



Commission of Inquiry Respecting the Muskrat Falls Project

APPLICATION OF THE GRAND RIVERKEEPER LABRADOR INC. RULE 39 AND RULE 15

DECISION

AUGUST 27, 2018

LEBLANC, J.:

[1] The Grand Riverkeeper, Labrador Inc. (the Applicant) has applied to have Philip Raphals called as a witness on its behalf at the hearings of the Commission of Inquiry Respecting the Muskrat Falls Project (Commission). It also seeks funding to consult with Mr. Raphals in order to prepare for the Inquiry hearings.

[2] My understanding is that the Applicant seeks to have Mr. Raphals called in order to provide information to the Commission respecting issues that the Applicant had previously retained Mr. Raphals to address prior to sanction of the project. From their application, it is my understanding that Mr. Raphals had played a “consultative” role prior to sanction and is one of a number of experts who has appeared before various bodies on issues related to the assumptions, analysis and conclusions made by Nalcor in supporting the sanctioning of the project. The Applicant suggests that Mr. Raphals can therefore speak to the integrity of the process leading to sanction, including matters before the Joint Review Panel, as well as speak to the analysis done by Nalcor and the Government of Newfoundland and Labrador and the knowledge held by both prior to sanction. The Applicant has also suggested that Mr. Raphals has noted “gaps” in the information and findings of the Commission’s

expert, Grant Thornton, contained in its sanctioning phase report and that he can assist the Commission regarding these gaps.

[3] The Applicant claims that that it is necessary to hear from Mr. Raphals and that a failure to call him would prejudice the work of the Commission and any findings that it might make.

[4] Before dealing directly with this Application, I note that I have been advised by Commission Co-counsel that a request had previously been made by the Applicant to have the Commission retain Mr. Raphals as an expert witness to testify at the Inquiry hearings. This request was refused by Commission Co-Counsel on the basis that Mr. Raphals had been retained prior to the sanctioning of the project by the Applicant and therefore he did not possess the necessary independence for an expert retained by the Commission. I wish to indicate here that I agree with this position in the circumstances as I understand them to be. I have decided however, that Mr. Raphals should be called as a fact witness at the Inquiry based upon the information set out by the Applicant. As will be seen by my subsequent remarks, this is something that I can now direct Commission Co-counsel to arrange.

[5] In dealing with the application filed by the Applicant, the difficulty that I have with it is that the Applicant has not been given standing to deal with the issues and testimony that I understand they wish the Commission to hear from Mr. Raphals. As such, I am not prepared to permit the Applicant to retain and call Mr. Raphals for the Inquiry hearings. I refer here back to my earlier decision on standing for the Applicant dated April 16, 2018, as well as the further decision I provided on May 16, 2018 regarding an application it made to have its standing reviewed. The Applicant has not been granted standing in order to address concerns related to the assumptions, analysis and conclusions presented by Nalcor to support sanction. It may well have questions regarding environmental assessment and conclusions but the Applicant will have no broader participation in the Inquiry hearings than that set out in my earlier standing decision. I say this recognizing that the Applicant is working collaboratively with the Muskrat Falls Concerned Citizens Coalition who has been granted full standing to participate in the Inquiry hearings.

[6] Having said this, I am very appreciative of the Applicant placing this before me at this time as I am of the view that Mr. Raphael's evidence will likely assist the Commission in completing its work. I do not believe that it is appropriate to have him retained as an expert witness on behalf of the Commission for the reason set out above. However, I do believe that he should now be interviewed by Commission Co-counsel, or their designate, and that he should be called as a witness to speak to his involvement in pre-sanction issues as set out by the Applicant in its application. As such, I direct that Commission Co-counsel contact Mr. Raphael, arrange for him to testify as a witness and prepare him to do so. He will be compensated like any other of the witnesses that we are calling, including those who provided expert assistance to other parties prior to sanction.

[7] As regards the Applicant's request for funding in order to allow it to retain Mr. Raphael to prepare for the hearings, I would repeat what I said above regarding the basis upon which standing has been granted to the Applicant. I see no reason then that the funding request made by the Applicant should be granted.

[8] Again, I wish to express my gratitude to the Applicant for raising this matter at this time as I believe that the testimony of Mr. Raphael will further the work of this Commission of Inquiry.



JUSTICE RICHARD D. LEBLANC
COMMISSIONER