



Commission of Inquiry Respecting the Muskrat Falls Project

STANDING APPLICATION FOR THE GRAND RIVERKEEPER LABRADOR AND LABRADOR LAND PROTECTORS FOR THE MUSKRAT FALLS INQUIRY

DECISION

APRIL 16, 2018

LEBLANC, J.:

INTRODUCTION

[1] The Grand Riverkeeper Labrador (“Riverkeeper”) and Labrador Land Protectors (“Land Protectors”) have jointly applied for full standing as a party before the Commission of Inquiry Respecting the Muskrat Falls Project. They also jointly request that a recommendation be made to Government for funding for legal counsel and for travel. They assume that the Commission will fund the costs of any expert witnesses that they may wish to call.

[2] Both groups are primarily composed of residents of Labrador. The Riverkeeper group was incorporated as a non-profit company that has since been dissolved but currently they advise that they are taking steps to renew their incorporation. Their Mission Statement provides that the primary purpose of the organization is to preserve and protect the water quality and ecological integrity of the Grand (Churchill) River and its estuaries for present and future users. They do this through public awareness activities, monitoring intervention and habitat restoration on the River. No information has been provided about the number of members for this group but it is stated, like the Land Protectors, that its members live in the watershed of the River, including flood zones identified by Nalcor in

Environmental Impact Statement Flood Maps done for the Muskrat Falls Project. One such area is the community of Mud Lake which experienced flooding last spring. The cause of the flooding is disputed by both the Riverkeeper and Land Protectors group as they do not agree with the position of others that the flood was the result of natural causes. They believe that the flooding resulted from the construction of the Muskrat Falls Project.

[3] The Land Protectors are a voluntary association formed in 2016 consisting of persons resident in Labrador who are both Indigenous and non-Indigenous people. At present, the Land Protectors are in the process of incorporating. This group states that they have brought public attention to risks to human life as a result of the construction and future operation of the Muskrat Falls Project, with specific concerns being methylmercury contamination and the stability of the North Spur, a part of the infrastructure of the plant upstream. Their stated goals are to ensure progress and accountability as regards an agreement signed in October 2016 on methylmercury by Labrador Indigenous leaders and the Government of Newfoundland and Labrador, to initiate an independent review of the North Spur, to ensure that this Commission of Inquiry includes a forensic audit of Nalcor and that it pays more attention to environmental, social and Indigenous factors notwithstanding their recognition that the Commission's Terms of Reference are narrow.

[4] The Riverkeeper state that they have been funded and have been actively involved in the environmental assessment for the Muskrat Falls Project including making presentations to the Joint Review Panel as well as being a participant in the Public Utilities Board review of the Project.

[5] Both co-applicants have called for an independent inquiry into Muskrat Falls Project as well as the North Spur stabilization issue. They also have met with Government officials, including the Premier, concerning issues related to the Project such as methylmercury contamination and the stability of the North Spur. Symposiums have also been organized and both groups have participated in these in Labrador.

[6] As can be readily seen from the application of the co-applicants, both have a primary focus and interest on the environmental impacts from the construction of the Muskrat Falls Project on the Grand (Churchill) River. They also express an interest in ensuring that any social impacts of the Project are minimized.

[7] Applications for standing and funding are provided for in section 5 of the *Public Inquiries Act, 2006*, S.N.L. 2006, c.P-38.1, the relevant provisions of which state as follows:

5. (1) A commission shall give those persons who believe they have an interest in the subject of the inquiry an opportunity to apply to participate.
- (2) A commission shall determine whether a person may participate in an inquiry, and how he or she may participate, after considering
 - (a) whether the person's interests may be adversely affected by the findings of the commission;
 - (b) whether the person's participation would further the conduct of the inquiry; and
 - (c) whether the person's participation would contribute to the openness and fairness of the inquiry.
- ...
- (5) A commission may recommend that the government of the province provide funding for counsel and other expenses of a person who is permitted to participate in an inquiry.
- (6) Where a commission makes a recommendation under subsection (5), the minister shall consider the recommendation and advise the person concerned of the decision of the government and the level of funding to be provided, if any.

[8] On standing applications, Commissions of Inquiry are required to allow persons who believe they have an interest in the subject matter of the Inquiry to apply to participate. In considering a participation request, whether the person's interests may be adversely affected by the Commission's findings, whether the

person's participation would further the work of the Inquiry and whether the person's participation would contribute to the openness and fairness of the Inquiry, must be in focus.

