SUBMISSION to the MUSKRAT FALLS COMMISSION OF INQUIRY

The Honourable Justice Richard LeBlanc Commissioner

PART I : (1) General Considerations

The Commission is to be applauded for affording members of the public the opportunity to comment on the Commission's Terms of Reference prior to the initiation of formal proceedings.

The Commission's task is an onerous one but one for which the Public Inquiry mechanism is well suited.

The unique role and capacity of Public Inquiries within the Canadian framework was the subject of an interesting presentation by The Hon. Associate Chief Justice Dennis R. O'Connor, Court of Appeal for Ontario and Ms Freya Kristjanson of the Toronto law firm of Borden Ladner Gervais before the Canadian Institute for the Administration of Justice, Annual Conference October 10, 2007 in Halifax, Nova Scotia.

The following quote from that presentation serves to give an overview of that role:

"The crisis that leads to an inquiry often demands a response that is public, specific about the past, comprehensive about the future, and also cost-efficient and speedy. A public inquiry commissioner may combine a number of roles: that of a fact-finder, like a judge; a proposer for policy reform; a healer for traumatized communities; and a manager with responsibility for budgets and an administrative and legal staff."

In the UK too, the Judicial Inquiry mechanism seems to be gaining favour as a means of tackling thorny problems where the law and pressing societal problems intersect.

In the highly contentious 2011/2012 UK Levenson Commission of Inquiry regarding

the culture, practises and ethics of the British Press following a phone hacking scandal, Lord Justice Toulson of the Supreme Court of the United Kingdom (speaking for a 3 Judge panel) supported a widened mandate for the Commission when he stated that:

"The public interest in the chairman being able to pursue his terms of reference as widely and deeply as he considers necessary is of the utmost importance."

While admittedly directed towards the admissibility of evidence from anonymous witnesses as opposed to the extent of the Levenson Inquiry's Terms of Reference, the orientation of the ruling of the UK's Supreme Court shows the growing tendency for common law Courts to allow Commissions of Inquiry latitude in the execution of their mandate.

It is submitted that the public "right to know" and a "root and branch" test should inform how this Commission approaches any supposed limitation on it's mandate.

(2) Subsequent Evidence of Cabinet's intention

The Terms of Reference for the Judicial Inquiry into Muskrat Falls are set out in Order-in-Council O.C.2017-339 which was passed pursuant to the Public Inquiries Act.

In reading that document the Commission should consider all public statements by the Premier and the responsible Ministers since the promulgation of that governing Order in Council which can be fairly be characterized as giving assurances as to the broad nature of Commission's mandate and as to the degree of flexibility afforded the Commission.

It seems clear from these statements, attuned as they are to broad public

sentiment, that the objective of having a Muskrat Falls Commission of Inquiry was to examine the Muskrat Falls Project in a comprehensive fashion.

3) Period under the Commission's mandate

On the premise that the Muskrat Falls Commission of Inquiry has been given such a broad mandate particular attention should be given to the history of the project since its inception.

Section 4 of the Order in Council, though using the term "Nalcor", can be taken as referring to the "Muskrat Falls Project" including the planning period in the years prior to the date Nalcor was created by Act of the Legislature on June 14,2007.

Otherwise the Commission would be prevented from understanding how the project was conceived, what it's objectives were and how it was to be executed. Without such a "project history" approach the Commission's approach would be an examination of the leaves rather than the "root and branch" of the matter.

For instance, the Order in Council as written should not be taken as barring the Commission from examining the documents and discussions surrounding the initial SNC Lavalin Feasibility and Financial Plan study commissioned by the Province in 2006 or any of the discussions or arrangements that flowed from it or were connected with it.

A clear understanding of the history of a project, particularly in it's early formative stages, is usually key to it's proper examination.

(4) Treatment of Evidence arising of an Imminent Public Danger

Section 7 of the Order in Council establishing the Commission reads as follows:

7. The commission of inquiry shall not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.

But while Section 7 restricts the Commission from expressing "any conclusion or recommendation" regarding anyone's civil or criminal responsibility arising from any wrong doing it may uncover, the Commission is not saddled with a similar incapacity a matter of Imminent public danger.

No strict interpretation as to the Commission's scope prevents it from immediately forwarding any evidence of imminent public danger to the Minister responsible for Dam Safety. As discussed below, it is submitted that the North Spur issue clearly falls within the category of a potential "imminent public danger".

Given the expansive nature of the Commission's mandate as set out above, no explicit words are needed in the Commission's Terms of Reference to empower the Commission to take action in this respect.

