



Commission of Inquiry Respecting the Muskrat Falls Project

**STANDING APPLICATION FOR
HER MAJESTY IN RIGHT OF CANADA
FOR THE MUSKRAT FALLS INQUIRY**

DECISION

MARCH 4, 2019

LEBLANC, J.:

[1] Her Majesty in Right of Canada (“Canada”) has applied for standing at the Phase Two hearings of the Muskrat Falls Inquiry only when testimony is being given by Nik Argirov, who acted as the Independent Engineer appointed pursuant to a loan guarantee provided by Canada related to the Muskrat Falls Project.

[2] My understanding of the Application filed is that Canada wishes to have its lawyer appear during Mr. Argirov’s testimony in order to raise any objections should questions for Mr. Argirov stray into areas outside of the jurisdiction of a provincial Commission of Inquiry or outside the Terms of Reference for this Inquiry.

[3] In its Application, the Applicant states the purpose of standing would be “solely to make objections, and to comment or make enquiry in relation to the testimony of Nik Argirov. The objections would be limited to questioning that involves Canada and its process of instruction to the Independent Engineer, diligence, ongoing advice, report contents and similar in relation to the Muskrat Falls Inquiry and its debt with related Financial Guarantee”. Canada also indicated that its counsel will not act as counsel for Mr. Argirov.

ANALYSIS

[4] In my decision on the interpretation of the Commission's Terms of Reference dated March 14, 2018, I referred to the jurisdictional limitations related to a provincially called Commission of Inquiry and any investigation involving the actions of Canada. At paragraphs 51 – 53, I stated as follows:

- [51] First of all, some of the submissions suggested that I should inquire into the Federal Government's dealings in approving the Federal Loan Guarantee as well as its responsibility to the citizens of this Province in this regard. Pursuant to the authority provided in the *Public Inquiries Act, 2006*, I do not have the jurisdiction, and nor does the Order in Council provide me with any authority, to consider the Federal Government's dealings with the Federal Loan Guarantee.
- [52] In cases such as *Canada (Attorney General) v. Saskatchewan (Commissioner of Milgaard Inquiry)*, 2006 SKQB 385, it has been held that a province is not authorized to establish a Commission of Inquiry to investigate the substantive operations of a federal government institution or investigate into the administration or management of such an institution beyond what is authorized in any Terms of Reference which are accepted or found constitutionally valid based upon there being a valid exercise of a provincial constitutional power. As well, generally speaking, a provincially established Commission of Inquiry cannot inquire into the conduct of a federal employee with respect to the employee's activities on behalf of his or her employer. (See paragraphs 24 and 25 of the *Milgaard* decision.) The provisions in our Constitution setting out the division of legislative powers for both the federal and provincial levels of government (sections 91 and 92 of the *Constitution Act, 1867*) prevent a provincially established Inquiry from trespassing on federal jurisdiction and *vice versa*.
- [53] I will hear evidence related to the obtaining of the Federal Loan Guarantee, which ultimately impacted the Project's financing costs, and also I will review the terms of that Guarantee and the impact of those terms on the Province. However, what the Federal Government did as regards its due diligence, and otherwise, prior to providing this is a matter that I am unable to investigate. Nor is this within the mandate provided in the Terms of Reference.

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[5] On February 7, 2019, I filed an Addendum to my March 14, 2018 decision regarding the involvement of the Independent Engineer in this Inquiry. This was based upon what is seen as appropriate and necessary based upon the investigation to date regarding the Commission's Terms of Reference and the involvement of the Independent Engineer in the Muskrat Falls Project. At paragraphs 4 and 5 of that Addendum I explained as follows:

[4] It has now become apparent to me that in order to properly respond to the Commission's Terms of Reference it is necessary to investigate the work done by the Independent Engineer who was put in place as part of the Federal Loan Guarantee process and agreement. During the Phase One hearings, some of the witnesses testifying who were involved with the consideration, approval and oversight of the Muskrat Falls Project on behalf of the Government of Newfoundland and Labrador and Nalcor referred to their reliance on work done by and on behalf of the Independent Engineer. As such, it is clearly within the mandate of this Commission to investigate that work and what was actually being disclosed to the Government of Newfoundland and Labrador and Nalcor as part of that process.

[5] For instance, I will need to review and consider certain reports, emails and other communications provided to or between the Independent Engineer and the Government of Newfoundland and Labrador as well as with Nalcor Energy and its subsidiaries. There are other communications that Commission counsel are aware of from Alison Manzer, a lawyer and agent of the Government of Canada, that were provided to the Government of Newfoundland and Labrador and Nalcor and its subsidiaries that are considered to be relevant to the Commission's mandate.

[6] Based upon my view of the ability of this Commission of Inquiry to investigate the work and activities of the Independent Engineer, I am satisfied that he is a necessary and appropriate witness during Phase Two of the Inquiry's hearings. Saying this, I recognize that there are some jurisdictional limitations regarding the activities of Canada that might potentially come into play during Mr. Argirov's testimony. As such, I am prepared to grant limited standing to Canada in order that through its counsel objection can be made, if needed, during the testimony regarding the Commission's jurisdiction.

[7] Notwithstanding the grant of standing for that purpose, I wish to make it clear that I am not prepared to accept at this time that questions related to the “diligence, ongoing advice, report contents and similar” are areas that are necessarily outside this Inquiry’s Terms of Reference or jurisdiction. Similarly, I see no reason at this time to permit counsel for Canada to “comment or make enquiry” in relation to the testimony of Mr. Argirov.

[8] As a result, Canada will be granted limited standing only to make objections, if necessary, where questioning of the Independent Engineer goes potentially beyond the Commission’s Terms of Reference or its jurisdiction.



JUSTICE RICHARD D. LEBLANC
COMMISSIONER