

**Submission to the Commission of Enquiry Respecting the Muskrat Falls Project with
respect to the interpretation of the Terms of Reference**

We wish to respond to the public notice seeking submissions with respect to the interpretation of the Terms of Reference for the Commission of Enquiry Respecting the Muskrat Falls Project.

We believe that the Commissioner should broadly interpret the Terms of Reference so that there is a complete review of the project which provides full context for the public policy decision to announce and then sanction the project, the management of the project and its long term effects on Newfoundland and Labrador and ratepayers.

We list below the issues which we feel should be examined by the Commissioner and how the Terms of Reference can be interpreted so as to allow the issues we raise to be considered by the Commissioner. Each refers to the paragraph of the Terms of Reference which we believe gives the Commissioner the authority to consider the issue.

We have not commented on issues which are clearly identified in the Terms of Reference.

Democratic Institutions 4(b)v, 4(c), 4(d), 5(a), 5(b), 5(c), 5(d), and 5(d)

It is vital that the province take stock during this inquiry as to how such a monumental error in public policy could take place. There are other egregious mistakes in our history but none of this magnitude. We believe that the Inquiry should offer some reflections on why it is there was so little willingness to question the decisions that were being taken or speak publicly. Why were

politicians and others prepared to make ad hominem attacks on critics? Why was Newfoundland Power silent throughout the Public Utilities Board hearing? Why did Memorial University, through the Harris Centre, back away from its earlier role of convening dialogue on Muskrat Falls? What are the deficits in civil society which prevent full and informed public debate on important public policy issues?

1. Are the decisions taken on this project indicative of fundamental problems with how our democratic institutions in this province are working? The Commission's mandate to deal with this question arises, inter alia, from 4(b) v, 4(c), 4(d), 5(a), 5(b), 5(c), 5(d), and particularly from 5(d) which deals with "the need to balance commercial considerations and public accountability and transparency in carrying out a large-scale publicly-funded project."

Inappropriate Interference with due process 4(c) and 4(d)

2. There is evidence that government attempted to influence the deliberations of the Public Utilities Board during the reference hearing on Muskrat Falls. Did government Ministers and public servants attempt to influence the Board by seeking access to Board members beyond the access available to ordinary citizens? What was the extent of this interference with the work of a quasi-judicial, independent tribunal?
3. It has been alleged that Nalcor was allowed to review testimony given by provincial departments and agencies which presented evidence before the Joint Environmental

Panel, to facilitate approval of the project and to suppress or minimize presentation of adverse environmental effects? Did Nalcor intervene inappropriately in a manner to compromise the environmental assessment process? Was such intervention endorsed by the government?

Relationship between government and independent oversight agencies 4(d)

4. Did government respect the independent oversight role of agencies mandated to protect the public interest, including the Public Utilities Board and the Department of Municipal Affairs and Environment?

Joint Environmental Panel 4(b) v and 5(a)

5. Were the environmental and other risks identified by the Joint Environmental Panel report considered in the decisions and recommendations leading up to the sanctioning of the project, and in its implementation, including the Panel's recommendations for environmental monitoring, compliance and adaptive management? The Commission's mandate draws upon 4(b) v which refers to "risk assessments, financial or otherwise" and upon 5(a) which deals with participation by indigenous people who "may have been adversely affected by the Muskrat Falls Project."

Impact on Indigenous people 4(b) v and 5(a)

6. Were the adverse impacts upon indigenous people adequately weighed in the assessment of the benefits and costs of the project and in its mitigation? The Commission's mandate draws upon 4(b) v and 5(a).

Misleading information and deception 4(a), 4(b) v and 5(b)

There exists significant evidence in the public domain that Nalcor employed a deliberate strategy of deception to maintain public support for the project over a period of several years. These claims offered certainty, not supported by the facts, that the cost estimates and schedule were generally within Nalcor's forecasts. Nalcor also made claims regarding the specific construction of certain contracts, i.e. "fixed-priced" vs. "unit-priced" for the purpose of de-emphasizing the liabilities each posed to Nalcor.

The full extent of the cost to which the project's overruns had accelerated and the delay in schedule were not known until three months after EY submitted its April 8, 2016 Interim Report, following the November, 2015 provincial election. Nalcor's decision to hold back the information may have had important political implications. A Crown Corporation may have been deliberately engaged in attempting to influence the outcome of the 2015 General Election.

