

THE MANITOBA CLEAN ENVIRONMENT COMMISSION

IN THE MATTER OF:

THE KEYASK GENERATION PROJECT (“KEYASK”)

BETWEEN:

CONCERNED FOX LAKE GRASSROOTS CITIZENS (“CFLGC”),

Applicant,

- and -

KEYASK HYDROPOWER LIMITED PARTNERSHIP,

Respondent.

For the Applicant: Peter Kulchyski

**For the Respondent: Douglas Bedford
Jack London, Q.C.**

REASONS FOR DECISION

The applicant’s motion was argued before the Keeyask Hearing Panel on October 17, 2013. The participants were advised by email on October 18, 2013 that the motion was dismissed with written reasons to be delivered later. Following are the panel’s reasons for dismissing the motion.

BACKGROUND

In November 2012, the Minister of Conservation issued a request that the Clean Environment Commission hold public hearings on the proposal by the Keeyask Hydropower Limited Partnership to construct the Keeyask Generation Project.

In March 2013, the Concerned Fox Lake Grassroots Citizens were granted funding under the Participant Assistance Program (PAP) and, thus, became a registered participant for these CEC proceedings.

ISSUE AND RELIEF SOUGHT

The applicant has filed a Notice of Motion pursuant to Section 2.08 of the Clean Environment Commission's *Process Guidelines Respecting Public Hearings* seeking an order of the hearing panel directing the disclosure of certain documentation. The specific relief sought is:

1. an order for disclosure of documents by Rachel Eni, a past employee of Fox Lake Negotiations Office and Manitoba Hydro.
2. an order for the disclosure of any information relating to socio-economic data and reports on the impacts of hydro-development in north Manitoba completed by Rachel Eni (and her assistant Gladys Rowe) between the years 1999-2013.

The Notice of Motion, as filed, does not make it clear whether the order being sought is to be directed towards the respondent partnership, Manitoba Hydro or the named individual, Rachel Eni.

During his oral submission Dr. Kulchyski, the representative of the applicant, made it clear that he did not really care who the order was directed towards as long as the material itself was disclosed.

In light of the hearing panel's ultimate disposition of the motion, it is unnecessary to decide the question as to whom the order should be directed, as well as the panel's concern that Ms Eni was not served with the Notice of Motion and supporting material.

APPLICANT'S GROUNDS FOR THE MOTION

For the purposes of these Reasons for Decision, the panel will quote extensively from the written submissions filed on behalf of the applicant:

1. Manitoba Hydro has failed to accurately identify and assess the cumulative effects of the Keeyask project on Makeso Sakahican community members
 - a) To gather traditional knowledge (TK) and local knowledge about the impacts of hydroelectric development on the culture of local harvesters and resource users of Makeso Sakahican (Fox Lake). We see the environment and people as closely connected and we find it is imperative to look at the social and cultural impacts on land use in both, current and past contexts. We are concerned about the failure of society and industry such as Manitoba Hydro to understand that Fox Lake, like other First Nations, does not view land and water as a commodity but as an integral part of their relationship to the earth and their ancestors.

- b) There are many serious and ongoing impacts from Manitoba hydro projects and project-related infrastructure. According to Makeso Sakahican members and relevant literature (Keeyask EIS, *In the Shadows of the Dams*; Ninan; CFLGC personal communication), impacts began when the first Manitoba Hydro project was built about 40 years ago. The cumulative effects on the community and the environment continue to be affected with each in-coming project.
- c) To examine the interconnectedness and additive impacts of the current projects. The Keeyask dam is the driver behind all the ancillary projects to be built or proposed on Makeso Sakahican; this includes the South access road that is to become a highway, the BiPole III project and connecting transmission lines and the necessary infrastructure.
- d) The cumulative impacts are devastating on the community; loss of resource harvesting areas, meeting and camping places, recreational areas, traditional travel routes, burial sites etc. UNESCO identified the tangible as well as the intangible cultural heritages of Indigenous peoples like Makeso Sakahican to be essential components of cultural diversity – so our research will take both elements of culture into account. These are part of the collective memory of the community that have never been forgotten, and yet Manitoba Hydro and consultants still downplay the cumulative impacts of past projects on these cultural expressions.
- e) The Commission is mandated to carefully review all aspects of the Keeyask project. To do so, it is essential that all data is presented so that an informed decision could be made. Proceeding without the evidence contained in these documents would amount to procedural unfairness and an error of law; it would also call into question the entire environmental assessment regime in Manitoba.
- f) In the response CFLGC has received from Manitoba Hydro, it is stated that "no work undertaken by Rachel Eni has been used in the development of these predictions" (MH-Keeyask IR responses-CFLGC -017). As such, we would like to see the data that was excluded in the creation of the Keeyask EIS as well as other hydro-electric projects.

