

SUPREME COURT  
OF BRITISH COLUMBIA  
VANCOUVER REGISTRY

190619

No. \_\_\_\_\_  
Vancouver Registry

JAN 18 2019

IN THE SUPREME COURT OF BRITISH COLUMBIA



Between

British Columbia Hydro and Power Authority,

Petitioner

and

Information and Privacy Commissioner for British Columbia  
and Bob Mackin,

Respondents

## PETITION TO THE COURT

### ON NOTICE TO:

Information and Privacy Commissioner for British Columbia  
4<sup>th</sup> Floor, 947 Fort Street  
Victoria, BC V8V 3K3

Bob Mackin  
bob.mackin@me.com

AND TO (notice as required by s. 16 of the *Judicial Review Procedure Act*):

Attorney General of British Columbia  
Legal Services Branch  
6th Floor, 1001 Douglas Street  
Victoria, BC V8V 1X4

**This proceeding is brought by the Petitioner for the relief set out in Part 1 below**

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the Petitioner
  - (i) 2 copies of the filed response to petition, and
  - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

**Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.**

**Time for response to petition**

A response to petition must be filed and served on the Petitioner,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

- (1) The address of the registry is: The Law Courts  
800 Smithe Street  
Vancouver, BC V6Z 2E1
- (2) The ADDRESS FOR SERVICE of the Petitioner is: BORDEN LADNER GERVAIS LLP  
1200 Waterfront Centre  
200 Burrard Street  
P.O. Box 48600  
Vancouver, British Columbia  
V7X 1T2  
Attention: Robert J.C. Deane  
Michelle T. Maniago

Fax number address for service (if any) of the Petitioner: None

- E-mail address for service (if any) of the Petitioner: None
- (3) The name and office address of the Petitioner's lawyer is: BORDEN LADNER GERVAIS LLP  
1200 Waterfront Centre  
200 Burrard Street  
P.O. Box 48600  
Vancouver, British Columbia  
V7X 1T2  
Attention: Robert J.C. Deane  
Michelle T. Maniago

### CLAIM OF THE PETITIONER

#### PART 1: ORDERS SOUGHT

1. The Petitioner, British Columbia Hydro and Power Authority ("**BC Hydro**"), seeks an Order:
  - (a) setting aside the 11 December 2018 order of the delegate of the Information and Privacy Commissioner ("**Order F18-51**"), requiring BC Hydro to release the names of certain of BC Hydro's employees, pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("**FOIPPA**"), and remitting that matter to the Information and Privacy Commissioner for further consideration in light of this Court's reasons;
  - (b) costs; and
  - (c) such further and other relief as counsel may advise and as this Honourable Court may permit.

**PART 2: FACTUAL BASIS**

2. This petition concerns BC Hydro's withholding of certain employees' names in response to an access request made pursuant to *FOIPPA*. In Order F18-51, a delegate of the Information and Privacy Commissioner held that ss. 19 and 22 of *FOIPPA* did not apply to the employees' names and required that the names be released. BC Hydro submits that the delegate erred in doing so, including by applying the incorrect legal tests and misapprehending the record.

***The Parties***

3. BC Hydro is a provincial Crown corporation continued under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212, and is a "public body" as defined in Schedule 1 of *FOIPPA*.

4. The Respondent, the Information and Privacy Commissioner for British Columbia (the "**Commissioner**"), is appointed by the Lieutenant Governor under *FOIPPA* and has certain decision making powers regarding access requests for documents held by public bodies under *FOIPPA*.

5. Bob Mackin (the "**Applicant**") is an individual who has made five access requests to BC Hydro under *FOIPPA*. These requests related to BC Hydro's Site C Clean Energy Project ("**Site C**"), which is anticipated to be the third dam and hydroelectric generating station on the Peace River in northeastern British Columbia.

