



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

NOTICE OF APPLICATION

Name of applicant: British Columbia Hydro and Power Authority ("**BC Hydro**").

To: 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 (the "**Plaintiffs**" or "**West Moberly**");

And to: All other parties.

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 850 Burdett Avenue, Victoria on the assize list for the week of April 9, 2018 at 9:45 a.m. for the orders set out in Part 1 below.

Part 1 ORDERS SOUGHT

1. An order that the following documents relating to the expert reports filed by the Plaintiffs in support of their application for an interlocutory injunction (filed January 31, 2018, served February 2, 2018) listed on Schedule A to this Notice of Application (the "Reports" or "Report") be produced to the defendants within two days of the date of this order:

- (a) All retainer letters and instructing letters to the experts referred to in Schedule A (the "Expert" or "Experts");
- (b) a list of every document relied on by the Expert in forming his or her opinion;

- (c) all written statement or statements of facts on which the Experts' opinion is based;
- (d) all records of any independent observations made by the Expert in relation to the report; and
- (e) all data compiled by (or relied on by) the Expert in relation to the report.

2. Specifically with respect to the Report of Rachel Olson and Steve DeRoy, and without limiting the above, an order that the following documents are to be produced within two days of the date of this order:

- (a) all interview notes, recordings and transcripts of:
 - (i) the oral history interviews referred to in Section 1.2.1 (page 10);
 - (ii) the interviews with three West Moberly members undertaken from January 15-19, 2018, referred to in Section 1.2.2 (page 11)
 - (iii) all other Traditional Land Use interviews reviewed or undertaken for the Report, including but not limited to the 2011 interviews (see, e.g., page 17).

3. Specifically with respect to the Report of Bruce Muir and Lesley Shelley, attached to the affidavit of Annette Muttray, and without limiting the above, an order that the following documents are to be produced within two days of the date of this order:

- (a) interview notes,
- (b) transcripts,
- (c) recordings and other data

collected as part of the Traditional Knowledge interviews undertaken for the assessment (described at section 2.1.1 and used in section 3, and specifically referred to at page 29 as "Traditional knowledge data collected during interviews with participants from West Moberly").

4. With respect to paragraphs 2 and 3 above, an order that the identity of the interviewees be included in the documents produced or otherwise provided to the defendants.

5. An order that the remainder of the Expert's files concerning the Reports be produced to the defendants by May 9, 2018 (including, for example, correspondence with counsel, previous drafts of the Report, and documents reviewed but not relied on by the Expert).

6. Costs of this application in the cause.

Part 2 FACTUAL BASIS

1. BC Hydro is currently constructing the Site C Clean Energy Project ("Site C" or the "Project"), a hydroelectric dam and generating facility. BC Hydro received environmental assessment approval for the Project in October 2014, and commenced construction of the Project

in July 2015. A significant amount of money has been spent developing and building the Project already: *Prophet River First Nation v. British Columbia (Environment)*, 2015 BCSC 1682, affirmed 2017 BCCA 58, leave to appeal to SCC refused; *Prophet River First Nation v. Canada (Attorney General)*, 2015 FC 1030, affirmed 2017 FC 15, leave to appeal to SCC refused; *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355.

2. The Plaintiffs filed this action on January 15, 2018. The action seeks, among other things, a permanent injunction stopping construction, completion and operation of the Project.

3. On January 31, 2018, the Plaintiffs filed an application for an injunction seeking to halt construction of the Project until trial of the action. The Reports form part of the evidence the Plaintiffs have filed in support of their injunction application and rely on as purported expert evidence.

4. Under a case planning order made on February 23, 2018, the following dates (among others) have been set for the injunction application:

- (a) The defendants/respondents responding affidavits are due by April 30, 2018;
- (b) The plaintiffs/applicants reply affidavits, if any, are due by May 21, 2018;
- (c) Any cross-examination on affidavits is to be conducted between May 22 and June 18, 2018;
- (d) The hearing of the injunction is to commence on some date after July 23, 2018 but no later than September 10, 2018.

5. A number of interlocutory applications are scheduled to be heard over three days during the week of April 9, 2018, including an application by BC Hydro to strike five the Reports on the basis they are not admissible.