7. Was the project sanctioned on the basis of misleading information which misrepresented the benefits and costs of Muskrat Falls and the potential of other options better to "provide consumers in the province with electricity at the lowest possible cost consistent with reliable service?"

8. Were unrealistic claims made concerning the prospect of large dividends and other benefits from Muskrat Falls?

Water Management 4(b) (v)

The doubtful status of a Water Management Agreement (WMA) between Nalcor and CFLco, intended to maximize the production of power by coordinating the water flows to the two hydro projects on the Churchill River, threatens Muskrat's ability to achieve rated capacity, with major implications during periods of high demand. Nalcor claimed to have an agreement but they did not have the consent of Hydro Quebec. In its application to the PUB for approval of the WMA, Nalcor made claims that suggested production from Muskrat would be severely compromised without a binding WMA.

9. Did Nalcor correctly represent to the Public Utilities Board the implications of operating the Muskrat Falls project in the absence of a Water Management Agreement?
10. Was Nalcor negligent in requesting project sanction in the absence of judicial certainty as to the status of the WMA and have the water management risks increased as a result of the opinion of the Quebec Superior Court on the interpretation of the renewal contract for the Upper Churchill?.
11. Did Nalcor falsely and deliberately claim that it was in possession of a binding WMA when it clearly was not? 4(a) (i)

12. Is Nalcor in possession of an effective WMA now?
13. If it has no WMA, how will power production at Muskrat Falls be affected until 2041 when the Upper Churchill contract expires?
14. Was it reasonable to assume the Water Management Agreement, as one of “the assumptions or forecasts on which the analysis of alternatives was based”, would allow management of water flows to achieve the projected energy and capacity targets?

Demand projections 4(a)i and 4(b)v

With doubling of rates in the offing it has to be questioned if projections of electricity requirement took into account the elasticity of demand and demographic projections which show little if any population growth. Reasonable assumptions on elasticity lead to the conclusion that demand for Muskrat Falls power will vanish with the doubling of rates.

15. Were demand projections undertaken with appropriate weight given to the behaviour of consumers who minimize cost by substituting other energy sources when rates rise?
16. Were the demand projections reasonable and in accordance with best practice and did they reflect the demographics facing the province?

17. Did government or Nalcor, in response to escalating costs and declining demand projections, assess the options of terminating or suspending the generation component and measure their benefits and cost? What was the conclusion reached?
18. Was there a point in time after sanction when the project could have been terminated, in whole or in part, based upon a comparison of the costs of termination versus the costs of continuing the project through to completion?
19. Did Nalcor at any point after sanction seek reconsideration of the decision to sanction?

The North Spur 4(b) v

The North Spur may be inherently unstable, notwithstanding Nalcor's remediation. That is based on the scientific research of international geotechnical experts including Dr. Stig Bernander of Sweden, a noted geotechnical engineer and academic and his associates Dr. Lennart Elfgrén and Robin Dury. Nalcor has repeatedly refused requests from the Grand River Keepers and other groups and individuals, including the undersigned, to refer this issue, which is both a major economic and life safety issue to the people living downstream, to an independent panel of geotechnical engineers to confirm the safety and stability of the remediated North Spur.

20. Given that the North Spur was a natural, rather than an engineered formation, making the Canadian Dam Safety Regulations an unsuitable design standard, was Nalcor's design for North Spur remediation performed according to generally accepted engineering standards?

21. Have the risks associated with the North Spur been mitigated? Were the risk assessments undertaken in accordance with best practice and have the safety and stability of the North Spur been both assured?

22. Is there adequate insurance against the worst case scenario of the failure of the North Spur.

Contaminants 4(b) v

23. Were the risks associated with contaminants released from the project, including methylmercury, adequately mitigated, were the risk assessments undertaken in accordance with best practice and have health risks been minimized?

The EMERA Agreements 4(a) (i) and 4(c)

The multi-part deal with EMERA found its origins in the “20 for 20” principle which was enshrined in the 2010 Term Sheet announced by Premier Danny Williams and Nova Scotia Premier Darrell Dexter.

In exchange for building the Maritime Link, and allowing Nalcor Energy to export power at no transmission cost over the Link, Emera was to receive 20% of the power for 35 years. The Term Sheet provides for Emera to absorb 20% of the capital investment for 20% of the power from Muskrat Falls.

