



Commission of Inquiry Respecting the Muskrat Falls Project

STANDING APPLICATION FOR KEN MARSHALL, LEO ABBASS, GERRY SHORTALL AND TOM CLIFT (FORMER NALCOR DIRECTORS) FOR THE MUSKRAT FALLS INQUIRY

DECISION

APRIL 16, 2018

LEBLANC, J.:

INTRODUCTION

[1] Ken Marshall, Leo Abbass, Gerry Shortall and Tom Clift applied jointly for standing at the hearings for the Commission of Inquiry Respecting the Muskrat Falls Project. They also seek a recommendation for funding.

[2] Some of the applicants were Directors of Nalcor Energy when the Muskrat Falls Project was conceived, sanctioned and at the time of commencement of construction. Others were there for part of that time. As such, they state that they were extensively involved in examining information provided to the Board which included an “extensive review of the decisions, approaches and issues related to the sanction of this Project and all ongoing matters of a business, political, financial, regulatory and other nature”. They also state that, where necessary, they would have obtained and received financial, legal and technical reports prepared by experts.

[3] All of the applicants were Board members up to April 2016 at various times. It was at that time that they resigned following the termination of the then Chief Executive Officer of Nalcor Energy. The applicants indicate that as Directors of

Nalcor's Board at the relevant times related to the Muskrat Falls Project, they should be permitted to participate in the Inquiry hearings as, unless or until they are subpoenaed to be interviewed or as a witness at the hearings, they would have no input into the information placed before the Commission. They also state that they have a substantial and direct interest in the outcome of the Inquiry particularly as related to their reputations which may be potentially impacted by the findings of this Commission. As such they wish to be granted standing to permit them an opportunity to cross-examine witnesses. They do not specify whether they are seeking full or limited standing.

[4] The applicants also seek a recommendation for funding for legal counsel. While Mr. Clift remains employed, Mr. Marshall, Mr. Abbass and Mr. Shortall indicate that they are retired and have no employment income. As well, they indicate that they received no remuneration as Nalcor Directors other than being reimbursed for expenses incurred by them as Directors of the Board and to attend Board meetings.

[5] Upon my request at the hearing of their application for standing on April 6, 2018 for clarification as to whether, as past Directors, they would expect indemnification for or the payment of their legal costs if standing were granted, further information was provided to the Commission by way of correspondence dated April 11, 2018. I will deal with the funding request later in this decision should standing be granted.

[6] The Inquiry's mandate is well known to the four applicants. Whether given standing or not, I am satisfied that the actions of Nalcor, and its Directors and employees at all times relevant as regards the Muskrat Falls Project will be investigated by this Commission. However, the fact that any or all of the individual Directors could be interviewed by Commission co-counsel or that they are required to testify at the hearings is not, of itself, a basis to grant standing.

[7] Section 5(2) of the *Public Inquiries Act, 2006*, S.N.L. 2006, c.P-38.1 sets out criteria to be considered in determining whether the standing application should be granted. These criteria are as follows:

- (a) whether the persons 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.

[8] In assessing the criteria for these applicants, it is important to recognize that their actions as Directors, assuming no fraud or dishonesty on their part as regards Nalcor's interests, in effect form part of the actions of Nalcor at the time. Nalcor Energy has already been given standing allowing it to participate fully in the Inquiry hearings. It will no doubt be attempting to ensure that the interests of the entity as a whole, as well as its management, Directors, and employees are fairly presented. There is nothing before me at this time to suggest that Nalcor will not be acting in the interests of its past Directors. I say this being fully cognizant of the fact that a new Chief Executive Officer has been put into place and that these applicants resigned as Directors when the previous Chief Executive Officer was replaced. At this stage, I see no reasonable basis to conclude that their retirement or the change of management will somehow negatively impact the interests of the applicants as regards their actions as Directors. That being the situation, I find that it is very likely that Nalcor's and the applicants' interests are going to be similar and that the applicants' involvement as a party with full standing is unnecessary here. I obviously expect Nalcor and the applicants to cooperate with one another.

[9] I am unable to conclude that the applicants' participation as a party with full standing would further the conduct of this Inquiry. Again I reference the commonality of interests that these applicants have with Nalcor. As well, any information they might have can be obtained by the Commission without each of them, or as a group, being made a party. I also see no basis to grant full standing to ensure a contribution to the openness or fairness of the Inquiry in these circumstances.

[10] Having said this, should there be evidence led going to specific actions taken by the applicants or going directly to the reputation of the applicants as Directors,

individually or collectively, notwithstanding the involvement of Nalcor as a party with standing, I am prepared to grant limited standing to the four applicants as a group to participate in hearings with regard to such evidence. It will only be where the evidence specifically involves one or all of these applicants and their reputations that the limited standing I have granted will be engaged.

[11] Commission co-counsel will be required to notify the applicants if and when their participation in the hearings is required based upon what I have said above.

[12] Having been granted the limited standing as set out above, I must now deal with their funding request. As noted earlier, the applicants have provided further information to the Commission which has now been considered.

[13] From what has been provided, I remain unsure whether funding for legal counsel for these four former Directors is available, either from Nalcor or through any available insurance policy. Nalcor's response as regards funding for legal counsel is not a definitive one. As the applicants have now been granted limited standing, Nalcor has indicated that they can apply to it for indemnification for legal fees but that this can only happen at the conclusion of the Inquiry.

[14] As I am not aware of any suggestion by anyone that any of these applicants as former Directors acted dishonestly or in bad faith as regards the interests of Nalcor, I have difficulty understanding why Nalcor should defer its decision on funding until the conclusion of this Inquiry. Such, in effect, means that Directors and others covered by sections 205 and 207 of the *Corporations Act* would be required to expend their personal funds to speak to their actions as Directors on behalf of Nalcor before they could, in fact, be compensated. I would now respectfully request that counsel for the four applicants provide Nalcor with a copy of these remarks. I would ask Nalcor officials to carefully consider these remarks and provide a more definitive response to the applicants on funding for their counsel.

[15] As well, I do not feel that I should make a recommendation for funding as the insurance carrier for Nalcor has yet to advise of its position on funding the legal

costs for the applicants. That is a matter that should be further pursued before I should be asked to decide on a funding recommendation.

[16] Therefore, I have decided that it would not be appropriate to make a funding recommendation for the applicants as a group at this time. I will be prepared to deal with this request once the applicants and Nalcor have pursued what I have referenced above. I will await further clarification from the applicants on this.

[17] I do want to state that I have taken into account the proposal made by the applicants that a funding recommendation be made to government with a proviso that should the applicants be indemnified for their legal costs, they would then indemnify the government. While a possible solution, I am not at this stage prepared to accept it as the basis for a recommendation on funding.

[18] As limited standing as described has been granted, I would remind the applicants that they are bound by the Commission's Terms of Reference. I would bring specific attention to Rule 19 regarding their disclosure obligations on the grant of standing.



JUSTICE RICHARD D. LEBLANC
COMMISSIONER