



Commission of Inquiry Respecting the Muskrat Falls Project

STATEMENT ON WATER MANAGEMENT PROCESS

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR

NOVEMBER 14, 2018

LEBLANC, J.:

[1] Water Management on the Churchill River has been identified as a matter for consideration by this Commission of Inquiry. I have raised and identified concerns about any risks regarding the control of the flow of the river and its potential impact on the operation and output from the Muskrat Falls generating station as an area that the Commission of Inquiry would look into. My purpose in doing so is to determine how this particular issue was assessed and considered at the time of and up to sanction of the Muskrat Falls Project by the Government of Newfoundland and Labrador, as well as Nalcor Energy.

[2] In order to deal with evidence on water management, it has become obvious to me that much of what needs to be presented would be privileged information in that there is a solicitor-client privilege attached to it. Evidence that is subject to solicitor-client privilege can be legitimately withheld from a Commission of Inquiry. For this Inquiry, both the Government of Newfoundland and Labrador and Nalcor Energy have provided documentation, including solicitor-client privileged information, related to the water management issue to us, which remains subject to privilege pursuant to s. 24.1 of the *Public Inquiries Act, 2006*. As a result, it is the Government of Newfoundland and Labrador and Nalcor Energy that controls my ability to assess what I believe is important and relevant evidence on this issue as both can rely on Solicitor-Client privilege.

- [3] To understand the position taken by Government and Nalcor on water management, and what consideration was given with regards to water management prior to sanction of this Project, it is imperative that I receive this information as evidence notwithstanding the fact that much of it is subject to solicitor-client privilege. Litigation privilege is also likely potentially applicable.
- [4] In order to have this evidence presented to the Commission notwithstanding the privilege asserted, the Commission has endeavoured to try to find a way to satisfy the Government and Nalcor that the information presented would be protected. I, too, wish to avoid potentially negatively impacting the position of the Government and Nalcor on this issue, particularly with ongoing litigation taking place. In this regard, I am mostly concerned about any possible impact on the ratepayers and taxpayers of the Province already faced with the cost burden of this Project.
- [5] In considering the development of a process to deal with water management, I have insisted that there be at least some ability for the interests of the public to be represented as part of the process other than just by having Commission Counsel present. This has been indicated to both Nalcor and the Government. With the agreement of both, the public's interests will be represented in the process that I will be setting out by representation by the Consumer Advocate and his counsel during the process, with them having the ability to explore any concerns or questions, including questions provided by Counsel for the other parties with Standing.
- [6] My final review and assessment of the water management issue will be made part of my report to be filed at the conclusion of these proceedings. That report will ultimately be made public. In that report, I will be cautious to ensure that nothing is disclosed that could impact any existing legal position or strategy in place with regards to the water management issue.

[7] The process will be as follows:

- i) The water management issue will be dealt with in-camera. Notwithstanding this, not all exhibits used during the in-camera session will be confidential exhibits. Those already in the public domain or not subject to any privilege will certainly be public exhibits and will be available on the Commission's website.
- ii) Counsel for the following parties will be in attendance at the in-camera hearing:
 - Commission counsel
 - Province of Newfoundland and Labrador
 - Nalcor Energy
 - Consumer Advocate
 - Todd Stanley
- iii) Parties represented by these counsel, including the Consumer Advocate, can be in attendance but all counsel and parties attending will be subject to strict confidentiality agreements for the in-camera hearing.
- iv) Counsel for other parties with standing before this Commission may provide the Consumer Advocate, or other counsel to be present, with questions they would like to have asked of the witnesses to be called at the in-camera hearing. The Consumer Advocate or any counsel will not be permitted to report the answers back to counsel for other parties as such will be covered by the confidentiality agreement.
- v) Transcripts for the in-camera hearing will be transcribed by Commission staff only and all confidential exhibits will be sealed to protect disclosure to anyone.

vi) Witnesses to be heard during the in-camera hearing are as follows:

- Philip Raphals
- Todd Stanley
- Peter Hickman
- Gilbert Bennett
- Dennis Browne

With these witnesses and the exhibits to be tendered, the Commission will have the benefit of different views on the water management issue.

vii) The in-camera hearing will take place on November 30, 2018.

[8] Again, while I would have preferred a much more open and public hearing on this issue, to deal with it at all I have had to recognize that without the agreement of the Government of Newfoundland and Labrador and Nalcor, I would not be able to assess what is potentially an important aspect related to the Commission's Terms of Reference.

[9] Finally, I would add that my ruling on this process applies only to the water management issue. It will have no bearing on any other application presented for an in camera hearing.



JUSTICE RICHARD D. LEBLANC
COMMISSIONER