

Ontario Muskrat Solidarity Coalition



Submission to the Commission of Inquiry Respecting the Muskrat Falls Project and the interpretation of Terms of Reference

February 14, 2018

Commissioner Richard LeBlanc
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Dear Commissioner LeBlanc,

The Ontario Muskrat Solidarity Coalition is a network of individuals and groups who, in working closely with the Labrador Land Protectors and the Grand Riverkeeper, engages in educational outreach and public advocacy regarding the major concerns that have been raised regarding the Muskrat Falls megaproject.

By way of introduction, our membership is composed of individuals who have developed close ties over many years with members of Nunatsiavut, Nunatukavut and the Innu Nation, as well as individuals who are members of those nations currently living outside of Labrador. While many Coalition members have long been involved in prioritizing Indigenous rights, newer members come to this work inspired by the Calls to Action of the Truth and Reconciliation Commission to seek right relations, as well as the legislative attempts to adopt and implement the United Nations

Declaration on the Rights of Indigenous Peoples, UNDRIP (Private Member's Bill C-262, currently before Parliament).

Framework of the Inquiry and Multi-Lens Approach: UNDRIP, the Democratic Deficit, Consideration of a Terms of Reference Re-Set, and Grass Roots Voices

We wish to state at the outset our disappointment at the extremely limited terms of reference for this Inquiry, which appear slanted towards largely financial and technical considerations. While important inasmuch as the impact of the Muskrat Falls megaproject will be borne most by the poorest residents of the province, the terms of reference as currently written fail to incorporate the very human concerns raised by members of Indigenous nations, from the disappearance of sacred sites and the very real potential for destruction of a traditional food web that has existed since time immemorial to the well-established risk of mass drowning via catastrophic dam break.

While non-Indigenous Labradorians share similar concerns as well, our focus here is to urge this Inquiry to view its mandate through an UNDRIP lens. As a result, we urge this Inquiry to determine at the outset that its terms of reference require a complete re-set given the failure to properly consult Indigenous peoples about the terms of reference in an open, transparent fashion whereby all Indigenous peoples affected by the project would have been consulted *prior* to the Inquiry's announcement. It would serve this Inquiry well to consider a re-set of the terms of reference following a consultation with Indigenous peoples from the grass roots Labrador Land Protectors and traditional decisionmakers to elected leadership. Nothing less is acceptable when a commitment to truth and reconciliation is supposed to be the basis of respectful nation-to-nation relationships. Failure by the NL government to properly consult Indigenous peoples regarding the terms of reference does not absolve the Commissioner of the same responsibility. Indeed, engaging in this consultation would not only show good faith on the part of the Inquiry, but also

build some much-needed trust (and possibly avoid the delay caused by litigation challenging a failure to consult).

We also believe that the Inquiry must take note of and be informed by another lens, the democratic deficit which led to its creation in the first place. Throughout the history of the Muskrat Falls megaproject, issues of accountability, transparency, democratic decisionmaking – where they exist at all – have only come about as a result of intensive grass roots actions that have been met with draconian measures, from the criminalization and jailing of Labrador Land Protectors to the ongoing enforcement of a broad injunction. Indeed, the Independent Expert Advisory Committee (IEAC) exploring the issue of methylmercury poisoning, for example, only arose out of a painful hunger strike and peaceful occupation of the work site, among many other public actions. This proposed Inquiry needs to address the issues that have been raised by bloggers, land defenders, and concerned residents through tireless advocacy efforts. In addition, it is only as a result of proactive truth-seeking by individuals and non-governmental organizations that some of the documents that should be considered by this Inquiry – especially the engineering analyses by Stig Bernander on North Spur instability and methylmercury poisoning by Harvard University – were commissioned to assist in filling in the information gaps that the project proponents (Nalcor, government of Newfoundland and Labrador) refused to adequately address.

In the above context, this Inquiry must prioritize those grass roots voices whose dedicated, persistent advocacy has made the Muskrat Falls megaproject the subject of an Inquiry in the first place: Indigenous Elders, Mud Lake flood victims, criminalized Land Protectors, concerned citizens fearful for their lives, and low-income individuals facing eviction in light of doubled or tripled hydro rates.

