

**IN THE MATTER OF: THE MANITOBA CLEAN ENVIRONMENT COMMISSION REVIEW OF
THE PROPOSED VIVIAN SAND EXTRACTION PROJECT MADE ON BEHALF OF SIO
SILICA CORPORATION**

**AND IN THE MATTER OF: A NOTICE OF MOTION FOR AN ADJOURNMENT AND OTHER
RELIEF**

DECISION OF THE HEARING PANEL

Representatives for the Moving Parties: Susanne McCrea and Dennis LeNeveu

Counsel for the Applicant Sio Silica Corporation: Sander Duncanson

In November 2021 the Minister of Conservation and Climate (now Environment, Climate and Parks) requested the Clean Environment Commission (the “CEC”) to undertake a technical review of an application which had been submitted by Sio Silica Corporation (formerly CanWhite Sands Inc.) (the “Applicant”) seeking a license under the provisions of The Environment Act. The requested review is to include a public hearing.

Certain interested parties, including What the Frack Manitoba Inc. and Dennis LeNeveu, applied for and have been granted Participant status at the public hearing.

As part of its mandate CEC retained technical advisors to provide a technical review respecting the application.

The advisors submitted their reports (hereinafter referred to as the “Technical Reports”) which were provided to the Applicant and the hearing participants on September 26, 2022.

Suffice to say, the Technical Reports indicated that there were significant omissions and/or deficiencies in the materials which had been submitted in support of the application.

What the Frack and Dennis LeNeveu (“the moving parties”) filed a Notice of Motion with the CEC hearing panel (“the hearing panel”) seeking the following:

- (a) An order directing the Applicant to file materials rectifying the alleged material deficiencies in the Application as identified in the Technical Reports and public comments prior to continuation of the hearing.
- (b) Delay or suspension of the hearing until Section 35 Indigenous consultations are complete.

The hearing panel determined that the motion could proceed by way of written submissions.

Position of the Moving Parties

The moving parties argue that there are significant omissions in the material put forward in support of the Proponent's application for an environmental license, which impair the participants' abilities to assess the risks posed by the proposal. They state that the omissions and deficiencies will prevent their meaningful participation in the hearing process which will in turn impair their intention to assist the CEC in fulfilling its mandate. In support of their position, the moving parties rely heavily on the shortcomings outlined in the Technical Reports and have summarized these shortcomings in their motion materials.

Position of Sio Silica Corp

The Applicant argues that, contrary to the position taken by the moving parties, the indicated deficiencies are not deficiencies in the Application which has been submitted and therefore do not preclude the hearing process from proceeding.

The Applicant also submits that the Technical Reports put forward by the CEC's advisors contain fundamental flaws and misunderstandings about the proposed project and that some of the work which is recommended in those reports go beyond the requirements of an Environment Act proposal.

The Applicant also submits that, through the environmental review process and supplemental filings made to date, it has provided extensive information about the likely environmental effects of the proposed project. The Applicant states that although "it expects that additional information will be forthcoming through the hearing process, including the answers to Information Requests ("IRs"), that the information which it has already provided meets and in some respects surpasses what is required for an Environment Act proposal and allows the commission to be able to make credible, informed decisions about what the likely environmental effects of the Project will be."

The Applicant cites legal authorities for the proposition that environmental assessments, by their nature, can never achieve finality or certainty because they are performed early in the planning of projects and are predictive in nature.

Additionally, the Applicant argues that there ought to be a balance struck between the amount of studies to be undertaken and the need to review proposed projects in a timely and efficient way. It submits that the balance should, in this particular instance at least, be done at the conclusion of the hearing process based upon a full evidentiary record. The Applicant argues that there must be a testing of the Technical Reports, which presumably means through questioning of the authors and/or additional evidence and argument.

The Applicant indicates that the upcoming IR process is designed to allow parties to request information about the proposed project, including the kinds of information which the moving parties are requesting at this stage.

The Applicant states that "It would be premature and unfair to Sio Silica for the commission to significantly delay its review process before it has even begun in earnest, on the basis that Sio Silica needs to provide additional information which parties can request as part of the current Hearing process, and before Sio Silica has been able to test and fully respond to the technical review reports on which the motion is based. Instead, the commission should let the Hearing

process unfold, as established, to address the Technical Reports and all other matters that parties choose to raise”.

