to five per party "in a proceeding." In *Apotex Inc. v. Sanofi-Aventis*, 2010 FC 1282, the court declined to allow a party to call eight experts, which counsel argued were required as there were eight distinct aspects of the case to cover scientifically (paras. 21-22). The court rejected that

application. It noted that the new rule, which explicitly tied the maximum to each party in a proceeding and which articulated factors for leave, codified considerations left silent under s. 7 of the Act (para. 20).

[13] Although the codified considerations are specifically found within Federal Court rules, they have been taken by the Tax Court as “useful criteria” when deciding an application under s. 7, and therefore could be seen as transferable: *General Electric Capital Canada Inc. v. Canada*, 2009 TCC 246, para. 7.

[14] Outside the pharmaceutical context, an earlier Ontario Superior Court decision also interpreted the cap as being per party, not per issue: *Burgess (Litigation Guardian of) v. Wu*, [2005] O.J. No. 929, 137 A.C.W.S. (3d) 962 (S.C.). In *Burgess*, the court dealt with s. 12 of the *Ontario Evidence Act*, which applies to civil court proceedings. Under that statute, the stated number is three “on either side” subject to leave being granted to call additional experts.

[15] In *Burgess*, Ferguson J. relied on *Bank of America Canada v. Mutual Trust Company* (2005), 39 O.R. (3d) 134 (Gen. Div.), where Farley J. pointed out that *Fagnan* and its predecessor *Scamen*, while cited by the “per issue” proponents, arose from the Alberta context which gave no opportunity for leave. He was of the view that where a statute denies an application for leave to increase the number of experts to be called and thereby places an immovable cap on the number of experts, the courts might tend to interpret the provision more generously in order to satisfy the needs of justice.

[16] In *Bank of America Canada*, Farley J. referred to two other decisions which interpreted the respective provincial limits on number of experts as unambiguously applying to the trial as a whole: *Buttrum v. Udell* (1925), 57 O.L.R. 97, [1925] 3 D.L.R. 45 (C.A.), and *British Columbia Pea Growers Ltd. v. Portage La Prairie (City)* (1964), 49 D.L.R. (2d) 91, 50 W.W.R. 415 (Man. C.A.).

[17] Hamish C. Stewart in Halsbury’s Laws of Canada, *Evidence* (2014 Reissue), “Opinion Evidence: Expert opinion” (VI.3.(2)(b)) at HEV-155 “Procedural aspects:

Statutory limit on number of experts,” adds that the “per issue” interpretation “should not be followed when the statute permits the court to grant leave.”

[18] An even more restrictive reading of limits on experts is further suggested by Stewart. He points out that a “truly purposive” reading of the phrase “either side” in s. 7 of the Act and in similar provincial statutes would take the limit as the number of experts to be shared among litigants with the same interest in the resolution of the factual issue to which the expert’s opinion is relevant. On this point Stewart refers to *Eli Lilly and Co. v. Novopharm Ltd.*, [1997] F.C.J. 488, 147 D.L.R. (4th) 547 (C.A.) at paras. 119-120.

[19] In *Burgess*, after finding that the default limit on experts in the Ontario statute unambiguously meant “three in total on all issues” (para. 8, adopting from *Bank of America Canada*), the court set out several “relevant factors” for the court to consider when asked for leave to call experts in excess of the cap. Ferguson J. stressed that his factors were not a closed list (para. 35):

A decision on motions like this will necessarily be fact driven and consequently it is not possible to identify a fixed list of relevant factors. However, I conclude the following are relevant factors in this case taking into account the case law and the circumstances of this case:

- a. Whether the opposing party objects to leave being granted. While I can imagine situations where both parties are “overkilling” the evidence, I think that if both parties have agreed on certain numbers of experts or on filing reports from some experts in addition to calling others then this is a significant factor. While there is certainly public expense involved, in civil cases the parties bear a very substantial portion of the costs of trial which is the crux of the rule. I believe contested motions on the issue of granting leave are rare. I think that where there is no opposition then leave is usually granted.
- b. The number of expert subjects in issue.
- c. The number of experts each side proposes to have opine on each subject.
- d. How many experts are customarily called in cases with similar issues?
- e. Will the opposing party be disadvantaged if leave is granted because the applying party will then have more experts than the opposing party?
- f. Is it necessary to call more than three experts in order to adduce evidence on the issues in dispute?

- g. How much duplication is there in the proposed opinions of different experts?
- h. Is the time and cost involved in calling the additional experts disproportionate to the amount at stake in the trial?

[20] As mentioned above, the Federal Court added Rule 52.4 to deal precisely with the interpretation of leave under s. 7 of the Act, and provides factors for granting leave:

- (1) A party intending to call more than five expert witnesses in a proceeding shall seek leave of the Court in accordance with section 7 of the Canada Evidence Act.

Leave considerations

- (2) In deciding whether to grant leave, the Court shall consider all relevant matters, including
 - (a) the nature of the litigation, its public significance and any need to clarify the law;
 - (b) the number, complexity or technical nature of the issues in dispute; and
 - (c) the likely expense involved in calling the expert witnesses in relation to the amount in dispute in the proceeding.