***Statutory Framework***

6. Access requests for documents held by public bodies are governed by *FOIPPA*.

7. Under *FOIPPA*, requested documents may be withheld from production to an applicant in specified circumstances which are either discretionary (on the part of the public body) or are mandatory.

8. Section 19(1)(a) authorizes a public body to refuse to disclose information to an applicant if the disclosure could reasonably be expected to "threaten anyone else's safety or mental or physical health".

9. The burden of proof is on the public body to satisfy the elements of s. 19.

10. Section 22(1) provides that the head of a public body “must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy”.

11. In determining whether the disclosure falls within s. 22(1), the head of the public body must consider all the relevant circumstances set out in s. 22(2), which provides a non-exhaustive list of circumstances that may be considered. If the disclosure falls within s. 22(1), it must be withheld from production to an applicant unless one of the circumstances listed in s. 22(4) applies.

12. The burden of proof is on the applicant to prove that the disclosure of a third party’s personal information would not be an unreasonable invasion of the third party’s personal privacy: *FOIPPA*, s. 57(2).

13. If the public body and the applicant cannot agree regarding the disclosure of information under *FOIPPA*, a review by the Commissioner may be sought: *FOIPPA*, s. 52. Where the matter is not resolved, the Commissioner may conduct an inquiry: *FOIPPA*, s. 56. In practice, as here, the Commissioner delegates the review, inquiry, and decision to a staff member in his office, known as an “adjudicator”.

### ***Applicant’s Access Requests***

14. The Applicant has made five requests for various documents relating to Site C, including for board materials, correspondence, and change order logs.

15. The Applicant has also sought the names of all personnel involved in the Site C project (OIPC File No. F17-71525), but that request has not yet been referred to inquiry and was not the subject of Order F18-51. Still, it will be affected by the outcome of this Petition, given the reasoning employed by the Commissioner’s delegate.

16. This Petition directly concerns only those aspects of the board materials which disclose the names of BC Hydro employees involved in adjudicating procurement proposals which have not

already been disclosed to the Applicant (OIPC File No. F17-7518), and which proceeded to inquiry before one of the Commissioner's delegates.<sup>1</sup>

*Inquiry before the Commissioner's Delegate*

17. The inquiry was conducted in writing, with BC Hydro filing initial submissions and evidence in support, the Applicant filing a response submission and evidence in support, and BC Hydro filing reply submissions.

18. BC Hydro relied upon ss. 19 and 22 of *FOIPPA* in support of its decision to withhold the names of certain BC Hydro employees which were contained in the board materials.

19. In respect of s. 19, BC Hydro submitted that, in the context of the violence and threats which already surround the Site C project, its concerns for the safety and mental health of its employees engaged with the Site C project were reasonably held and reasonably connected to the disclosure of those employees' names.

Affidavit #1 of Margaret MacAulay, Exhibit "C" at 64–68 (Affidavit #1 of Doug Powell at paras. 8–22)

20. BC Hydro provided evidence that Site C has been the focus of contentious public debate. While that has often included genuinely constructive, reasoned, and peaceful protest and complaints, there have also been alarming displays of physical and threatened violence, including during the following events, which were in evidence before the Commissioner's delegate:

- (a) On 16 July 2015, BC Hydro held a public information meeting at the Stonebridge Hotel in Dawson Creek. Inside the meeting area itself, a protestor, Terry Hadland, terrified BC Hydro staff by ripping down display maps, overturning two tables, and screaming obscenities at staff. According to media reports, a 9-1-1 call was placed by a witness for police assistance. When police arrived outside the Hotel, they encountered a masked man (wearing a Guy Fawkes mask) who had two knives on his person, one of which was an illegal switchblade. Police incorrectly assumed

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<sup>1</sup> Redacted copies of the records in dispute are attached as Exhibit "G" to the Affidavit #1 of Margaret MacAulay, made on 17 January 2019. BC Hydro reserves its right to seek to file unredacted copies of the records in dispute, under seal, should that be necessary or of assistance to the Court.

that this man, James McIntyre, had been the source of the disturbance inside the Site C meeting. However, according to witnesses, Mr. McIntyre was “waving” the switchblade, “threatening”, “lunging at”, “jabbing at”, or “trying to stab” the police. The police tried using pepper spray, but it was ineffective. A single shot was fired, which killed Mr. McIntyre.