An Inquiry in a Vacuum

We are also disappointed that even though the language of some of the Terms of Reference clearly outlines some significant and urgent concerns raised by the Muskrat Falls megaproject, the Inquiry will be proceeding without a suspension of the project. We feel that the only way to build confidence in the Inquiry is to have construction halted pending the outcome of the Inquiry. While we understand it is beyond the Inquiry's current mandate to call for a suspension of the project, we believe it is critical for the Inquiry to have as a core operating assumption that something is very wrong with a study whose recommendations will only likely be delivered at the completion of a project, despite the many risks still unaddressed by Nalcor and the provincial and federal governments. Those risks are real and pressing, from Indigenous people reliant on country food who are now fearful of being poisoned to Mud Lake residents fearful of another round of flash floods to anyone downstream who fails to comprehend how last week's significant landslide can be dismissed by Nalcor as having no effect on or relation to the project.

How can this Inquiry proceed with confidence that its time is well-spent and its recommendations will be heeded if the project being studied continues to barrel ahead full steam, despite, among many, many unresolved issues, the uncontradicted findings of the Harvard methylmercury study, and the absence of a truly independent study on the instability of the North Spur?

To use an analogy that puts the Inquiry's position into proper perspective: a train is racing down the track towards a cliff. Any objective observer can see the cliff, and the train's driver is ignoring all the scientific evidence, engineering reports, and internal documents that predicted the train would run off the cliff if it were not stopped. One can either pull the brakes on the train to prevent the potential for catastrophe, or one can initiate a study on whether certain financial

issues and decisionmaking that put the train in such peril in the first place was done without proper authorization or due diligence (as the train drives over the cliff).

The Muskrat Falls megadam is that train racing down the tracks. The human cost of this potential train wreck is beyond measure. The cloud of that uncertainty, that fear, that despair, hangs over this Inquiry as long as the project being studied does not apply the brakes pending your findings. The failure of the government of Newfoundland and Labrador to exercise the precautionary principle in this instance (applying the brakes) when the mounting evidence screams out for it, creates a metaphoric framework of futility for the Inquiry that could very much discourage participation from those who see no point in taking part when it would appear the outcome of the project is now a *fait accompli* and the work of this Inquiry mere window dressing that may be useful for future scholars of poor decisionmaking.

Critically, if the Terms of Reference are indeed subject to the much-needed re-set through an UNDRIP lens as stated above, part of that new mandate could very well consider the need for a suspension of operations based on compelling evidence and justified by the much-needed application of the precautionary principle.

In any event, another lens through which this Inquiry must interpret its terms in as broad and generous a fashion as possible is that of the precautionary principle, a touchstone of environmental law and a norm of customary international law, as recognized by the Supreme Court of Canada (114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 SCR 241), in which it referenced the *Bergen Ministerial Declaration on Sustainable Development* (1990) and declared:

Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment" (D. Freestone and E. Hey, "Origins and Development of the Precautionary Principle", in D. Freestone and E. Hey, eds., *The Precautionary Principle and International Law* (1996), at p. 41. As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law" (J. Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in *ibid.*, at p. 52). See also O. McIntyre and T. Mosedale, "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 *J. Env. L.* 221, at p. 241 ("the precautionary principle has indeed crystallised into a norm of customary international law").

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. ***Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.*** (emphasis added)

The threat of serious and/or irreversible damage is already well-documented with respect to methylmercury poisoning and North Spur instability, from the original joint provincial/federal panel through the Harvard and Bernander studies. The Inquiry cannot proceed without a serious recognition of this threat, which is why our call for a re-set for the Terms of Reference following proper consultation with all affected Indigenous peoples, and a subsequent suspension of operations at the Muskrat Falls megaproject pending a re-set Inquiry's findings, would make the most sense, and dovetail with the need to respect the precautionary principle.

Lack of Proper, Ongoing Consultation

In addition, NL and Nalcor's consultation with Indigenous peoples appears to have been based on an impoverished definition of "consult" (see *The Government of Newfoundland and Labrador's Aboriginal Consultation Policy on Land and Resource Development Decisions*, April, 2013) that fails the well-established test of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in seeking free, prior, and informed consent, and in recognizing that consent is not a *fait accompli*, but rather part of a process of ongoing dialogue and negotiation that allows for change of

circumstances, introduction of new information, and the ability of Indigenous people to withdraw consent.