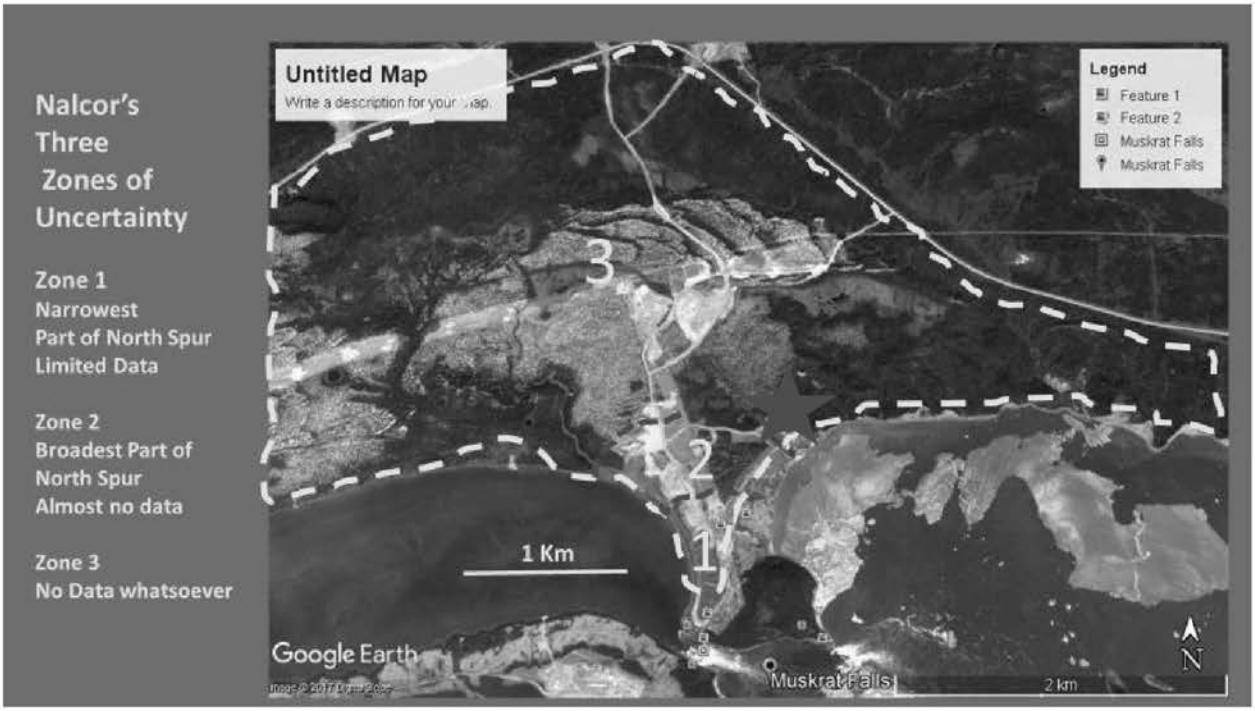
PART II The North Spur : an example of an Imminent Public Danger

Failure of the North Spur (or of the hillside above it) is the single most serious project risk facing the Muskrat Falls Project in that if significant slide and Dam Failure should take place not only would there likely be serious loss of life, both on the construction site and downstream but all Muskrat Falls generation assets could be lost and all related legal and economic obligations thrown into chaos.

The Google Earth image below (taken in June 2015) as modified outlines the

problem.

The view is looking north from the south side of the Churchill River.



The Upper and Lower Muskrat Falls are shown at the bottom.

The white line above the yellow dashed line is the Trans Labrador Highway at ~ 90 m above sea level. The Lower Churchill River at the downstream toe of the North Spur is at 0 m (sea level). All of the many square kilometers within the dashed yellow line are underlain by various amounts of sensitive unstable glacio-marine clay including Quick Clay that can suddenly liquify and turn to highly flowable watery mud.

The red star marks the location of the early February 2018 riverbank slide just downstream from the North Spur proper.

The uncertainty as to the level of landslide risk in the different areas of the overall site relates directly to the varying amount of geotechnical data acquired by Nalcor.
The only and proper way of getting the requisite data is to drill boreholes and retrieve cores of the various underground strata so that they can be subjected to various geotechnical laboratory tests. No boreholes means no core – no core means no reliable data – no reliable data means no reliable studies or risk assessment.

The whole area can be broadly divided into three different "uncertainly" zones based on the presence or absence of soil data.

Zone 1 – This is the area commonly called the North Spur which is directly impacted by reservoir impoundment. It is an area of a limited and inadequate number of boreholes giving limited data coverage. The data that does exist shows that the underground conditions in this area can vary quickly from place to place. Quick Clay conditions have been encountered in Zone 1.
Zone 2 – area of almost no boreholes
Zone 3 – area of no boreholes at all
The whole very large Zone 3 area is a sloping upward body of unconsolidated material many meters thick including sensitive marine clay which can be seen in roadcuts and stream banks. The total volume of material potentially ready to be mobilized measures in the millions of tonnes.