Affidavit #1 of Margaret MacAulay, Exhibit “C” at 64, 81, 84, 87  
(Affidavit #1 of Doug Powell at para. 9, Exhibit “C” at 13, 16, 19)

- (b) In 2016, the Independent Investigations Office (“ILO”) cleared the RCMP office of any wrong-doing in the fatal shooting of Mr. McIntyre, finding that the police acted appropriately in the face of a “real and imminent” threat. The shooting received significant media attention, as did the resulting ILO report in 2016. Friends of Mr. McIntyre were interviewed by the media, and one stated that Mr. McIntyre was “worried about the Peace country being destroyed by another dirty project”, referring to Site C. ILO investigators also reviewed a Twitter account, believed to belong to Mr. McIntyre, which contained posts suggesting that the user planned to attend and disrupt the Site C meeting on 16 July 2015. The online “hactivist” group Anonymous vowed to avenge the shooting and promised to make public information about the officers involved.

Affidavit #1 of Margaret MacAulay, Exhibit “C” at 79–81, 84  
(Affidavit #1 of Doug Powell, Exhibit “C” at 11–13, 16)

- (c) The 23 July 2015 rally against Site C, set to take place outside the BC Hydro corporate office in downtown Vancouver, was cancelled over fears the event could become violent.

Affidavit #1 of Margaret MacAulay, Exhibit “C” at 70 (Affidavit #1 of Doug Powell, Exhibit “C” at 2)

- (d) In November 2015, BC Hydro’s Site C employees were subjected to direct physical threats when a “speedboat” dangerously encircled a working excavator, attempting to splash the contractor’s employee (located inside the excavator) and disrupt his work. The occupants of the boat were aggressive and intimidating, shouting

obscenities at the contractor's employees and at BC Hydro's employees on the shore.

Affidavit #1 of Margaret MacAulay, Exhibit "C" at 65 (Affidavit #1 of Doug Powell at para. 13(a))

- (e) At public meetings, on multiple occasions, members of the public have made veiled threats of future violence, using such phrases as "watch your back" and "blow them up". Likewise, BC Hydro's employees have been told that if they enter private properties, the landowners will be there with "guns waiting". The general demeanour of many of those who were opposed to Site C at that time was one of intimidation, anger, and aggression.

Affidavit #1 of Margaret MacAulay, Exhibit "C" at 65 (Affidavit #1 of Doug Powell at para. 13(b))

- (f) Some protesters have physically demonstrated their own anger about Site C, menacingly waving their fists at public meetings, blocking vehicles and construction equipment, and yelling at BC Hydro's employees.

Affidavit #1 of Margaret MacAulay, Exhibit "C" at 65 (Affidavit #1 of Doug Powell at para. 13(c))

- (g) In October 2017, BC Hydro's employees discovered that one of the stop signs located within the construction zone at Site C, which was not publicly accessible, had been shot at, and there were two bullet holes through the sign. Based on the size and shape of the holes, and the location of the sign, BC Hydro determined that the shots came from across the river and were shot by someone using a high-powered weapon. This sign was located in a very active work area, and employees were absent only because there was a break in construction activity at the time. This incident was very upsetting to BC Hydro's employees, who perceived this as a "warning shot".

Affidavit #1 of Margaret MacAulay, Exhibit "C" at 66 (Affidavit #1 of Doug Powell at para. 13(d))



- (h) Around the same time in 2017, BC Hydro's employees discovered that another sign, posted along the river shoreline to indicate to boaters that they were entering an active construction zone, was also shot at several times.