SOR/2010-176, s. 2, effective August 4, 2010 (Can. Gaz. Pt. II, Vol. 144, No. 17, p. 1547), as corrected by the erratum published in Can. Gaz. Pt. II, Vol. 144, No. 19, p. 1791.

[21] Given the unique nature of the cases at issue here, not all of the criteria considered in *Burgess* have application. In addition, as the expert reports are not yet before the court it cannot be known if the experts are necessary or if they duplicate one another.

[22] However, the evidence will canvas many complex areas of history: geography, botany, anthropology, archeology, ethno-history, genealogy, ethno-ecology, law and the culture of indigenous peoples and their understanding of the terms of the treaty as well as the authenticity of documents. The issue is further complicated because there is an agreement between all parties that the evidence of each of the plaintiffs may be relied upon by the other.

[23] The plaintiffs rely on *R. v. Noyes* (1991), 1 B.C.A.C. 81 at para. 23, for the point that the purpose of s. 7 of the Act is to prevent abuse. The court said:

The history of s. 7 of the *Canada Evidence Act* confirms it to be purely pragmatic. It appeared in substantially its present form in 1902, 2 Edw. 7, c. 9 and s. 2 was added in 1906, c. 145. It was first commented on briefly in *R. v. Dodge* (1906), 38 S.C.R. 149, at p. 152, when Idington, J., simply noted that its application could have minimized the reduction of much irrelevant evidence. The plea for the need for a general power of restriction of evidence was perhaps most eloquently put by Tomlin, J., as a trial judge in *Graigola Merthyr Co. v. Swansea Corporation*, [1928] Ch. 31, in a civil case where he said counsel owed the court a positive duty to reduce to a minimum the experts required. *Wigmore* (Chadbourne Ed.) vol. 6, s. 1907 et seq., makes extensive reference to the history in various jurisdictions and it is plain that the legislation was directed to curbing expense or abuse.

[24] British Columbia's objection to the application is based on the fact that several of the expert reports overlap and are thus unnecessary and repetitive. In their application, the Songhees plaintiffs summarized the evidence that they propose to lead from each of the experts they plan to call. In response, British Columbia has pointed out the areas in which it says the Songhees reports overlap with, or duplicate, the reports of other experts.

[25] It is not disputed by any of the parties that this is complex litigation engaging many areas of expertise. The trial is expected to be a long one. Counsel anticipate considerable cross-examination of at least some of the experts who will be called to testify. The plaintiffs say that, given the broad areas of expert evidence to be considered at trial, the number of experts they wish to call is necessary to properly present their case and is not unreasonable in all of the circumstances. The Songhees plaintiffs have also advised the defendants as to which proposed Esquimalt experts they plan to rely on.

[26] As the nature of the litigation is unusual, it cannot be said that the number is disproportionate to the number of experts called in similar cases. In this case, one of the central issues is to determine whether there was a breach of a treaty and, if so, how much land the Lekwungen or Chekonein peoples utilized before the alleged

treaty was made. A considerable body of expert opinion will be required in determining that issue.

[27] The Songhees plaintiffs acknowledge that there may be some limited overlap in the expert evidence, but argue that the experts provide different perspectives and are therefore necessary. They submit that some overlap is to be expected in a historical treaty case where the evidence relates to a time more than 150 years ago.

[28] The Songhees also submit that expert evidence in aboriginal cases is particularly important. As was noted in *Ahousaht Indian Band v. Canada (Attorney General)*, 2009 BCSC 1494 at para. 55:

The task facing courts in aboriginal rights and title cases is one usually reserved for historians, anthropologists, archaeologists, and ethnographers. Courts have sufficient difficulty determining what happened a few months or years ago, never mind a few centuries ago. The main fact that the plaintiffs seek to prove is that they traded fish prior to contact with European culture, and that that activity is analogous to the modern activity of commercial fishing. The majority of the evidence at trial concerning the aboriginal rights claim was led to prove this fact.

[29] The Songhees say that even if there is some duplication in the expert evidence, it does not amount to an abuse as contemplated in *Noyes* and the additional time and expense involved in calling the evidence are not disproportionate to a case of this magnitude.

[30] It is my view that s. 7 of the Act limits the number of experts to be called in any action to five experts per party and not five experts per issue. To conclude otherwise would likely result in the issues being “dissected and segmented” (*Apotex*, para. 25). I agree with the *Apotex* decision on this point.

[31] I accept that allowing Songhees to call 12 experts may result in some duplication among the evidence given by the experts, but any abuse can be managed by restriction of the evidence during examination and cross-examination of the expert wherever appropriate. I believe that while there cannot be a simple abrogation of the way a trial is normally conducted just because the case involves

aboriginal claims, some accommodation should be granted to allow the issues to be fully explored.

[32] Therefore, the application is allowed and Songhees will be allowed to call 12 expert witnesses at the trial of this action.

[33] Costs will be in the cause.

“J. K. Bracken, J.”

The Honourable Mr. Justice Bracken