[9] In considering these criteria, it is obvious that I must look to the subject matter of this Inquiry. As well, the fact that an applicant for standing might be a witness or that they have a genuine concern or even have expertise on the subject matter of the Inquiry does not satisfy the test for standing in my view.

[10] The subject matter for this Inquiry is as set out in the Order in Council establishing this Commission of Inquiry. After requesting and accepting submissions from the public on how that Order in Council should be interpreted, I prepared an interpretation on the subject matter or mandate for this Inquiry. In that decision dated March 14, 2018, after reviewing sections 4, 5 and 6 of the Order in Council as well as the law regarding interpretation of legal terms, I concluded that this Inquiry would investigate four matters:

1. the considerations of Nalcor in determining to recommend government sanction of the Muskrat Falls Project and whether these considerations were appropriately determined by Nalcor;
2. the significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction to the time of the Inquiry, together with reliable estimates of the costs to the conclusion of the Project;
3. whether the decision to exempt the Muskrat Falls Project from oversight by the Board of Commissioners of the Public Utilities (PUB) was justified and reasonable, as well as looking at the effect, if any, on the Project development costs and operations as a result, and
4. whether the government of this Province was fully informed and made aware of the risks and anticipated problems with the Muskrat Falls Project so as to enable it to have accurate and sufficient information to appropriately decide to sanction the Project and, thereafter, whether the government exercised appropriate oversight of the Project's risks, governance arrangements and decision-making processes associated with the Project.

RB

[11] At paragraph 29 of my interpretation decision, I also concluded that the Commission's work and mandate is primarily to be focused on the business case advanced by Nalcor and accepted by Government for the need, financial viability, costs and benefits of the Muskrat Falls Project. As well, the Project's exemption from full PUB scrutiny and the oversight of the Project's construction by Nalcor and the Government form part of the subject matter of the Inquiry.

[12] This business case focus was expanded to some degree by me as a result of my consideration of section 5(a) of the Order in Council which spoke about considering participation in the Inquiry by the Indigenous people whose rights may be negatively impacted by the Project. In that regard, I agreed that the Commission would permit the participation by the appropriate Indigenous groups on four matters, these being the consultations that took place with the established leadership of the Indigenous people, assessments and reports done as regards their concerns, the appropriateness and reasonableness of Nalcor and the Government's consideration of those assessments and reports and finally, the appropriateness of mitigation measures taken to address reasonably potential adverse effects on Indigenous people who had asserted or settled claims or treaty rights.

[13] There is no reference in the Order in Council establishing this Commission of Inquiry to deal specifically with environmental matters as they relate to this Project. Notwithstanding this, I went on to interpret the Commission's mandate to include a consideration of any environmental analyses, risk assessments and the like for this Project on the basis that such would normally form part of any proposal for the sanction of a project like Muskrat Falls. I described the extent of the Commission's work and investigation as regards environmental matters at paragraphs 54 to 56 of my Interpretation. I will set that out in full as it is important that the co-applicants understand the extent to which this Commission will be considering environmental matters.

54. I will also investigate what analyses, risk assessments, etc., were done as regards environmental concerns and whether these were appropriate and reasonable in the circumstances based upon accepted industry standards and the knowledge that the parties had at the various times when the analyses or risk assessments were completed. Included in this will be a review of the measures taken, if any, to address any legitimate environmental concerns. I will not, however, assess the correctness of the positions taken by the

various parties. As well, I am satisfied that the Terms of Reference do not permit me to conduct any further environmental assessment and nor does the time I have to conclude this Inquiry permit this.

55. Some submissions suggest that I have the authority, or should exercise my authority, to order the shutdown of the Project based upon environmental concerns. I have no such right or authority based upon the terms set out in the Order in Council.
56. Also raised in one of the submissions is Nalcor's adherence to environmental permits. In my view, this is not a matter for consideration by the Commission pursuant to the Order in Council. Nalcor's adherence to environmental permits is only relevant if failure to comply with those permits contributed to any escalation of construction costs or delay. As a result, the general topic of adherence to environmental permits is not a matter that I find is relevant to the Terms of Reference.

[14] The request of the co-applicants for standing here must be measured against the mandate or the subject matter of this Commission of Inquiry. It seems obvious to me from the application filed as well as the oral argument made before me on April 6, 2018 that the expectations of these two groups as to what the Inquiry can deal with, and the extent to which it will deal with, environmental concerns are not consistent with the mandate or the Terms of Reference in place.