Affidavit #1 of Margaret MacAulay, Exhibit "C" at 66 (Affidavit #1 of Doug Powell at para. 13(e))

21. BC Hydro also provided evidence of the harmful impact of these events on its employees, as well as evidence of the steps BC Hydro has taken to address those effects. In particular:

- (a) The verbal abuse, violence, and threats to date, and the ongoing discord associated with the Project, is emotionally unnerving to some of BC Hydro's Site C employees. Some Site C employees work in a very emotionally-charged environment which can be very menacing and threatening from a worker's perspective. The tone and tenor of the abusive verbal threats during meetings and at the construction site have left some employees feeling unsafe. Overall, these comments and actions, viewed as a whole, have made some of BC Hydro's Site C employees feel vulnerable, apprehensive, and threatened.

Affidavit #1 of Margaret MacAulay, Exhibit "C" at 66–67 (Affidavit #1 of Doug Powell at paras. 14, 16–17)

- (b) BC Hydro has taken unprecedented steps to protect its employees, including by not publishing the Site C office information on employees' business cards. BC Hydro has refused previously to release the names of Site C employees who are not part of the "public face" of Site C (*i.e.*, those who comment in the media about Site C, those who present at public meetings about Site C, and similar public-focused, or external-facing, roles). As well, BC Hydro increased security measures throughout its Site C operations, from private meetings to job fairs (as well as to the construction site itself). Basic personal safety training is offered to all Site C employees, as well as escalated training for physical personal self-defence, which is hopefully not used but is provided to best train BC Hydro's employees.

Affidavit #1 of Margaret MacAulay, Exhibit "C" at 67 (Affidavit #1 of Doug Powell at paras. 19)

- (c) BC Hydro is concerned that the release of individual names will put its Site C employees at risk for targeted violence by extreme opponents of Site C, and that it will increase the risk of mental distress of the employees whose names will become publicly associated with the project, where previously they had not been. BC Hydro is concerned about the dissemination of these employees' names on social media and the reasonable likelihood of "passionate" advocacy against the project turning dangerous, ugly and targeted towards identifiable Site C employees. Likewise, BC Hydro is concerned that the dissemination of individual names will increase the risk to those employees' own mental well-being.

Affidavit #1 of Margaret MacAulay, Exhibit "C" at 67 (Affidavit #1 of Doug Powell at paras. 20–21)

22. BC Hydro also relied upon s. 22 of *FOIPPA* in support of support of its decision not to release to the Applicant the names of BC Hydro employees which were contained in the board materials, on the basis that the disclosure of such personal information would constitute an unreasonable invasion of those employees' personal privacy. BC Hydro addressed specifically the Applicant's attempt to discharge his burden using s. 22(4)(f), the only subsection upon which he specifically relied.

***Order F18-51***

23. In a decision indexed as 2018 BCIPC 55, [2018] BCIPCD No. 55, the Commissioner's delegate held, among other things, that BC Hydro could not rely upon ss. 19 or 22 of *FOIPPA* to withhold the names of the BC Hydro employees appearing in the board materials. She ordered BC Hydro to disclose the employees' names to the Applicant.

24. In respect of s. 19, the Commissioner's delegate held there was not a sufficient connection between the disclosure of the employees' names and a threat to those employees' safety, or mental or physical health to satisfy the burden on a public body under s. 19(1)(a):

76 There is no suggestion that particular employees have been targeted because of their association with Site C. The incidents described by the Security Manager were directed generally at the Site C project. There is nothing to suggest that the names and

identities of the employees present at the time were relevant to the incidents. Rather, it was the employees' physical proximity to the project which caused them to be in harms-way.

77 In addition, the incidents occurred at the work site and at a public forum in Dawson Creek on Site C. It is understandable that those locations might be lightning rods for opponents of the project as those are the locations directly impacted by the dam. No evidence was provided, however, that anything remotely similar has occurred at BC Hydro's offices where the procurement assessment presumably takes place and records of the type at issue here are dealt with.

