



Commission of Inquiry Respecting the Muskrat Falls Project

**STANDING APPLICATION FOR
NORTHERN PENINSULA (MEKAP'SK) MI'KMAQ BAND
FOR THE MUSKRAT FALLS INQUIRY**

DECISION

AUGUST 27, 2018

LEBLANC, J.:

[1] On August 10, 2018, Chief Mildred Lavers, on behalf of the Northern Peninsula (Mekap'sk) Mi'Kmaq Band (Mekap'sk), wrote to the Commission of Inquiry Respecting the Muskrat Falls Inquiry (Commission) seeking to participate in the hearings of the Commission. I have accepted the correspondence as an Application for Standing before the Commission.

[2] Chief Lavers states in her correspondence to the Commission that the Mekap'sk are an indigenous group comprised of some 1200 members situate on the Northern Peninsula on the island portion of Newfoundland and Labrador. The Mekap'sk claim that they hold aboriginal title to certain lands and waters situate on the Northern Peninsula.

[3] The concern expressed in the Application for Standing of the Mekap'sk appears to have arisen from Nalcor Energy's (Nalcor) decision to remove bridges and gate roadways leading to transmission towers constructed as part of the Muskrat Falls Project. Chief Lavers states that by removing these egresses the Band members will be restricted from accessing areas which the Mekap'sk state are located on their claimed territory for such things as berry picking and moose hunting. The Mekap'sk

oppose the removal of bridges and gating of roadways by Nalcor along its construction line.

[4] The Mekap'sk claim that they are not being consulted by Nalcor and the Government of Newfoundland and Labrador (Government) on this issue and further claim that the only consultation occurring is with non-Indigenous groups such as the Newfoundland and Labrador Outfitters Association.

[5] No prior Application for Standing was made by the Mekap'sk notwithstanding that standing was a matter dealt with some four months ago by the Commission. Chief Lavers indicates that as other Indigenous groups have been granted standing by the Commission, the Mekap'sk now seek standing regarding "the lack of consultation" by Nalcor and Government as well as the lack of mitigation measures "against the adverse effects to our Aboriginal Rights and title". Chief Lavers suggests that one of the Commission's established principles in dealing with this inquiry is thoroughness and, as such, it is important that the Mekap'sk have an opportunity to participate in the Inquiry hearings. Chief Lavers also relies on section 5 of the Commission's Terms of Reference related to the role of Indigenous groups in the Inquiry.

ANALYSIS

[6] I wish to address the timing of this application initially. As stated in a recent decision I prepared regarding a late standing application by Manitoba Hydro International (MHI), this Commission is willing to consider late applications regarding standing, particularly where the party seeking standing has received late notice of its need to participate in the Inquiry as a party. Unlike that case, here it appears from the application of the Mekap'sk that the group was aware of its right to apply for standing when standing applications were to have been filed but decided not to do so at that time. It is only after the announcement of the bridge and roadway closures that it has determined that it should apply for standing.

[7] While I question whether the late application should be permitted to proceed in these circumstances, I have decided to proceed to determine whether appropriate grounds exist to grant standing based upon the circumstances set out in Chief Lavers letter to the Commission.

[8] It is true that section 5(a) of the Commission's Terms of Reference requires that I consider participation of Indigenous groups in the Inquiry. However, it is of significance to note that this relates only to Indigenous groups "whose settled or asserted Aboriginal or treaty rights to areas in Labrador have been adversely affected by the Muskrat Falls Project" (my emphasis). Therefore, section 5(a) does not assist the Mepak'sk based upon their geographical claim of Aboriginal title.

[9] However, this does not mean that an Indigenous group such as the Mepak'sk cannot obtain standing if it can bring itself within the test to be applied under section 5 of the *Public Inquiries Act, 2006*, S.N.L. 2006 c. P38.1. I will consider that section shortly.