Correspondence requesting production of documents relating to the Reports

6. On February 23, 2018, BC Hydro's counsel wrote to the Plaintiffs' counsel requesting a copy of the contents of the experts' files relating to the preparation of the opinion set out in each of the Reports. In addition to making a general demand for the Expert Files, BC Hydro's counsel set out some specific requests (outlined at paragraphs 2, 3 and 4 of Part 1 of this Application).

7. On February 29, 2018, Plaintiffs' counsel wrote to BC Hydro's counsel advising that they did not agree BC Hydro was entitled to copies of the experts' files pursuant to Rule 11-6(8) and that exchange of files should occur after any issue of admissibility is addressed by the Court.

8. On March 2, 2018, BC Hydro's counsel wrote to Plaintiffs' counsel advising that given the short timelines in place under the case planning order, waiting until after a decision on admissibility was not in the interest of the parties, and asked Plaintiffs' counsel to inform them if they would be objecting to producing the documents so that BC Hydro could apply to the court for their production.

9. On March 13, 2018, BC Hydro's counsel wrote to Plaintiffs' counsel proposing a date of May 9, 2018 for mutual exchange of experts' files, but also seeking immediate production of the

specific documents set out in paragraphs 1, 2 and 3 of Part 1 of this Application as those documents are needed to prepare responsive reports.

10. To date, the Plaintiffs have not produced any of the documents requested.

Part 3 LEGAL BASIS

1. BC Hydro relies on Rule 11-6 of the *Supreme Court Civil Rules*, the common law and the inherent jurisdiction of the Court.

2. Under Rule 11-6(1), an expert report must set out:

(c) the instructions provided to the expert in relation to the proceeding. It is necessary to set out the actual instruction, a summary or paraphrasing of the instructions is insufficient *Pinch v. Hofstee*, 2015 BCSC 1887 para 3.

(f)(iii) a list of every document relied on by the expert in forming the opinion (if any).

3. Under Rule 11-6(8)(a), any party on whom an expert report is served is entitled to receive from the serving party:

(i) any written statement or statements of facts on which the expert's opinion is based;

(ii) a record of any independent observations made by the expert in relation to the report; and

(iii) any data compiled by the expert in relation to the report.

4. Under Rule 11-6(8)(b) if asked to do so by a party of record, the party who serves an expert report must make available to the requesting party for review and copying the contents of the expert's file relating to the preparation of the opinion set out in the expert's report. See Conseil scolaire francophone de la *Colombie-Britannique v. British Columbia (Education)*, 2014 BCSC 741; *Birkich v. Cantafio*, 2015 BCSC 2293.

5. The common-law rule, which continues to apply and is slightly broader than rule 11-6(8), is set out by the BC Supreme Court in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2007 BCSC 909 at para 7:

There is a well-recognized exception to litigation privilege that is relevant here. When an expert witness who is not a party is called to testify, or when his or her report is tendered in evidence, he or she may be required to produce all documents in his or her possession which are or may be relevant to matters of substance in his or her evidence or credibility, unless it would be unfair or inconsistent to require such production. This exception to litigation privilege is based upon implied waiver ...

6. Whether it is pursuant to the *Supreme Court Civil Rules* or the common law, expert opinion evidence cannot be received without the essential components of qualifications, education, experience, information and assumptions on which the opinion is based, the

instructions given, and the research. *Healey v. Chung*, 2015 BCCA 38, para 20; *Araya v. Newsun Resources Ltd.*, 2016 BCSC 1856, para 181.

7. With respect to interlocutory proceedings where expert evidence is relied on, a court should ensure that there is a fair notice to the other side of the factual underpinnings of any expert opinion. *L.S. v. G.S.*, 2015 BCSC 377 para 19.

8. Attaching an expert report to an affidavit does not relieve the party attempting to tender that evidence of the obligations to comply with the common law and the *Supreme Court Civil Rules* regarding expert reports. See for example: *Lewis v. Fraser-Fort George (Regional District)*, 2016 BCSC 1957 paras 30-35.