2. The Need for Adequate Information

- a) The Clean Environment Commission has found in the Report on Public Hearings: BiPole III Transmission Project (2013:126) that past hydro-electric developments in Northern Manitoba have "had a profound impact on communities in the area of these projects" and other proposed projects will add to these impacts.

- b) Up to date, there has never been a socio-economic comprehensive assessment done on past and existing hydroelectric development, and the data available in Rachel Eni's report(s) would be of appropriate significance.
- c) The commission, under its Terms of Reference, is required to conduct a review of all elements of the EIS and the potential social and economic effects the Project may have on Makeso Sakahican members.
- d) Manitoba Hydro is a Crown Corporation, and is thus is required to assist in determining the most appropriate way to implement the new obligations under the Canadian Environmental Assessment Act. Furthermore, the honour of the Crown is at stake, and as such, good governance and proper treaty relations with Canada's aboriginal people require that a more dynamic process – mandating active participation of indigenous peoples and the Crown in the identification of Aboriginal rights (Slattery 2005:434).

3. The Commission has the Authority to Control Its own Procedures

- a) The CEC has jurisdiction over the release of information, including access to relevant documents held by the Proponent. CFLGC files this motion for the disclosure of records and confidential communications regarding research conducted by Rachel Eni that is held by the Proponents and the Fox Lake Negotiations Office. CFLGC would respectfully show the court that these documents are essential in understanding the full scope of the Keeyask project and procedures under S.6(3) of the *Environment Act*.
- b) Under the *Environment Act* 2(2)e, the department, has as one of its duties to research, monitor, study and and investigate environmental issues related to the acquisition of knowledge, data or technological understanding necessary to perform its mandate.
- c) Section 6(6) of the *Environment Act* confirms the power of the Commission under *Evidence Act* section S.6(1).
- d) Good cause exists for the release of the requested information in that other ways of obtaining the information are unavailable and/or ineffective and the public interest and need for disclosure outweigh the potential injury to the confidentiality agreement signed by Rachel Eni.

4. Ownership and Access to Community Data

- a) Disclosure of the data will enable CFLGC to examine the impact Keeyask and other Manitoba Hydro infrastructure could have on Aboriginal and treaty rights of people in Makeso Sakahican.

- b) Additionally, the Makeso Sakahican members of CFLGC are a party to the Partnership between Manitoba Hydro and Fox Lake Negotiations Office. They have participated, directly or indirectly, in the studies conducted by Rachel Eni, and thus lack of disclosure would amount to a breach of procedural fairness.
- c) The Supreme Court, in *Canada (Minister of Industry) v. Canada (Information Commissioner)* 2007, ordered disclosure for the specific and limited purpose for which the band records were requested.
- d) The researcher and the proponents of the research are under the ethical responsibility of to disclose and provide access of the obtained research data from Aboriginal community members to the community members. The notion of OCAP - ownership, control, access, and possession - of data is discussed in numerous scholarship involving Indigenous people and ethics, and most examined in the National Aboriginal Health Organization as well as in Tuhiwai-Smith (2006).
- e) In the Responses to Information Requests - CEC, Round 1, CFLGC-017, it is stated that "the work undertaken by Rachel Eni [...] is considered confidential by Fox Lake Cree Nation". As CFLGC represents the interests of Makeso Sakahican, it is pertinent under the Partnership Agreement that the material evidence is released to Fox Lake community members.
- f) The term "documents" under the Manitoba *Environment Act* refers to "data and information, whether maintained and stored as printed material or in computer files or discs". Although the data and research reports have been excluded in the Keeyask EIS, they are "maintained" at Manitoba Hydro.
- g) Article 29 of the Draft Declaration on the Rights of Indigenous Peoples provides that:

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

5. Remedies

- a) CFLGC requests that the Manitoba Hydro be ordered to disclose the records and reports regarding the social well-being of Fox Lake Community members.