Such material can be mobilized through a broad range of "trigger events" – including a failure of the North Spur itself in Zone One which presently acts as a "support" for much of the hillside.

No discussion of the North Spur issue would be complete without reference to an

authoritative instructional video prepared by the Norwegian Geotechnical Institute on the 1978 Rissa Quick Clay landslide.

https://www.youtube.com/watch?v=3q-qfNIEP4A

Notice at the start of the film how simply disposing of a small amount of fill to extend a barn basement caused a slide that extended some 1.5 km over flat terrain. This demonstrates that the start of a Quick Clay slide is unpredictable and its initiation can involve relatively small amounts of energy.

And while the Rissa slide developed on and continued over essentially flat ground, the relatively steep slope above the North Spur area lends an added level of risk and more resembles the terrain at the site of the deadly March 22,2014 Oso Washington State slide.

Here is an aerial view taken shortly after the Oso slide took place.

The ill-fated Oso subdivision lies buried in the runout of the slide which ran from right to left.

Here is a link to one of the innumerable articles on the Oso slide:
http://blogs.agu.org/landslideblog/2017/04/28/oso-landslide-new-paper/

To put it simply, the Oso Slide started upslope on the north side of the river at a location some 150 m above the bottom of the river valley, rushed as a mass of liquified mud across the river, through a subdivision at 60 miles per hour with the loss of 43 lives and then across the river valley for a distance of about 1 mile.

The Muskrat situation can be seen as a combination of Rissa (Quick Clay liquefaction) and Oso (liquefaction of unconsolidated material on a steep slope hovering over a flat river valley).

And the Muskrat Falls power house and general construction site are on the southside of the Lower Churchill River in the same relative position as the ill-fated Oso sub-division.

The rapid downhill movement of millions of tonnes of liquified glacio-marine clay originating over several square kilometers, starting uphill near the Trans Labrador highway and successively mobilizing material all the way down to the North Spur proper would, in the words of Dr. Stig Bernander, see Nalcor's North Spur stabilization measures " swept away like matchsticks" (personal communication).

Such a potential event is often overlooked because of a focus on the issue of the potential failure of the North Spur itself – which is a big enough problem in any event.

Moreover, such a hillside landslide/ liquefaction event would for a certain period seal off the Lower Churchill River in its present location. The river would then likely seek out its old channel north of Spirit Mountain which has been infilled by some 800 or so feet of unconsolidated clay and sand.

The immediate impact on the Muskrat site is that all generation assets will be left either buried and/or stranded both physically and economically.

It would be the greatest civil disaster in Canadian history.

The dysfunctional situation with respect to the technical analysis of the North Spur issue is central to the conundrum of a project proceeding under such a high risk profile and is well illustrated by the mysterious and recently released SNC-Lavalin May 17, 2013 Muskrat Falls Risk Assessment Report.

Given the centrality of the need to deal effectively with the North Spur risk, a matter recognized by all since the 1960's, it was obviously incumbent on Nalcor and it's technical advisors to ascertain the risk of catastrophic failure because of soil chemistry, insufficient soil strength, poor load bearing and other critical aspects of the Muskrat Falls ground conditions.

And this could only be done by measuring and judging those factors by means of a comprehensive geotechnical program carried out by qualified independent engineers and geo-technicians.

In this light it is very problematic that a May 2013 SNC-Lavalin Risk Assessment Report would say (**after** sanction) that :

" Insufficient geotechnical information for the North Spur area . As limited geotechnical investigations have been performed on the North Spur adverse conditions could be discovered during construction leading to major rework, cost overruns and delays. COMMENT: Because of Geotech uncertainties , we could find bolder (sic) or unstable soil which could result in a major scope change.

The SNC Lavalin Risk Assessment Report went on to characterize the resulting North Spur situation as **RISK LEVEL -VERY HIGH ; CONSEQUENCE – VERY HIGH** (SNC-Lavalin caps and bolding).

It bears noting that when writing this report SNC-Lavalin held the Engineering Procurement and Construction Management (EPCM) contract from Nalcor for the Muskrat Falls Project.

Consequently key questions for the Commission are :
Were proper geo-technical, engineering and project management procedures followed with regard to the North Spur ? And if not, why not ?

PART III The role of SNC LAVALIN in Muskrat Falls Project Planning and Execution

Another very troublesome practical issue facing the Muskrat Falls Inquiry is whether significant aspects of the Muskrat Falls Project have been warped by some sort of serious high-level corruption.

It is fully appreciated (as noted above) that this is a matter that the Commission must weigh carefully given the ban on the Commission "laying blame". The main concern in this respect is the possible impact on the "reputation" of those involved.

But it is argued that the duty not to "lay blame" do not mean the imposition of some sort of historical amnesia in the context of a legal process designed to elucidate and protect " the public interest".