This represented a commitment of 980 GWh annually, at no energy charge. At the end of 35 years the Link is to be transferred to Nalcor. In addition, Nalcor agreed to supply 240 GWh of “supplemental” power each year for five years. The “Nova Scotia block” was therefore 1,220 GWh for five years and then 980 GWh each year for 30 years.

The UARB rejected this Term Sheet in July of 2012, arguing that more cheap power was needed for the deal to be the “lowest cost option” for Nova Scotia. Nalcor capitulated to the UARB’s demand. Nalcor and EMERA entered into an Energy Access Agreement (EAA) under which Nalcor agreed to supply a minimum of 1,200 GWh of “market energy” over the period up to 2041.

In addition, Emera was allowed to acquire a 29% share of the Labrador Island Link, with a guaranteed rate of return linked to rates allowed to other regulated utilities.

Emera had no equity share in the generation component, nor was it required to share in cost overruns at the Muskrat Falls site. Nalcor, on the other hand, was required to share in cost escalation on the Maritime Link.

Against the revised project costs, as a consequence of “overruns,” Nova Scotia’s share now equates to “11%, and not 20%” of the total cost of the project. The share of the 4,600 GWh committed to Nova Scotia becomes a minimum not of 20% but 48%.

As if these terms were still inadequate, Nalcor agreed to backstop a possible future "green" power project for EMERA, possibly wind. In addition, it agreed to give EMERA a return on its equity contribution to the LIL and ETA components equal to that approved by the PUB for Newfoundland Power and to gross up those dividends, putting EMERA on the same level as Nalcor which, as a crown corporation, does not pay income taxes.

The agreements, seemingly, were an essential part of the scheme to effect release of the FLG without which the Government lacked the fiscal capacity 'to go it alone' with the Muskrat Falls project.

Assessed on commercial terms and taken together, the deals seem hopelessly one-sided, even reckless. In addition, when these arrangements are considered alongside suggestions that Nalcor falsified or "low-balled" the project estimates, making cost "over-runs" inevitable, the project was doomed and that outcome ought to have been recognized by Nalcor.

24. Taken together, were the contracts with EMERA reasonable?

25. Did the Term Sheet with Nova Scotia expose the province to unnecessary risks and did the veto powers allowed for the Nova Scotia Utilities and Review Board weaken the position of the province of Newfoundland and Labrador by recognizing the authority of the UARB and not that of the NL PUB?

Fiscal and social impact 4(b)v

26. What is the fiscal and social impact of Muskrat Falls, both during the construction period and during its subsequent operation?
27. What will be the impact upon social programs as a result of the project?
28. What are the economic and financial risks of meeting the financial obligations arising from the project and what risks remain to be mitigated? What will be required from the taxpayer to mitigate rate increase so they don't double and how will that be funded?

Departure from Cost of Service accounting for Generation Assets 4(a)(i) and 4(a)(iii).

Nalcor applied cost of service accounting to the recovery of costs associated with the Labrador Island Link but a radically different approach to the generation assets (MF and LTA), one which defers the province's return on its 35% equity investment into the future (See PUB reference Exhibit 36) and greatly reduces the revenue requirements from ratepayers in the early years. It leads to a lower statement of project cost than application of COS methodology on a consistent basis and shifts costs to future generations.

29. Does the unusual cost recovery structure and the project's financing, which depends upon a) 35% equity in generation assets, b) deferred payment of the province's return on equity, and c) strong future growth in demand for power, create a high financial risk for

the province, given the large escalation of capital costs, the impact of this escalation on power rates and price elasticity of demand for power?

The Status of the Upper Churchill in 2041 4(a)i and 4(b)v

Nalcor inserted doubt as to the availability of power from the Upper Churchill Falls project in 2041 as one of the premises for advancing Muskrat sanction. Then Minister of Natural Resources, Jerome Kennedy, presented a Paper entitled “Upper Churchill: Can we wait until 2041” which is in stark contrast with arguments advanced by Nalcor during Hearings before the UARB of Nova Scotia. In that province Nalcor left no doubt that the Upper Churchill reservoir, in 2041, would be capable of helping satisfy Nova Scotia's future energy needs.