- b) CFLGC files this motion requesting that the data and any Rachel Eni reports be publicly released. Manitoba Hydro and the Fox Lake Negotiations Office has information regarding the social, economic and cultural well-being of Makeso Sakahican community members that is relevant to a determination of CFLGC individual and community rights, and the public has the right to know where their energy comes from.
- c) The release of the documents and the research data conducted by Rachel Eni would be an example of the open process investigation that is the foundation of the Clean Environment Commission under 6(5)(c) of the Manitoba *Environment Act*.
- d) Disclosure of the documents to the CFLGC will once again be evidence of transparency to community members. Data and personal information collected from the community members for the purpose of research should be returned to the community members. This is not only research ethics but shows good faith of the partnership and the Negotiations office that looks after the best interests of the Makeso Sakahican community members.
- e) In order to have a good working relationship with the Aboriginal people on whose [land] hydro projects are built, Manitoba Hydro must be inclusive to the Ininew conceptions of how knowledge is used, generated and “owned”. As Harding et al. (2012:6) discuss the difference of Western understanding of how knowledge is generated, meaning, how it refers to:

‘individuals who have autonomy in determining whether to share it. Once knowledge is shared, it is free for all to use, with only limited exceptions [...]. By contrast, ‘within tribal communities, there may be an assumption that knowledge is part of the group’s overall identity’.

CFLGC requires all data that was conducted on the health and well-being of the local people, to be one of the determining factors of the local identity.

RESPONDENT’S GROUNDS FOR OPPOSING THE MOTION

As above, the position of the respondent is detailed by quoting extensively from the material filed on its behalf:

1. This Motion is ill-advised and ought to be withdrawn. If it is not withdrawn, it should be dismissed.
2. The Clean Environment Commission (“the Commission”), at the hearing in Gillam, Manitoba, has already heard the evidence of Councilor George Neepin that the Fox Lake

Cree Nation, after having received all information and having participated in Referenda regarding the Joint Keeyask Development Agreement (JKDA) and the Adverse Effects Agreements (AEA), overwhelmingly approved both Agreements and the participation of Fox Lake Cree Nation as a limited partner in the Keeyask Generation Project.

3. In paragraph 3(B) on page 4 of the Notice of Motion filed by an individual on behalf of the CFLGC, it is indicated that the Makeso Sakahican of CFLGC are party to the Partnership between Manitoba Hydro and Fox Lake Negotiations Office. Similarly, in paragraph 3(E) on page 4, it is argued that CFLGC represents the interests of Makeso Sakahican.
4. The statements and their intent are inaccurate, and there is no evidentiary basis for those assertions provided by the CFLGC. Fox Lake Cree Nation, an Indian band under the Indian Act, governed by a Chief and Council and its own constitution, are not represented by the CFLGC nor does the CFLGC represent the interests of the Fox Lake Cree Nation, its members, its Resource Management Area or its Traditional Territories. The CFLGC, whatever might be its composition and its intent, represents its own perspective but that perspective is not shared by the Fox Lake Cree Nation nor has the Fox Lake Cree Nation authorized the CFLGC to speak or make requests on its behalf, in its name or in the name of its Members collectively.
5. At the hearings in both Gillam and Bird, Manitoba, Chief and Council of Fox Lake Cree Nation have indicated their support for, and encouragement of, those individuals in its community who hold views different than those of the Fox Lake Cree Nation and its collective members to speak out, but it has never granted authority to, or support for, any group other than itself to make representations for Fox Lake Cree Nation, nor does it share in the criticism and dissent which may be forthcoming from splinter groups, even those which may have some Members of the Fox Lake Cree Nation as members of such a group.
6. CFLGC requests that Manitoba Hydro, as opposed to the Proponent KHLP, be ordered to disclose the records and reports of Dr. Eni regarding the social well-being of Fox Lake Cree Nation community members. As stipulated in the Statement of Facts appended hereto at Tab 1, Manitoba Hydro is not in possession of the records and is only in possession of an unfinished, preliminary report described in paragraph 8 of the Statement of Facts, which it does not have authority to produce.
7. CFLGC requests that the data and any Rachel Eni reports be publicly released. The KHLP and Fox Lake Cree Nation object, strongly, to any such order being made. Neither of those parties is in possession of the said data. The data and reports were also not used in the development of the Environmental Impact Statement (EIS) and, as such, such an order would exceed the Commission's authority under its Terms of Reference.