[15] I can say clearly to the co-applicants that while the Commission will investigate and report on what analyses, risk assessments and mitigating actions were taken by Nalcor and the Government as regards environmental matters for the Muskrat Falls Project and assess whether these were reasonable and appropriate based upon accepted industry standards for a project like this, I have no mandate to assess the correctness of the positions taken as regards environmental matters by the various parties involved, including Nalcor, the Government and the co-applicants. I do not have authority here to request any form of independent assessment as regards methylmercury contamination or the issue of the stability of the North Spur as seems to be the desire of these two groups. What this Commission will do is that it will consider what analyses and risk assessments were done and what Nalcor and the Government did to respond to these in order to assess the reasonableness of the actions taken by them.

[16] I recognize that these co-applicants represent the interests of some of the residents living downstream from the main construction for this Project and who are fearful of the possibility of flooding of their homes and, as well, contamination of the river system. Both Ms. Roberta Benefiel Frampton and Ms. Marjorie Flowers spoke well of these concerns when they appeared before me on April 6, 2018. I wish to make it clear at this time that I am not minimizing what was said as regards these concerns. The problem I have as regards the expectations of the co-applicants is that I do not have the authority pursuant to the Commission's Terms of Reference to do anything more than what I have described above.

[17] While this Commission appreciates the need for participation by both non-Indigenous and Indigenous people in Labrador, I am unable here to grant full standing on the basis of the application and arguments that have been put before me by the co-applicants. Clearly the extent of the interests of the co-applicants do not coincide with the subject matter of the Inquiry.

[18] Having so concluded, this Commission does welcome some participation of the co-applicants in this Inquiry. I recognize here that they are people residing in Labrador who have been affected by the construction of the Muskrat Falls Project.

[19] I am also of the view that participation of these two co-applicants, as Labradorians, could further the conduct of the Inquiry so long as their involvement is confined to the limits that exist regarding the Commission's work and mandate. I also believe that their participation in this regard would contribute to the openness and to the fairness of this Inquiry.

[20] As well, I am aware that, at least to some degree, both co-applicants will be working together with Muskrat Falls Concerned Citizen Coalition who have been granted full standing. Both that group and the co-applicants have similar positions and similar interests on many aspects of the Muskrat Falls Project. Working cooperatively with the Muskrat Falls Concerned Citizens Coalition will provide both co-applicants with an opportunity to participate in the Inquiry. My funding recommendation will recognize their involvement in this regard.

[21] As a result, recognizing the agreement for cooperation of the co-applicants with the Muskrat Falls Concerned Citizens Coalition, I am prepared to grant the co-applicants separate but limited standing at the Inquiry hearings where the evidence will deal with environmental analyses, risk assessments and mitigation measures as I have discussed above. Obviously, on matters relevant to their being granted limited standing, their participation will include the right to cross-examine witnesses, to make suggestions to Commission co-counsel with regards to evidence to be led and/or witnesses to be called and also to make closing or final submissions.

[22] Commission co-counsel will advise counsel for the co-applicants when matters for which they have been jointly given limited standing will be raised in the hearings so that they can be present and participate.

[23] As regards environmental matters for which the co-applicants have been granted standing, I will be expecting them to work collaboratively and cooperatively with other parties granted standing where their interests are similar in order to avoid duplication in effort and questioning at the hearings.

[24] As for the co-applicants' request that I recommend the provision of funding to allow participation in this Inquiry, based upon the information the co-applicants have provided, I am satisfied that for financial reasons funding will be required for their joint participation. Neither group has the financial means to retain counsel to assist them or to pay for expenses to participate in the hearings.

[25] Based upon their willingness to work cooperatively with the Muskrat Falls Concerned Citizens Coalition as well as in accordance with the limited standing that I have granted the co-applicants, I will be recommending to Government that it provide funding to the co-applicants jointly for the retention of one counsel to assist them in working cooperatively with the Muskrat Falls Concerned Citizens Coalition and to represent the co-applicants on matters for which they have been granted limited standing. I will also recommend funding for reasonable expenses for that counsel as well as travel costs to attend the hearings in St. John's for one representative of each group. I recognize that the Land Protectors have requested that two representatives be permitted to attend but, as with other groups requesting

funding, I will be limiting any travel reimbursement recommendations to one representative of each of the co-applicants.

[26] I would now remind the co-applicants of the Commission's Rules of Procedure and their need to comply with these. As well, Rule 19 requires any party given standing to submit any relevant documents or things in its possession related to the subject matter for this Inquiry to Commission co-counsel within 14 days of the grant of standing. Counsel for the co-applicants is encouraged to contact Commission co-counsel as regards this obligation as soon as is possible as it may be that an extension of time can be provided.



JUSTICE RICHARD D. LEBLANC
COMMISSIONER