The provincial government's policy statement declares *"NL desires a practical consultation process that helps to ensure that land and resource development decisions minimize or, where reasonably practicable, eliminate potentially adverse impacts on asserted rights. NL also aims to maintain, foster and improve effective working relationships among Aboriginal organizations, project proponents and NL."* The experiences of Indigenous-led groups such as the Labrador Land Protectors can attest to the fact that this policy statement has been consistently violated over the past half decade, whether through a persistent refusal to meet and meaningfully address concerns, the criminalization of peaceful acts of land protection, the judicial stifling of voices of opposition, and policies that fail to eliminate adverse impacts.

Critically, among NL's guiding principles, #10 states: *"This Policy and any form of Aboriginal consultation conducted by NL or its delegates, does not constitute acceptance or recognition of asserted rights. The process of consultation does not create any Aboriginal or treaty rights."*

The provincial government's consultation is not meant to achieve consent and a harmonious working relationship; it is simply to take into consideration certain views without providing Indigenous people a say in the final outcome of the project. This Inquiry, in dealing with Indigenous issues, must employ the broader and more generous lens of consultation and consent as provided by UNDRIP.

Recommendations

Given the manner in which this Inquiry has been limited in terms of scope, as well as the questionable utility of its findings given that there has been no suspension of construction pending our conclusions, we are calling upon you to interpret the terms of reference in as broad and generous a manner as possible to allow for the inclusion of voices that appear to have been excluded from the Terms of Reference. Toward that end, we are calling on you to re-set the Terms of Reference after engaging in a proper, UNDRIP-informed consultation with those Indigenous voices who have clearly not been heard, as evidenced by the limited consideration they are given under the current framework. As currently set out, the Terms of Reference appear to be flawed by an apparent apprehension of bias that favours and limits the potential liability of the government which called the Inquiry and set those terms absent proper consultation with all affected parties.

Recommendation 1: We believe the Commissioner must agree to a re-set of the terms of Reference, and should engage in a process of UNDRIP-informed deep consultations with Indigenous peoples at all levels (from elected leadership to grass roots land defenders, elders and traditional decisionmakers) to ensure that concerns specific to their lives (and the serious, multiple threats posed to their lives by the Muskrat Falls megaproject) are included in the Terms of Reference for this Inquiry. The lens of UNDRIP (as elucidated in part below) will be of assistance in this regard, as will current Canadian and international jurisprudence with respect to the duty to consult and to seek free, prior, and informed consent.

Recommendation 2: We believe the Commissioner should broadly and generously interpret Section 5 (*“participation in the Inquiry by the established leadership of Indigenous people, whose settled or asserted Aboriginal or treaty rights to areas in Labrador may have been adversely affected by the Muskrat Falls Project”*) to include any and all members of Indigenous nations affected by the project, and not simply those who hold elected positions. We also

believe that this same principle of inclusion should be extended to the voices of non-Indigenous Labrador residents affected by this project. This recommendation may well inform the Commissioner's response to Recommendation #1.

Such consideration must include a view of all aspects of the Muskrat Falls megaproject through an UNDRIP lens. This should include consulting experts on UNDRIP, as well as exploring the failure of the NL government, the federal government, and NALCOR to recognize the obvious trigger points for deep consultation not just with Indigenous government leaders, but with traditional decisionmakers as well as those voices of the Labrador Land Protectors whose views have not been properly represented by their governments. The Commissioner must question whether all Indigenous people affected were allowed an open, transparent process to achieve free, prior and informed consent not only at the project's outset, but throughout its development as it continues to proceed through the life of the Inquiry.

The Commissioner must hear from the voices of Indigenous people who feel that their voices have not been properly consulted not only by the NL and NALCOR, but by their own leadership as well. It should also consider the very real possibility that the effects of the Muskrat Falls megaproject could result in an act of genocide, as defined by the Convention on the Prevention and Punishment of the Crime of Genocide (Article 2b, "Causing serious bodily or mental harm to members of the group"; 2c, "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"; 2d, "(d) Imposing measures intended to prevent births within the group".) While the Genocide Convention speaks of deliberate action, an argument could well be made that willful blindness to the effects and consequences of one's actions, especially in light of compelling evidence of impending harm, does not provide immunity from liability.

