

No. 18 0247
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: Her Majesty the Queen in Right of the Province of British Columbia
(the "Province").

THIS IS A RESPONSE TO the notice of application of British Columbia Hydro and Power
Authority ("BC Hydro"), filed March 20, 2018 (the "Hydro Application").

Part 1: ORDERS CONSENTED TO

The Province consents to the granting of all of the orders set out in Part 1 of the Hydro
Application.

Part 2: ORDERS OPPOSED

None.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

None.

Part 4: FACTUAL BASIS

1. The Province repeats and relies on the facts as set out in Part 2 of its Notice of Application filed March 16, 2018, regarding the admissibility of Affidavit #1 of Harry Swain (the “BC Application”).
2. The Province agrees with the additional facts set out in Part 2 of the Hydro Application.

Part 5: LEGAL BASIS

3. The Province repeats and relies on the law as set out in paragraphs 22 through 35 of Part 3 of the BC Application.

A) Komers #2 and Muttray #1

4. The Province agrees with the position of BC Hydro that Affidavit #2 of Petr Komers, made January 30, 2018 and Affidavit #1 of Annette Muttray, made January 29, 2018 should be struck in their entirety.
5. Komers #2 attaches a report dated November 25, 2013, prepared by Dr. Scott McNay (the “McNay Report”). Dr. Komers did not author the McNay Report, but rather deposes as follows: “I hereby adopt the McNay Report, subject to paragraph 4, as my expert evidence in this proceeding, and certify that I hold as my expert opinion the opinions, conclusions and recommendations made therein”.¹
6. Muttray #1 attaches a report dated March 2015, prepared by ERM Consultants Canada Ltd. (the “Crooked River Report”). Dr. Muttray did not author the Crooked River Report but rather deposes as follows: “Based upon [my review of the report] and my discussions with members of the ERM Project Team, I hereby adopt the Crooked River Report as my expert opinion, and without limiting the foregoing I concur with its approach, assumptions, limitations, conclusions and recommendations”.²

¹ Affidavit #2 of Petr Komers, made January 30, 2018, at para. 5.

² Affidavit #1 of Annette Muttray, made January 29, 2018, at para. 9.

7. Dr. Muttray further deposes that one of the authors of the Crooked River Report, Dr. Leslie Shelley, “declined the opportunity to be deposed regarding the Crooked River Report on the basis that Ecofish [her new employer] is engaged by BC Hydro on the Site C project”.³
8. The McNay Report and the Crooked River Report are inadmissible hearsay.⁴ Komers #2 and Muttray #1 thus fail the third *Mohan* criterion – absence of an exclusionary rule.
9. In addition, Rule 11-6(1)(e) requires that an expert’s report set out “the expert’s opinion respecting those issues [on which they have been asked to opine]”. This court has held that:

[A] document is not a written statement setting out the opinion of an expert unless it appears clearly from the face of that document that the opinions in it are those of the individual expert who prepared and signed the statement. Our rules make no provision for the entry in evidence of joint or corporate opinions. The opinion must be that of an individual expert and it must fall, of course, within the scope of her own expertise. The opinion cannot simply be a reporting of the opinions of others. The statement, to be admissible, must show clearly that this is the case.

[Emphasis added]⁵

10. Komers #2 and Muttray #1 both fall squarely within this prohibition.
11. Neither Komers #2 nor Muttray #1 set out the instructions provided to them,⁶ and both fail to set out the reasons for their opinions.⁷ Indeed, Drs. Komers and Muttray simply indicate that they have reviewed the reports exhibited to their affidavits and make the conclusory statement that they adopt them as their opinions. As such, Komers #2 and Muttray #1 fail the *Mohan* criterion of necessity.⁸
12. Even if Komers #2 or Muttray #1 satisfy the *Mohan* criteria (which is denied), they fail the second stage of the common law test for admissibility of expert evidence as the potential

³ Muttray #1 at para. 4.

⁴ *Halifax (County) v. Sackville Manor Ltd.* (1997), 160 NSR (2d) 156 (CA) at para. 10 (QL); see also *Fisher v. Atack*, [2004] O.J. No. 5002 (SCJ) at paras. 6-9 (QL).

⁵ *Heidebrecht v. Fraser-Burrard Hospital Society*, [1995] B.C.J. No. 2996 (SC) at para. 11 (QL) [*Heidebrecht*]; see also *Mazur v. Lucas*, 2010 BCCA 473 at para. 42.

⁶ Rule 11-6(1)(e); *Pinch v. Hofstee*, 2015 BCSC 1887 at para. 3; *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 at para. 181 [*Araya*].