[10] In a decision filed on March 14, 2018, I ruled on the interpretation to be given to the Commission's Terms of Reference. That decision is obviously important in my consideration of the basis put forward by the Mepak'sk for standing. I have determined that the Terms of Reference mainly require this Commission to consider the business case put forward by Nalcor in proceeding with the project. As well, I am mandated to investigate the reasons for the cost escalation to complete the project from what was initially indicated to be the project cost, to consider issues related to the participation of the Public Utilities Board for this Province in the review of this project, as well as whether Government was fully informed by Nalcor so that it could have appropriately considered sanction of the project and whether there has been proper oversight of the construction and costs of the project.

[11] Based upon that interpretation given to the Commission's mandate, it does not appear that the concerns of the Mepak'sk relate to the Commission's Terms of Reference. Issues regarding the removal of bridges or gating of roadways used to access land near transmission towers for the Muskrat Falls Project on the Northern

Peninsula of the island are not matters within the mandate of this Commission of Inquiry.

[12] Having said this, while referring to section 5(a) of the Terms of Reference regarding the consideration of participation of Indigenous groups with land claims in Labrador, I did go on to set out the basis upon which I had decided to give such groups a role in the Inquiry and what that role was to relate to. At paragraph 47 of my decision, I stated the following:

[47] Having said this, it is obvious to me that the Lieutenant Governor-in-Council intended that the established leadership of the Indigenous people would have a part to play in this Inquiry. If that is so, the part that they should play would be in areas of concern or of interest to those Indigenous people. I note that paragraph 4(b)(v)(a) refers, as regards the issue of the cost escalation of the construction of the Project, to any risk assessments, financial or otherwise, conducted in respect to the Muskrat Falls Project. At present, while I do not have full information, I am aware that certain assessments likely were conducted, specifically risk assessments concerning environmental issues prior to, as well as subsequent to, sanction. I have decided here that a contextual and purposive review of the Order in Council permits me to investigate into what consultation occurred between the established leadership of the Indigenous people and Nalcor as well as the Government prior to sanction, what risk assessments and reports were done as regards the concerns of the Indigenous people, whether these assessments were appropriately and reasonably considered by Nalcor and the Government and whether appropriate measures were taken to mitigate against reasonably potential adverse effects to the settled or asserted rights of the Indigenous people both at the time of and post sanction. In investigating these matters, I will not be determining any claims or treaty rights for any of the Indigenous people as this clearly does not fall within the Commission's mandate.

[13] It is on this basis that the Mekap'sk now claim that they should be granted standing for the Inquiry hearings. I am not satisfied that the stated interests of the Mekap'sk fall within the scope or subject matter set out above. My interpretation was based upon what I considered was a reasonable extension to be given to the interpretation of section 5(a) and the other stated Terms of Reference. The reference to Labrador in section 5(a) cannot be ignored in this regard. As stated in my interpretation decision, this Commission of Inquiry must limit its investigation or mandate to that given to it by the Government.

[14] Therefore, I must now go to section 5 of the *Public Inquiries Act, 2006* in order to see if the Mekap'sk should be granted standing. Section 5(1) and (2) 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.

[15] It is my conclusion here that the application of the Mekap'sk does not disclose anything which would suggest that the findings of this Commission of Inquiry would adversely affect its interest and nor is there any basis to conclude that participation by the Mekap'sk would further the conduct of the Commission's work. In so concluding, I am not satisfied that the issue of consultation regarding the sanction and construction of the Muskrat Falls Project or the issue of assessments done regarding environmental and other risks forms the basis of the interests set out in the Application for Standing. It is clear to me that the reason for the application filed at this time is the decision made by Nalcor regarding the removal of the bridges and gating of roadways used in order to access the transmission towers for the project which I find is not a matter falling within the subject matter of this Inquiry.

[16] As such, the Application for Standing filed by the Mekap'sk is denied.



JUSTICE RICHARD D. LEBLANC
COMMISSIONER