The Inquiry should also consider how the longstanding legacies of colonialism and settler-state divide-and-rule policies have been used to silence particular voices in communities that would otherwise be speaking out.

Where the potential infringement of asserted Indigenous rights is high and the risk of non-compensable damage is similarly significant, deep consultation aimed at finding a satisfactory interim solution is required. Consultation must be a meaningful dialogue. But neither should Indigenous people be obliged to participate in a process that does not allow for a good faith attempt for the parties to understand one another's concerns. Deep consultation includes the opportunity to make submissions, formal participation in the decision-making process and the provision of written reasons to show that Indigenous concerns were considered and the impact they had on the decision. Responsiveness is a key requirement of both consultation and accommodation.

Despite the legal obligation for the Crown to consult with Indigenous peoples when contemplating or undertaking activities that may affect their rights, Nalcor, NL and the federal government have specifically excluded certain groups of Indigenous people from any ongoing consultation, even though they are owed the duty to consult in good faith.

The Inquiry must hear directly from witnesses who can attest to the failure of the provincial government of NL, NALCOR, and the federal government to engage in deep, ongoing consultation.

As a means of helping answer some of these probing questions, the Inquiry needs to respect the underlying purposes of UNDRIP, including, but not limited to:

Recognizing the urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Convinced that control by Indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.

The Commissioner also needs to hear from affected individuals to determine how the following, non-exhaustive articles of UNDRIP have been violated by NL, Nalcor (and, by extension, the federal government, the biggest financial player in Muskrat Falls). Should the Inquiry consider the use of an UNDRIP lens, further assistance can be provided with expert witnesses to explore issues of consent through Canadian and international jurisprudential contexts for which space considerations here do not presently allow.

Article 7: Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

Article 8: (1) Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. (2.) States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.”

Article 11 (1.) Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.”

Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decisionmaking institutions.

Article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands,

territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 32: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Recommendation 3

The whole of this Inquiry must ask why the precautionary principle did not seem to be applied as the project was approved and went forth, especially in light of the NL government and Nalcor's collective failure to institute the findings and recommendations of the joint provincial panel, SNC-Lavalin's own internal analysis, the Harvard and Bernander studies, and other assorted reports that were inevitably commissioned by citizens themselves when the proponent and its supporters failed to provide proper analysis and justification for key decisions. The Inquiry must determine whether this failure to apply the precautionary principle has unnecessarily placed Indigenous and non-Indigenous lives in jeopardy.

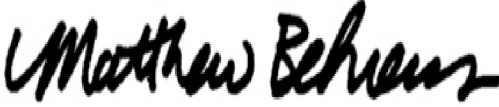
Conclusion

As noted above, the Inquiry must undertake a re-set of the Terms of Reference that includes a proper, UNDRIP-informed consultation with all Indigenous peoples affected by the Muskrat Falls megaproject. As part of a re-set, this Inquiry must consider the need to press for a suspension of construction at the Muskrat Falls megaproject pending the outcome of the Inquiry's findings, whose utility becomes questionable should constructed not be halted.

The Inquiry must approach all of the issues within its current (and hopefully re-set) mandate – and also provide a generous and broad interpretation of those terms – with a multi-lens approach that

incorporates questions about compliance with UNDRIP principles and the failure to proceed with the precautionary principle as a foundational operating guide; that considers expanding as widely as possible to include the Indigenous and non-Indigenous grass roots voices who have been ignored and cast aside as a result of the NL government's and NALCOR's democratic deficit; and that considers seriously and, where possible, acts upon the political conundrum in which it finds itself studying a project that is likely to reach a completion stage that, absent a suspension of operations, will mean the Inquiry's recommendations may have no beneficial effect or positive impact.

Submitted by

A handwritten signature in black ink that reads "Matthew Behrens". The signature is written in a cursive, slightly slanted style.

Matthew Behrens

Ontario Muskrat Solidarity Coalition