⁷ Rule 11-6(1)(f); *R. v. J.-L.J.*, 2000 SCC 51 at paras. 56-59; see also *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 18 [*White Burgess*].

⁸ *R. v. J.-L.J.*, 2000 SCC 51 at paras. 56-59; see also *White Burgess*, above at para. 18.

risks of admitting them far outweigh any benefits.⁹ The Province would be unable to test the opinions contained within Komers #2 or Muttray #1 on critical issues such as the qualifications of the reports' authors or the assumptions, research, methodologies, or potential biases contained in the original reports.

13. As neither Komers #2 or Muttray #1 nor the reports they append meet the admissibility requirements at common law or under the Rules,¹⁰ those affidavits should be struck in their entirety.

B) Komers #1, Gutsell, and Thompson

14. Affidavit #1 of Petr Komers, made January 30, 2018 attaches a report entitled "Evaluation of Impacts and Mitigations for Site C Dam Compared to Alternative Energies" (the "Comparison Report"). Dr. Komers, Dr. Sheri Gutsell, and Dr. Megan Thompson each depose to having authored portions of the Comparison Report and adopt those sections as their expert evidence in this proceeding.¹¹ The Gutsell and Thompson Affidavits do not themselves append the Comparison Report but rather reference Komers #1.
15. The Province agrees with BC Hydro that the Comparison Report does not meet the *Mohan* criterion of necessity and does not comply with the common law requirements codified in Rules 11-6(1)(c) and (f).¹² This report is highly speculative, based on a hypothetical portfolio of wind energy projects to theoretically meet the Province's energy needs. The Comparison Report does not meet the *Mohan* criteria of relevance and necessity.
16. Komers #1, along with the Gutsell and Thompson Affidavits, should accordingly be struck in their entirety.

⁹ See *Heidebrecht*, above at para. 12.

¹⁰ *Araya*, above at para. 181.

¹¹ Komers #1 at paras. 4-5; Affidavit of Sheri Gutsell, made January 30, 2018 at paras. 4-5; Affidavit of Megan Thompson, made January 30, 2018 at paras. 4-5.

¹² *Araya*, above at para. 181.

C) Eliesen

17. Affidavit #1 of Marc Eliesen, made January 26, 2018, attaches as Exhibit “A” a report prepared by him entitled “Development of BC Hydro’s Site C: Project Management, Cost and Schedule” (the “Eliesen Report”).
18. The Province agrees with BC Hydro that the Eliesen Report does not satisfy the *Mohan* criteria of necessity or qualification (nor does the Province admit that Mr. Eliesen’s evidence is relevant). In particular, the opinions contained in the report are mostly personal argument and commentary, not based on scientific or technical opinion, and lacking the required assumptions and basis for the opinion. On that basis the report fails to meet the *Mohan* criteria or it should, in any event, be excluded in the exercise of the court’s gatekeeping function. Further, the Eliesen Affidavit does not comply with the common law requirements codified in Rule 11-6(1)(c) and (f).¹³
19. As the opinion evidence offered by Mr. Eliesen is inadmissible, it follows that the remainder of his affidavit is unnecessary and should be struck in its entirety.

D) Swain

20. The Province agrees with BC Hydro that the Swain Affidavit should be struck. The Province repeats and relies on its submissions in the BC Application.

Part 6: MATERIAL TO BE RELIED ON

1. Notice of Application of the Province, filed March 16, 2018.
2. Case Plan Order of Master Bouck made February 23, 2018.
3. Notice of Civil Claim filed January 15, 2018.
4. Notice of Application filed January 31, 2018.
5. Affidavit #1 of Annette Muttray, made January 29, 2018.
6. Affidavit #1 of Petr Komers, made January 30, 2018.
7. Affidavit #2 of Petr Komers, made January 30, 2018.
8. Affidavit #1 of Sheri Gutsell, made January 30, 2018.

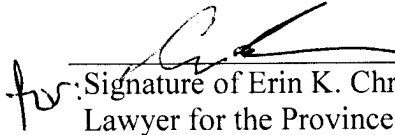
¹³ *Araya*, above at para. 181.

9. Affidavit #1 of Megan Thompson, made January 30, 2018.
10. Affidavit #1 of Marc Eliesen, made January 26, 2018.
11. Such further and other material as counsel may advise and the court may permit.

The Province estimates that this application will take one day.

- The Province has filed in this proceeding a document that contains the Province's address for service.
- The Province has not filed in this proceeding a document that contains the Province's address for service. The province's ADDRESS FOR SERVICE is:

Date: March 23, 2018



for: Signature of Erin K. Christie
Lawyer for the Province