



No. 180247  
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WEST MOBERLY FIRST NATIONS, AND ROLAND WILLSON ON HIS  
OWN BEHALF AND ON BEHALF OF ALL OTHER WEST MOBERLY  
FIRST NATIONS BENEFICIARIES OF TREATY NO. 8

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH  
COLUMBIA, THE ATTORNEY GENERAL OF CANADA, AND BRITISH  
COLUMBIA HYDRO AND POWER AUTHORITY

DEFENDANTS

**APPLICATION RESPONSE**

**Application response of :** the Defendant, British Columbia Hydro and Power Authority.

THIS IS A RESPONSE TO the Notice of Application of the Defendant, the Attorney General of  
Canada filed March 16, 2018.

**PART 1      ORDERS CONSENTED TO**

The Application Respondent consents to the granting of the orders set out in paragraph 1 of Part  
1 of the Notice of Application.

**PART 2      ORDERS OPPOSED**

The Application Respondent opposes the granting of the orders set out in none of the paragraphs  
of Part 1 of the Notice of Application

**PART 3      ORDERS ON WHICH NO POSITION IS TAKEN**

The Application Respondent takes no position on the granting of the orders set out in paragraph  
2 of Part 1 of the Notice of Application.

**PART 4 FACTUAL BASIS**

1. The Applicant seeks an order that paragraphs 7, 10, 12, 13, 16, 20, 21, 23, 27, 29 and 30 of the report of Harry Swain (the "Swain Report") attached as Exhibit A to Affidavit #1 of Harry Swain, sworn on January 31, 2018 ("Swain Affidavit") be struck out.
2. BC Hydro relies on the facts set out in its Notice of Application to strike affidavits filed in this proceeding on March 20, 2018 ("BC Hydro's Notice of Application")

**PART 5 LEGAL BASIS**

1. As set out in BC Hydro's Notice of Application, BC Hydro objects to the admissibility of the Swain Affidavit and seeks that it be excluded in its entirety because:
  - (a) it fails to meet the *Mohan* criteria;
  - (b) it ought be excluded in the exercise of the court's gatekeeping function laid out by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23; and
  - (c) it fails to comply with the common law requirements for expert reports, as codified in Supreme Court Civil Rule 11.
2. BC Hydro also agrees that, at a minimum, paragraphs 7, 10, 12, 13, 16, 20, 21, 23, 27, 29 and 30 of the Swain Report are a breach of deliberative secrecy privilege and an attempt to circumvent privilege to provide additional reasons to the JRP Report.

*Trial Review Panel*

**PART 6 MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Harry Swain, sworn on January 31, 2018;
2. The pleadings filed in this proceeding; and
3. Such further and other materials as counsel may advise and the Court may permit.

BC Hydro estimates that the application will take 3 hours (combined time, with the application filed by the Province on the same issue).

- The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.

Dated: 23-Mar-2018



Signature of

Application Respondent

Lawyer for BC Hydro

Mark Andrews, QC

The Solicitors for British Columbia Hydro and Power Authority are Fasken Martineau DuMoulin LLP, whose office address and address for delivery is 550 Burrard Street, Suite 2900, Vancouver, BC V6C 0A3

Telephone: 1 604 631 3131

Facsimile: 1 604 631 3232

Reference: Mark Andrews, QC/240150.00182