SNC Lavalin was engaged to play a central role in the Muskrat Falls project at a time when they were going through a well documented "troubled" period.
Indeed, over the last number of years the new management team at SNC Lavalin has taken extensive and very public measures to ensure an "ethical makeover" at the company compared to the bad old days back when they were pivotal in organizing the Muskrat Project. Indeed, they had at that time behaved so badly that for a period SNC Lavalin was disqualified from even bidding on World Bank contracts worldwide.

And SNC Lavalin's involvement in the Muskrat Falls Project was led by SNC Lavalin CEO Pierre Duhaime and SNC Lavalin VP Riadh ben Aissa who have been identified as the main renegade corporate culprits and who are still in various states of incarceration.

Their methods of doing business at the time of their initial Muskrat Falls involvement are of direct interest to the history of the Project and therefore to the Commission.

PART IV: The Role of Emera: A possible example of Civil Deceit

For many people in the Province, the overriding issue with regard to the Commission's work seems to be whether there is any way that work can lessen the financial blow from the Muskrat Falls Project on the average ratepayer/taxpayer.

Consequently,addressing the issue of an action of civil deceit against Emera is vital. 11

To properly base a case of civil deceit, evil intention need not be proven. So even if Emera was "only" reckless about any arrangement with Nalcor that alone could be enough to ground a successful action in civil deceit.

In such a case, Nalcor might be in less financial jeopardy over a broad range of situations including if the project were not actually put in operation and the site mothballed – something that the North Spur situation may demand in any event.

Possibly highly germane to the Emera civil deceit issue were shocking allegations by a former Muskrat Falls project engineer in an "Uncle Gnarley" online article on January 30,2017.

This unidentified Engineer detailed a process scenario wherein someone or some group within the Muskrat project team deliberately or recklessly ignored reality in presenting the Project's costs to their shareholder the Provincial Government.

According to this narrative, the parading of these lower than reasonable costs supposedly served to convince an ill-informed Provincial Cabinet at the date of Sanction that the Muskrat project, that Nalcor was so fervently promoting, made sense – when the "business case" was not there.

The Newfoundland and Labrador Cabinet's formal acceptance of these cost estimates can be precisely dated to the Muskrat Falls Sanction Decision of December 17,2012.

If these allegations are shown to be correct and if Emera knew (or should have known) that this egregious Nalcor behavior was going on over on the other side of the negotiating table (more or less unknown to the Newfoundland Government) when Emera entered into their vast and bewildering web of Muskrat contracts with

Nalcor then the actions of Emera may form the basis of a case of “civil fraud” .

It is settled Canadian law (as expressed by the Supreme Court of Canada in the case of Bruno Appliance and Furniture vs Hryniak ((2014) Supreme Court of Canada Reports 8) that contracts based on civil deceit are not valid and cannot be enforced.

In the Bruno case, the Supreme Court of Canada set out clearly the requirements necessary to establish the tort of civil fraud (or tort of deceit).

Justice Karakatsanis, writing for a unanimous Supreme Court, outlined the four elements of the tort of civil fraud:

Quote:

" From this jurisprudential history, I summarize the following four elements of the tort of civil fraud:

(1) a false representation made by the defendant;

(2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);

(3) the false representation caused the plaintiff to act; and

(4) the plaintiff's actions resulted in a loss.”

Unquote

In this case, an action of civil deceit might be sustained for instance if :
“ Emera knew (or ought to have known) that Nalcor’s numbers were ridiculous and reckless and nevertheless took part with Nalcor in an elaborate public charade to take advantage of an ill informed Provincial Cabinet to Emera's benefit and to

Nalcor/Newfoundland & Labrador's detriment."

Importantly, the Supreme Court said that a defendant can cross the deceit line "through knowledge or recklessness".

PART V SUBMISSION

Given the overarching nature of the Muskrat Falls Inquiry and the deep public interest that it has been empowered to protect, the matters set out in parts I to IV above are respectfully submitted as being within the remit of the Commission under it's current Terms of Reference.

PART VI IN THE ALTERNATIVE

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Section 3 Subsection (3) of the Public Inquiries Act under which the Muskrat Falls Inquiry Order in Council was issued reads as follows:

(3) Where it is in the public interest, the Lieutenant-Governor in Council may by order revise the terms of reference for the inquiry and revise the dates set for the termination of the inquiry and delivery of the commission's report.

It is submitted that it is "in the public interest" that the matters referred to above in Parts I to IV be considered by the Commission.

Alternatively, if the Commission takes the position that any of the matters raised in Part I to IV pertain to a serious aspect of "the Public Interest" and are yet beyond it's present Terms of Reference, it should seek the appropriate amendment or amendments to its Terms of Reference in that regard at an early date.

All of which is respectfully submitted on February 15,2018

Cabot Martin