The Applicant adds that the responsibility for Indigenous consultation rests with the Province of Manitoba, not the commission or the Applicant. Citing legal authorities, the Applicant states that the adequacy of Indigenous consultation should not be assessed until the government’s ultimate decision on a project.

The final submission is that the delay being requested will result in significant prejudice to the Applicant.

Analysis and Decision

There are two parts to the notice of motion under consideration. First, the moving parties request an order of the panel directing the Applicant to rectify identified deficiencies in its proposal, as outlined in the Technical Reports and appendix to their notice of motion. Secondly, they seek a delay in the hearing until Indigenous consultations are completed.

As outlined above, the moving parties argue that there are significant deficiencies in the proposal being put forward by the Applicant. The major support for their position is contained in the Technical Reports. The moving parties are of the opinion that the deficiencies identify significant risks to the environment and the conclusions reached in the Technical Reports undermine the credibility of the conclusions drawn by the Applicant. They further claim that the identified deficiencies make it impossible to perform a comprehensive assessment of the proposal’s environmental effects.

It is the position of the moving parties that the IR process will be insufficient in addressing the material deficiencies and that in order to fulfill its mandate the CEC should grant the order being requested.

The Applicant argues that the identified deficiencies are not deficiencies in the Application itself and do not require addressing before the hearing process can continue.

The Applicant submits further that the information which is being sought by the moving parties can be educed through the IR process and/or through further filings. The Applicant suggests that all information can be tested, including the Technical Reports themselves, so that the conclusions at the end of hearing are reached on a full evidentiary record. It is argued that it would be premature and unfair for the CEC to delay its process before the Applicant has had an opportunity to test fully or respond to the Technical Reports.

The Applicant also restates that it is not the responsibility of the commission or the Applicant to dictate the parameters surrounding Indigenous consultation.

The hearing panel, after carefully considering the positions of the moving parties and the Applicant, has decided that the moving parties’ motion ought to be dismissed.

The panel is not convinced that it has the statutory power to grant the order which the moving parties seek and even if it does have that power, it is not inclined to exercise such authority at this stage.

The hearing panel has the right to adjourn or suspend the hearing process, but its mandate does not include the right to dictate to an applicant what it must provide in the way of evidence, be that demonstrative or opinion based.

The hearing panel affirms that its mandate is to assess the potential environmental effects of the proposed project, and to do so may require additional information beyond that which was provided in the Environment Act application filed with the department.

The Applicant has not as yet had the opportunity to respond to the comments contained in the Technical Reports and the hearing panel agrees with the submission that it is premature to suspend or adjourn the hearing process prior to receiving or hearing further evidence.

During the course of the hearing process the moving parties, as well as the other participants, will have the right to challenge the methodology, results and conclusions tendered by the Applicant in support of its proposal. As well, participants will be given the opportunity to pose questions of the Applicant, including issues raised in the Technical Reports. The Applicant will be well advised to respond adequately to all such relevant questions. These materials will be made available to the public.

Should the panel determine, after hearing all of the evidence from the Applicant and the participants, that there is a deficiency of information or that the methodology or conclusions are wanting, it is open to the CEC to emphasize such determinations in its final report to the minister.

The CEC would certainly have the authority to suggest alternatives, conditions or remedies to the minister.

On the second matter of Section 35 Indigenous consultation. The consultation process for the Vivian Sand Extraction Project is being conducted by the Crown (Natural Resources and Northern Development) independently of the public hearing process being conducted by the Clean Environment Commission.

The panel is of the view that this is a matter that falls outside of the responsibilities of the commission.

The motion of the moving parties is dismissed for the foregoing reasons.

In dismissing the motion, the hearing panel has not made a finding that the evidence put forward to date is adequate or that the methodologies and conclusions are suitable. Likewise, it should not be inferred that the panel, in dismissing the motion, is somehow rejecting the issues raised by the moving parties. Those are issues which can be dealt with during the hearing process itself.

The panel thanks the moving parties and the Applicant for their informative and timely written submissions.

Dated this 16th day of November, 2022.

MANITOBA CLEAN ENVIRONMENT COMMISSION

Original signed by

John Doering, Panel Chair

On behalf of the Panel: Ian Gillies, Terry Johnson, Laurie Streich