78 Further, the employees whose names are withheld were responsible for procurement of one aspect of the project and they are not near the top of BC Hydro's corporate structure. It seems more likely that if anyone were to be the target of animosity related to Site C, it would be the board directors or senior management, yet BC Hydro has not kept their names from the public and there is no evidence that they have been harassed.

79 Lastly, I have no evidence from the employees whose names are in issue about how disclosure might threaten their mental health, which might support the application of s. 19(1)(a).

25. The Commissioner's delegate acknowledged that there was "no doubt that frontline workers have concern for their safety" but concluded – inconsistently, and not based upon anything in the record – that disclosing the names of the employees involved in the Site C procurement process could not reasonably be expected to threaten those employees' safety, or physical or mental health under s. 19(1)(a): Order F18-51, at para. 80.

26. In respect of s. 22(1), the Commissioner's delegate held that the employees' names were clearly "personal information" within the meaning of *FOIPPA*: Order F18-51, at para. 83. She then considered whether any of the circumstances set out in s. 22(4) applied such that the information should nevertheless be disclosed to the Applicant: Order F18-51, at para. 85. The Commissioner's delegate held that s. 22(4)(e), which provides that the disclosure of personal information is not an unreasonable invasion of personal privacy if "the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff", applied to the employees' names: Order F18-51, at

paras. 86-87. Accordingly, she ordered that BC Hydro could not rely upon s. 22(1) of *FOIPPA*, and that the names must be disclosed to the Applicant: Order F18-51, at para. 92.

**PART 3: LEGAL BASIS**

27. The decision of the Commissioner's delegate that BC Hydro is required by *FOIPPA* to disclose to the Applicant the employees' names, set out in Order F18-51, should be set aside and the matter remitted to the Commissioner for reconsideration, for the following reasons:

- (a) the Commissioner's delegate erred in law by construing s. 19 of *FOIPPA* as requiring the apprehended harms to be virtual certainties, or indeed have already occurred, before that discretion may be relied upon by a public body to refuse disclosure of employees' names;
- (b) the Commissioner's delegate erred in law by construing the employees' names to, themselves, be information "about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff", such that their disclosure is deemed not to be an unreasonable invasion of the employees' privacy pursuant to s. 22(4)(e) of *FOIPPA*; and
- (c) the Commissioner's delegate misapprehended the evidence when applying s. 19, including by applying irrelevant factors (not found in the evidence) and ignoring relevant evidence.

28. BC Hydro pleads and relies upon the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, and *FOIPPA*.

***Standard of Review***

29. There are only two standards of judicial review at common law: correctness and reasonableness. The *Administrative Tribunals Act*, S.B.C. 2004, c. 45, does not apply to *FOIPPA* or to judicial reviews of decisions of the Commissioner or, as in this case, one of his delegates.

*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 34

30. The standard of review of the Commissioner’s interpretation of *FOIPPA* (the Commissioner’s “home statute”) is presumptively reasonableness, acknowledging that in some circumstances the range of reasonable outcomes “will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it”.

*Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61 at paras. 34, 39

*United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 v. British Columbia (Information and Privacy Commissioner)*, 2018 BCSC 1080 at paras. 20–22

*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 38

#### ***Unreasonable Interpretation of s. 19***

31. Under s. 19 of *FOIPPA*, a head of a public body may refuse to disclose to an applicant information if the disclosure of that information could “reasonably be expected to threaten anyone else’s safety or mental or physical health”. A public body need not prove that the harm will probably occur as a result of the disclosure; however, the mere possibility of the harm occurring is not sufficient to engage s. 19. Instead, the courts have required public bodies to meet a “middle ground”, namely to establish a “reasonable expectation of probable harm” as a result of the disclosure. The Supreme Court of Canada has explained this standard as follows:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”: *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.

*Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3

32. Although the Commissioner's delegate referred to these judgments in her decision, it is clear from her reasons that, in assessing whether the "likelihood of threat ... [is] 'well beyond' or 'considerably above' a mere possibility", she effectively interpreted s. 19 to require that the apprehended harms rise to the level of being a near certainty, or even to require that the harms had actually already occurred, before the subsection could be relied upon by BC Hydro.

Order F18-51 at paras. 63, 75-80

*Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54

33. The delegate's adoption and application of this higher threshold is apparent from her reasons on the point (underlining emphasis added):

76 There is no suggestion that particular employees have been targeted because of their association with Site C. The incidents described by the Security Manager were directed generally at the Site C project. There is nothing to suggest that the names and identities of the employees present at the time were relevant to the incidents. Rather, it was the employees' physical proximity to the project which caused them to be in harms-way.

77 In addition, the incidents occurred at the work site and at a public forum in Dawson Creek on Site C. It is understandable that those locations might be lightning rods for opponents of the project as those are the locations directly impacted by the dam. No evidence was provided, however, that anything remotely similar has occurred at BC Hydro's offices where the procurement assessment presumably takes place and records of the type at issue here are dealt with.

78 Further, the employees whose names are withheld were responsible for procurement of one aspect of the project and they are not near the top of BC Hydro's corporate structure. It seems more likely that if anyone were to be the target of animosity related to Site C, it would be the board directors or senior management, yet BC Hydro has not kept their names from the public and there is no evidence that they have been harassed.

...

80 I do not mean to diminish the seriousness of the incidents which have occurred. I have no doubt that frontline workers have concern for their safety. However, I am not satisfied that disclosing the names of the employees involved in the administration processes related to the RFQ, could reasonably be expected to threaten their safety, or physical or mental health under s. 19(1)(a).

34. The Commissioner's delegate committed precisely the error identified by the Supreme Court of Canada in *Merck Frost*: she interpreted the "could reasonably be expected" test as requiring evidence that the apprehended harms had actually occurred, or that there is a near certainty that the harms will occur.

35. Absent such evidence which, as the Supreme Court of Canada noted, is simply not available in the real world or as a matter of human experience, BC Hydro was not able to rely upon s. 19 of *FOIPPA* to withhold production of the Site C employees' names at issue. Presumably, the situation would be different if and when the harms actually materialize and employees are injured, or worse – but that cavalier approach surely cannot have been the Legislature's policy in enacting s. 19 of *FOIPPA*.

36. The decision of the Commissioner's delegate regarding s. 19 of *FOIPPA* is accordingly unreasonable, and Order F18-51 should be remitted to the Commissioner on this basis alone.

#### ***Unreasonable Interpretation of s. 22***

37. In respect of s. 22, which mandates that a public body must withhold the information if the section applies (and an exception does not apply), the Commissioner applied an exception contained in s. 22(4)(e) that is plainly incapable of ever including employee names. In particular, the Commissioner's delegate held that employee's names are, themselves, "information... about... the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff": Order F18-51, at para. 86.

38. Here, the range of reasonable interpretive outcomes is necessarily limited — the exception could never admit of this interpretation as, on its face, a personal name is incapable of being "information... about... a position, function, or remuneration" within the meaning of s. 22(4)(e).

Consequently, the interpretation adopted by the Commissioner's delegate regarding s. 22(4)(e) is unreasonable.

39. With the erroneous interpretation of the exception removed from her reasoning, the Commissioner's delegate's analysis of s. 22 is incomplete and cannot withstand scrutiny; the issue must be remitted to the Commissioner.

### ***Misapprehension of the Record***

40. Where a tribunal misapprehends the evidence or fails to take into account relevant and important evidence, this constitutes an error of law. A misapprehension or misstatement of key evidence will render a decision unreasonable, and require the Court, absent exceptional circumstances, to remit the matter to the tribunal for reconsideration.

*Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 41

*Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49, at paras. 23–24, 48, 51

*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 72

41. The Commissioner's delegate misapprehended key evidence in three respects, each of which renders unreasonable her decision regarding s. 19 of *FOIPPA*:

- (a) First, her holding that there was “no suggestion that particular employees have been targeted because of their association with Site C” is wrong on its face, and is at odds with the evidentiary record. The uncontradicted evidence was that individual Site C employees had been the target of threats precisely because of their association with Site C, including: Site C employees being “subjected to direct physical threats when a “speedboat” dangerously encircled a working excavator, attempting to splash the contractor’s employee ... shouting obscenities at the contractor’s employees and at BC Hydro employees on the land”; “on multiple occasions, members of the public have made veiled threats of future violence, using such phrases as ‘watch your back’ and ‘blow them up’”; and “BC Hydro employees have



been told that if they enter private properties, the landowners will be there with ‘guns waiting’”. These employees’ association with Site C was obviously the only reason to target them. The Commissioner’s delegate’s conclusion that there was “no suggestion” of such targeting is inconsistent with the evidentiary record, and it is therefore unreasonable.

Affidavit #1 of Margaret MacAulay, Exhibit “C” at 65 (Affidavit #1 of Doug Powell at para. 13)

- (b) Second, the conclusions of the Commissioner’s delegate that the violence and other concerns that BC Hydro raised were “directed generally at the Site C project”, and that physical proximity to the project was the only reason why employees might be at risk, misapprehends the record. The evidence was that employees have been personally threatened. Threats and harm directed at the project is harm directed at the employees working on it – who have been, and continue to be, obvious targets. As a matter of evidence, contrary to the delegate’s misapprehensions, there was proof that the threats were not limited to the project site itself. For example, there was evidence that “[a]t public meetings, on multiple occasions, members of the public have made veiled threats of future violence”. These threats were not directed to the project itself.

Affidavit #1 of Margaret MacAulay, Exhibit “C” at 65 (Affidavit #1 of Doug Powell at para. 13)

- (c) Third, the conclusion of the Commissioner’s delegate that she could not discern how disclosure might affect the employees’ mental health also reflects a misapprehension of the record and the legal test. As noted, the question is not whether the evidence shows that the employees would in fact suffer harm, but rather whether it shows they could reasonably be expected to suffer harm. Proof of this point does not require an employee to testify that threats of violence would negatively impact her or him — evidence of a threat of physical harm is probative of a corresponding negative impact on mental health as a matter of logic and human experience. Nor has the Commissioner required strict proof of a risk of mental harm in the past, in particular where disclosure is sought in circumstances involving

politically and emotionally charged social issues. The Commissioner's delegate was looking for something in the record that is not required to be there and, as a practical matter, could never be there.

*R v. White*, 2011 SCC 13 at para. 36

OIPC Order No. 7-1994 at 4-6

OIPC Order No. 80-1996 at 4, 6

42. The foregoing errors, both individually and cumulatively, justify setting aside, in part, Order F18-51, and remitting the matter to the Commissioner.

**PART 4: MATERIAL TO BE RELIED UPON**

43. Affidavit #1 of Margaret MacAulay, made on 17 January 2019.

44. Such further materials as counsel may advise, and this Honourable Court may permit.

BC Hydro estimates that the hearing of the petition will take 1 day.

Date: 18 January 2019



Signature of Robert J.C. Deane

Petitioners  lawyer for Petitioners

British Columbia Hydro and Power Authority

***To be completed by the court only:***

Order made

in the terms requested in paragraphs \_\_\_\_\_  
of Part 1 of this petition

with the following variations and additional terms:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Date: \_\_\_\_\_

Signature of  Judge  Master

No. \_\_\_\_\_  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Between

British Columbia Hydro and Power  
Authority,

Petitioner

and

Information and Privacy Commissioner  
for British Columbia and Bob Mackin

Respondents

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**PETITION TO THE COURT**

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