8. Perhaps more importantly, given the sensitive nature of a large part of the data collected on a confidential basis by Dr. Eni, and in the absence of comprehensive and acceptable methodological processes of analysis with appropriate recommendatory work having been completed, it is the view of both the KHLP and Fox Lake Cree Nation that the release of any such documentation or data would not be facilitative of a work of this Commission but, more importantly, could be detrimental to, and could adversely affect, the wellbeing, confidence and interests, collective and individual, of the Members of the Fox Lake Cree Nation who agreed to participate in the study on a promise of confidentiality.
9. In the Statement of Facts referred to in paragraph 6 above the respondent details the following information:
 - (a) the data being requested are based upon work undertaken by Dr. Rachel Eli pursuant to a contractual relationship between Fox Lake Cree Nation and Dr. Eli operating as Rachel Enterprises Ltd.;
 - (b) Dr. Eli was not an employee or partner of Fox Lake Cree Nation nor was she employed by Manitoba Hydro or the proponent;
 - (c) the relationship between Dr. Eni and Fox Lake Cree Nation stipulated that all data collected would be held in strict confidence;
 - (d) participants in the study conducted by Dr. Eni were assured that data obtained from them would be held in confidence and would not be disclosed publicly;
 - (e) disputes arose between Dr. Eni and Fox Lake Cree Nation;
 - (f) the work contracted for was not completed although a preliminary draft report was prepared; and
 - (g) none of the data or its incomplete analysis was used in the preparation of either the EIS or the Fox Lake Cree Nation Environment Evaluation Report which forms a part of the EIS.

DECISION

The members of the Panel have read all of the written materials filed by the applicant and by the proponent in response, and have considered carefully the oral arguments presented.

It has been a long-standing practice in Commission proceedings that any documents that informed the production of the Environmental Impact Statement and/or is referenced in the EIS is to be made available to all parties to the proceedings, and will become part of the record of the proceedings.

The respondent asserted, in both its written response and oral argument, that “the data and reports were not used in the development of the Environmental Impact Statement ...” A similar answer was provided in response to an Information Request submitted earlier by the applicant.

The applicant did not dispute this assertion. In fact, during oral argument, the applicant appears

to have conceded the point. The Panel Chair asked the applicant's representative: "Is reference made to this information in the EIS or in some of the technical documents?" The response was: "Not as far as I can see." (Transcript, p. 138)

And, in rebuttal, Dr. Kulchyski seemed to further concede this point, stating "... our question is, should it have been used? Maybe it should have been used as part of the EIS ..." (Transcript, p. 157)

Given this evidence, the Panel is not able to come to the conclusion that the requested documents fall within the standard practice of the Commission with regard to production of documents that have been utilized in the preparation of the EIS or are referred to in the EIS.

That is not necessarily the end of the matter as there may be relevant material in the possession or control of a party (or indeed a non-party) which is directly relevant to the panel's mandate but it is, in the panel's opinion, incumbent upon someone such as the applicant to show with some degree of certainty that such documentation exists and that it is relevant. In the present situation the applicant has not done so. The documentation which is being sought is ill-defined, was apparently prepared on a draft basis only and may well have been generated on a confidential basis which would be privileged from production at law.

The panel is therefore not prepared to grant the request for production.

DISPOSITION

The motion of the applicant is dismissed.

DATED this 8th day of November, 2013.

MANITOBA CLEAN ENVIRONMENT COMMISSION

Terry Sargeant, Chair

On behalf of the Hearing Panel: Judy Bradley, Reg Nepinak, Jim Shaw,
Edwin Yee