The following is a direct quote from Nalcor’s Submission, to the PUB, in defense of its Muskrat Falls strategy:

"There is inherent uncertainty around guaranteeing the availability of supply from Churchill Falls in 2041 because it is difficult to determine the environmental and policy frameworks that will be in place 30+ years out. There are other issues surrounding the CF asset with respect to HQ, as Nalcor is not the sole shareholder of the Churchill Falls operation".

30. Was the claim regarding the "uncertainty" status of Upper Churchill power in 2041, embraced by Nalcor in Newfoundland and Labrador and contained in “*Upper Churchill: Can we wait until 2041?*“, reasonably assessed in the debate over whether the sanction of Muskrat Falls should proceed?

31. Was sufficient attention given to the availability of Churchill Falls power as a long term solution to the electricity requirements of the province, when the power contract concludes in 2041?

32. Did Nalcor offer different assessments of this option in different venues, emphasizing “inherent uncertainty” at the 2012 PUB hearing, while assuring Emera that Nova Scotia would be able to access low cost power after the termination of the Energy Access Agreement in 2041?

Oil Price Projections 4(a)i and 4(b)v

33. Did Nalcor ignore mounting evidence that oil prices would be significantly affected by the development of shale oil and gas resources and did they perform due diligence on the effect of lower oil prices on the selection of the least costly and most reliable power supply option?

Integrated Resource Planning 4(a), 4(b)v and 4(c)

34. Did Nalcor give sufficient weight to both demand side management and supply measures in assessing energy options as part of the Integrated Resource Planning recommended by the Joint Environmental Panel?

35. Why did they not undertake integrated resource planning as the best practice methodology to examine all options relating both to the demand for and the supply of electrical energy?

Joint Environmental Panel 4(a) and 4(b)v

36. Why did government ignore the advice of the Joint Environmental Panel? “The Panel concludes that Nalcor’s analysis that showed Muskrat Falls to be the best and least cost way to meet domestic demand requirements is inadequate and an independent analysis of economic and energy and broad-based environmental considerations of alternatives is required.” (Joint Panel report page 34)?

Public Utilities Board 4(a) and 4(b) v and 4(c)

37. Why did government ignore the conclusion of the Public Utilities Board “that the information provided by Nalcor in the review is not detailed, complete or current enough to determine whether the Interconnected Option represents the least-cost option for the supply of power to Island Interconnected customers over the period of 2011-2067, as compared to the Isolated Island Option”?

Reliance upon MHI 4(a)i

The PUB relied heavily on MHI's assessment of Nalcor's data and assumptions to arrive at its decision not to endorse the project based on the information Nalcor had submitted. After the Government removed the PUB from further assessment of the reference question Nalcor also sought review of its data by MHI.

38. Did MHI's review for Nalcor subsequent to the 2012 PUB Reference exhibit the same or similar standards of assessment of the evidence in its review for the PUB?

Silence in the community 4(b)v, 4(c), 4(d), 5(a), 5(b), 5(c), 5(d), and 5(d)

Nalcor has engaged in large scale donations and charitable activities which well exceeded the practices of its predecessor organization and are inappropriate for a Crown Corporation. In response to an ATIPPA request Nalcor advised that "Our Community Investment Program budget is based on industry standard of approximately 1 per cent of pre-tax profit (averaged over a five year period). Our investments include donations to community groups as well as sponsorship of community events and conferences related to our business activities."

These donations include grants awarded to community organizations, such as the announcement of \$1 million in November 2017 as a grant to be given over four years to the Labrador Wellness Centre in Happy Valley-Goose Bay and the grants to be made under the December 2017 agreement with the Nunatukavut Community Council. Donations over the five year period 2013-17 averaged \$930,000.

39. Has Nalcor used its charitable donations to community organizations to keep dissident voices silent and to quell opposition to the project? Have such donations been used to prevent citizens from expressing their views on the impact of the Muskrat Falls project?

Least cost reliable power 5(b) and 5(e)

40. Was the decision to undertake this project in keeping with s 5(b): “the need to provide consumers in the province with electricity at the lowest possible cost consistent with reliable service?” The Commission should assess other options to determine their capacity to supply affordable power reliably and at lower cost. In so doing the Commission will need to consider the future operation of the facilities as well as their construction.

Dated February 9, 2018

Respectfully,



Ron Penney



Des Sullivan



David Vardy