9. BC Hydro requires the following categories of documents now to understand and analyze the factual basis for the reports and the specific questions the reports are answering; and to respond to them:

- (a) the retainer and instructing letters;
- (b) a list of every document relied on by the Expert in forming his or her opinion;
- (c) statements of fact on which the experts rely;
- (d) independent observations of the expert;
- (e) data compiled by the expert.

10. More specifically, with respect to this final category (data compiled by the expert), the opinions set out in the Report of Olson/DeRoy (attached to the affidavit of Rachel Olson) and the Report of Muir/Shelley (attached to the affidavit of Annette Muttray), expressly rely on the results of interviews with West Moberly members, that, to date, have not been produced and, in most cases, the persons interviewed have not been identified.

11. Dr. Olson and Mr. DeRoy describe the land use interviews as the “main source of information” for two sections of their report (p. 7). The Report of Muir/Shelley states the following with respect to the interviews conducted: “Traditional knowledge data collected during interviews with participants from West Moberly (described in Section 2.1.1) will be used in the Exposure Assessment (Section 3) to help define the level of exposure through fish consumption.” (p. 29) and “TEK [Traditional Ecological Knowledge] of the West Moberly provided the basis for the assessment of risk to human health ...” (p. 72)

12. BC Hydro has been seeking these documents, to which it is entitled, for over a month and its time to prepare responsive evidence is running out. If the Plaintiffs do not produce the requested documents within the timeframe sought, it will likely be necessary to extend the deadline of April 30 to file responsive materials in the injunction application.

13. The remainder of the Expert Files are required before cross-examination of the Experts. BC Hydro has proposed May 9, 2018 as the date for the production of these remaining documents.

Part 4 MATERIAL TO BE RELIED ON

1. Affidavit #1 of Doreen Johnson, made March 28, 2018
2. The pleadings filed in this proceeding;
3. The Reports; and
4. Such further and other materials as counsel may advise and the Court may permit.

The applicants estimate that the application will take 1 hour.

- This matter is within the jurisdiction of a master
- This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days after service of this Notice of Application,

- (a) file an Application Response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) service on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed Application Response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: 28 March 2018



Signature of
 Applicant
 Lawyer for Applicants
 for: Mark Andrews, QC

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this Notice of Application

with the following variations and additional terms:

Date:

Signature of Judge Master

The Solicitors for the Defendant BC Hydro 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)

SCHEDULE A

1. Report of Beth Hrychuk, dated January 30, 2018, attached to an affidavit affirmed by Beth Hrychuk on January 30, 2018;
2. Report of Beth Hrychuk and Nikki McConville, dated March 1, 2017, attached to an affidavit affirmed by Beth Hrychuk on January 30, 2018;
3. Report of Marc Eliesen, dated January 25, 2018, attached to an affidavit affirmed by Marc Eliesen on January 26, 2018;
4. Report of Steve Graham dated March 15, 2017, attached to an affidavit affirmed/sworn by Steve Graham on January 29, 2018;
5. Report of Petr Kromers, Sheri Gutsell and Megan Thompson dated January 30, 2018, attached to an affidavit affirmed/sworn by Petr Komers on January 30, 2018.
6. Report of Steve McNay, dated November 25, 2013, attached to an affidavit affirmed/sworn by Petr Komers in January 30, 2018;
7. Report of Robert McCullough dated January 31, 2018, attached to an affidavit affirmed by Robert McCullough on January 31, 2018;
8. Report of Bruce Muir and Lesley Shelley, dated March 2015, attached to an affidavit affirmed by Annette Muttray on January 29, 2018;
9. Report of Rachel Olson and Steve DeRoy dated January 29, 2018, attached to an affidavit affirmed by Rachel Olson on January 30, 2018;
10. Report of Jim Pojar dated January 29, 2018, attached to an affidavit affirmed by Jim Pojar on January 30, 2018;
11. Report of David Schindler dated January 31, 2018, attached to an affidavit affirmed/sworn on January 31, 2018; and
12. Report of Harry Swain dated January 31, 2018, attached to an affidavit sworn by Harry Swain on January 31, 2018.

(collectively, the “**Reports**”)

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts