



Commission of Inquiry Respecting the Muskrat Falls Project

INTERPRETATION OF THE TERMS OF REFERENCE FOR THE MUSKRAT FALLS INQUIRY

MARCH 14, 2018

LEBLANC, J.:

INTRODUCTION

[1] On November 20, 2017, the Government of Newfoundland and Labrador established a Commission of Inquiry respecting the Muskrat Falls Project (O.C. 2017-339) pursuant to section 3 of the *Public Inquiries Act, 2006*, S.N.L. 2006 c. P-38.1. I was appointed the Commissioner for the Inquiry.

[2] Muskrat Falls Project is a major hydroelectric project with dam infrastructure in Labrador, transmission facilities and towers throughout the Province and an underwater link between Labrador and the island portion of the Province. The Project also includes underwater transmission infrastructure between the island portion of the Province and Nova Scotia, known as the Maritime Link. Nalcor, a Crown corporation established to oversee power generation projects and other energy projects for this Province, and Emera Inc., a publicly-traded utility company that operates in Nova Scotia, are both involved as regards some aspects of the Muskrat Falls Project.

[3] The physical components of the Muskrat Falls Project are referred to as part of the definition of the Project in the *Energy Corporation Act*, S.N.L. 2007, c.E-11.01 which states as follows:

2.1(1) For the purpose of this Act, “Muskrat Falls Project” means a project by the corporation [Nalcor], a subsidiary of the corporation [Nalcor], Newfoundland and Labrador Hydro and Emera Inc., whether individually or by any combination of them, for

- (a) the design, engineering, planning, construction, commissioning, ownership, operation, maintenance, management and control of equipment and facilities, to be comprised of
 - (i) the new hydroelectric plant to be constructed at Muskrat Falls on the Churchill River, and all associated facilities, including the intake structures, penstock, powerhouse, dams and spillways,
 - (ii) a new HVdc transmission line and all related components to be constructed between the Muskrat Falls hydroelectric plant on the Churchill River and Soldier’s Pond, including
 - (A) foundations, underground services, subsea services, roads, buildings, erections and structures, whether temporary or permanent,
 - (B) all other facilities, fixtures, appurtenances and tangible personal property, including inventories, of any nature whatsoever contained on or attaching to the transmission line, and
 - (C) all mechanical, electrical and other systems and other technology installed under or upon anything referred to in clause (A) or (B),
 - (iii) new transmission facilities to be constructed between the Muskrat Falls hydroelectric plant on the Churchill River and the generating plant located at Churchill Falls,
 - (iv) new transmission facilities to be constructed by Emera Inc between the island portion of Newfoundland and Labrador and Cape Breton, Nova Scotia including
 - (A) foundations, underground services, subsea services, roads, buildings, erections and structures, whether temporary or permanent,
 - (B) all other facilities, fixtures, appurtenances and tangible personal property, including inventories, of any nature whatsoever contained on or attaching to them, and

- (C) all mechanical, electrical and other systems and other technology installed under or upon anything referred to in clause (A) or (B), and
- (v) any associated upgrades to the bulk electrical system or related control facilities on the island portion of the province required as a result of subparagraphs (i) to (iv);

[4] The Terms of Reference for this Inquiry as they relate to the investigation to be conducted are primarily set out in section 4 of the Order in Council establishing the Inquiry. That section states that I must inquire into:

- (a) the consideration by Nalcor of options to address the electricity needs of Newfoundland and Labrador's Island interconnected system customers that informed Nalcor's decision to recommend that the Government sanction the Muskrat Falls Project, including whether
 - (i) the assumptions or forecasts on which the analysis of options was based were reasonable,
 - (ii) Nalcor considered and reasonably dismissed options other than the Muskrat Falls Project and the Isolated Island Option, and
 - (iii) Nalcor's determination that the Muskrat Falls Project was the least cost option for the supply of power to Newfoundland and Labrador Island interconnected system over the period 2011 – 2067 was reasonable with the knowledge available at that time;
- (b) why there are significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction and the costs by Nalcor during project execution, to the time of this inquiry together with reliable estimates of the costs to the conclusion of the project including whether
 - (i) Nalcor's conduct in retaining and subsequently dealing with contractors and suppliers of every kind was in accordance with best practice, and, if not, whether Nalcor's supervisory oversight and conduct contributed to project cost increases and project delays,
 - (ii) the terms of the contractual arrangements between Nalcor and the various contractors retained in relation the Muskrat Falls Project contributed to delays and cost overruns, and whether or not these terms provided sufficient risk transfer from Nalcor to the contractors,

- (iii) the overall project management structure of Nalcor developed and followed was in accordance with best practice, and whether it contributed to cost increases in project delays,
- (iv) the overall procurement strategy developed by Nalcor for the project to subdivide the Muskrat Falls Project into multiple construction packages followed industry best practices, and whether or not there was fair and competent consideration of risk transfer and retention in this strategy relative to other procurement models,
- (v) any risk assessments, financial or otherwise, were conducted in respect of the Muskrat Falls Project, including any assessments prepared externally and whether
 - (A) the assessments were conducted in accordance with best practice,
 - (B) Nalcor took possession of the reports, including the method by which Nalcor took possession,
 - (C) Nalcor took appropriate measures to mitigate the risks identified, and
 - (D) Nalcor made the government aware of the reports and assessments, and
- (vi) the commercial arrangements Nalcor negotiated were reasonable and competently negotiated;
- (c) whether the determination that the Muskrat Falls Project should be exempt from oversight by the Board of Commissioners of Public Utilities was justified and reasonable and what was the effect of this exemption, if any, on the development, costs and operation of the Muskrat Falls Project; and
- (d) whether the government was fully informed and was made aware of any risks or problems anticipated with the Muskrat Falls Project, so that the government had sufficient and accurate information upon which to appropriately decide to sanction the project and whether the government employed appropriate measures to oversee the project particularly as it relates to the matters set out in paragraphs (a) to (c), focusing on governance arrangements and decision-making processes associated with the project.

[5] In carrying out my investigation into the Muskrat Falls Project in accordance with section 4 of the Order in Council, I am directed to consider the following matters as set out in section 5 of the Order in Council:

- (a) participation in the inquiry by the established leadership of Indigenous people, whose settled or asserted Aboriginal or treaty rights to areas in Labrador may have been adversely affected by the Muskrat Falls Project;
- (b) the need to provide consumers in the province with electricity at the lowest possible cost consistent with reliable service;
- (c) the powers, duties and responsibilities of a Crown Corporation;
- (d) the need to balance commercial considerations and public accountability and transparency in carrying out a large-scale publicly-funded project; and
- (e) the need to balance the interests of ratepayers and the interests of taxpayers in carrying out a large-scale publicly-funded project.

[6] While I have only specifically referred to sections 4 and 5 of the Order in Council, I am mindful of the other requirements for this Inquiry set out by the Lieutenant-Governor in Council. For instance, section 6 states that I must make findings and recommendations considered necessary and advisable related to those matters referred to in section 4 of the Order in Council. In doing its work, the Inquiry, as is usually the case, cannot express any conclusion or recommendation regarding civil or criminal responsibility of any person or organization. The Commission of Inquiry is authorized to engage the services of people having special expertise or knowledge in order to meet its mandate.

[7] Finally, it is important to consider that the work of the Inquiry including its reporting obligation must be completed by December 31, 2019, less than two years away. The circumstances surrounding the sanction and construction of a major project like the Muskrat Falls Project are extensive. The December 31, 2019 deadline is a matter of practical importance as I interpret the breadth of the Inquiry's mandate. I am also mindful of the financial position of the Province and, as a result, will not incur public expense unless such is necessary to complete the mandate given.

[8] As has been done for other public inquiries, I was consulted by the Government of Newfoundland and Labrador on the Terms of Reference prior to the Order in Council being approved. The consultation consisted of my meeting with government officials, not politicians, in order to satisfy myself that the Terms of

Reference were sufficiently clear as to what was to be investigated and to discuss the time required to do the work necessary. This allowed me an opportunity to discuss the wording of the Terms of Reference and to make suggestions in order to better clarify what the Government wanted the Commission of Inquiry to investigate. My purpose was not to change the Terms of Reference but only to clarify them where needed and to give input into the timeframe I felt would be necessary in order to complete the work required.

[9] Since this Inquiry was announced, there has been significant public discussion about the scope of the investigation to be conducted as well as the questions to be answered. In order to have the benefit of the public's contribution at an early stage and so that I could provide some clarity around the Commission's work, I decided to seek public input regarding the interpretation to be given to the Order in Council and the Terms of Reference as they are written. There have been 32 submissions received¹. My intention now is to provide my interpretation of the Terms of Reference, in part considering the submissions received, so that the focus of the Inquiry and any persons applying for standing will be informed.

[10] As to the submissions provided, I found most quite helpful in identifying issues and matters for investigation. Many of the submissions filed express significant concern related to the approval or sanction process for the Project as well as the construction of the Project to date. One submission made suggested that the Project sanctioning must be investigated not only based upon future electricity costs but also longer term benefits regarding the impact on greenhouse gas emissions, reliability of power supply and other "strategic benefits" over the lifetime of the Project. As well, many of the submissions asked that I look forward as regards the Project and its impact on the citizens of the Province. I have also been asked in some of the submissions to ensure that the public has a meaningful opportunity to provide input into the investigation.

[11] There have been submissions filed that state that the Terms of Reference, as they are, are not appropriate and should be "reset" or reconsidered. It is not within

¹ While most submissions were in the form requested in the Request for Submissions and were filed in the timeframe required, some of the submissions proved to be longer and not in full compliance with the requirements of the Request for Submissions. As well, one of the submissions was received one day subsequent to the date that submissions were required to be filed. In any event, notwithstanding these issues, I decided to review and consider all of the submissions filed.

my authority to do this. In the notice issued calling for submissions with respect to the interpretation of the Terms of Reference, I requested that submissions made should only address the interpretation of the Terms of Reference as they currently exist. As a result, I will interpret the existing Terms of Reference, which is really the only mandate that I have as regards the conduct of this Inquiry.

[12] Finally, as regards to submissions received, there are matters referred to that I see as being clearly within the scope of the Terms of Reference. However, some of the submissions refer to matters that are not included in the Terms of Reference as they exist.

[13] I would add that I am providing my explanation of how the Terms of Reference will be interpreted at a very early stage in this Inquiry. While document disclosure and interviews are being undertaken, the Inquiry has much work to do to meet its mandate. Notwithstanding this, I feel it is important to provide some indication as to the focus of the Inquiry to inform the public, assist parties in deciding whether they wish to apply for standing and also to attempt to resolve uncertainty related to the breadth of the Terms of Reference. As the Inquiry proceeds, I reserve the right to alter this interpretation of the Terms of Reference as is necessary based upon information that emerges.

INTERPRETATION PRINCIPLES

1. Guiding Principles

[14] In past Commissions of Inquiry held in Canada, it has been the practice to articulate principles to guide the conduct of an Inquiry². I see substantial merit in doing so for this Inquiry. The principles which I will set out here will guide how this Inquiry will be conducted and its extensiveness. Here, I adopt the following principles for this Inquiry:

² See, for example, *The Walkerton Inquiry* and *The Inquiry into Pediatric Forensic Pathology in Ontario*.

1. **Independence** – That the Inquiry be an independent one with no pre-conceived or pre-formed bias towards any specific outcome.
2. **Cooperation** – That the Inquiry proceed on the basis of encouraging a cooperative approach as between all parties so as to promote the full canvassing of all relevant issues in the least adversarial manner as well as efficient use of time, effort and cost.
3. **Thoroughness** – That the Inquiry examine all relevant issues within its mandate proportionate to their level of importance or significance to the ultimate findings and recommendations to be made. Thoroughness does not mean the investigation must be totally exhaustive in all respects. To be borne in mind here is the amount of evidence surrounding the whole of the Project to be reviewed and considered as well as the amount of time available to conclude this Inquiry.
4. **Expeditious**: That the Inquiry be completed in the time mandated by the Government and that it be cost efficient but effective.
5. **Openness to the Public**: That the Inquiry be conducted in a transparent and an open manner subject to the need to respect any applicable legal privilege claims as well as to ensure that commercially sensitive material not be made public where such could negatively impact the overall construction and costs of the Project.
6. **Fairness**: That the Inquiry balance the interests of the public in learning what happened with the rights of those involved who are to be treated fairly. In an investigative Inquiry, it is important to be reminded that implicit in being fair is the need to guard against inappropriate reliance on hindsight. Any evaluation of past conduct must be done in the context of the knowledge that was available at the time, not what we know today.

[15] Aside from these principles, it is also important that I acknowledge that the Government of Newfoundland and Labrador has decided that the Project will continue to its completion. As such, it is in the public interest that the Inquiry, in fulfilling its mandate, cause the least possible disruption to the continued construction of the Project as well as the least possible impact on the ultimate costs for the Project.

[16] These principles are similar to those adopted for other investigative Inquiries and are meant to guide the Commission's work as it moves forward in all respects. Adherence to these principles, to as great a degree possible, will best ensure that the Commission is able to meet its mandate.

2. Generally

[17] It is important to emphasize that the language used in the Order in Council establishing the Commission of Inquiry dictates the mandate that I have here.

[18] As stated by Ed Ratushny in *The Conduct of Public Inquiries: Law, Policy and Practice* [Toronto: Irwin Law Inc., 2009], at page 130:

The terms of reference are crucial because the mere appointment of a commissioner tells us little. The entire life of a commission is dictated by its terms of reference, which are legally binding. They establish the jurisdiction of the commission. The boundaries of that jurisdiction dictate what the commission must do and what it cannot do. And they are legally enforceable by the Courts ...

[19] The Order in Council contains no preamble but sets out the direction I must take in conducting the Inquiry by way of the Terms of Reference set out in section 4 along with the considerations set out in section 5 earlier referred to.

[20] In interpreting the Order in Council and specifically the Terms of Reference, I must obviously look at the words used. However, as pointed out by Barry, J.A. in *Allen v. Workplace Health, Safety and Compensation Review Division*, 2014 NLCA 42, when engaging in legal interpretation the following must be borne in mind:

- 47 The modern approach is to accept that all language may prove ambiguous, words must be read in their entire context and in their grammatical and ordinary sense, harmoniously with the purpose of the legislation. A reference to "plain language" or "plain meaning" is not helpful. The only proper approach is to maintain a focus

upon the language of the text in the context of the various factors emphasized by the modern principle.

[21] I am satisfied here that while the words used must be considered based upon their meaning, I must take a contextual and purposive approach to the interpretation of the Terms of Reference and their breadth.

[22] It is also important to point out that it would amount to a jurisdictional error on my part if I were to interpret these Terms of Reference too widely and proceed to hear evidence that has no bearing on the issues to be resolved pursuant to those Terms. By doing this I would be going outside of the subject matter of the Inquiry. (See: *Re: Bortolotti et al and the Ministry of Housing, et al* (1977), 15 O.R. (2nd) 617 (ONCA) and *Ontario (Provincial Police) v. Cornwall (Public Inquiry)*, [2008] O. J. No. 153 (ONCA)).

[23] Many of the submissions filed suggest that I should approach the Terms of Reference as broadly as is possible to ensure that all the appropriate issues raised in the Terms of Reference, particularly section 4, are dealt with by the Inquiry. I find that approaching the interpretation of the Terms of Reference broadly is appropriate here.

[24] Supporting a broad approach to interpreting the Terms of Reference are the use of the words “including whether” related to matters to be considered in assessing the sanctioning recommendation by Nalcor in section 4(a) and the cost escalation of the Project in section 4(b). Having said this, there is a limit to how broadly the Terms of Reference for this Inquiry can be interpreted.

[25] As a result, while considering the submissions made, it is ultimately for me to interpret what the Terms of Reference entail. I will now proceed with my interpretation of the mandate of the Commission as set out in the Order in Council. I intend to do this by referring generally to sections 4 and 5 of the Order in Council. I will also address certain matters referred to in the submissions received that I find do not reasonably fall within the direction given in the Order in Council.

MY INTREPRETATION

1. Generally

[26] Interpreting the Commission's Terms of Reference is best done in these circumstances by focusing on what public interest is engaged and then considering what specific issues arise that will inform that public interest³.

[27] The actual wording, focus and context of the Terms of Reference seem reasonably clear and specific. In its subparagraphs, section 4 of the Terms of Reference speaks to four matters:

- (a) the considerations of Nalcor in determining to recommend government sanction of the Muskrat Falls Project and whether these considerations were appropriately determined by Nalcor,
- (b) the significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction to the time of the Inquiry, together with reliable estimates of the costs to the conclusion of the Project,
- (c) whether the decision to exempt Muskrat Falls Project from oversight by the Board of Commissioners of Public Utilities (PUB) was justified and reasonable, as well as looking at the effect, if any, on the Project development, costs and operations as a result, and
- (d) whether the Government of this Province was fully informed and made aware of the risks and anticipated problems with the Muskrat Falls Project so as to enable it to have accurate and sufficient information to appropriately decide to sanction the Project and, thereafter, whether the Government exercised appropriate oversight of the Project's costs,

³ Such an approach to interpretation is referred to by Ed Ratushny in *The Conduct of Public Inquiries: Law, Policy and Practice* at pages 132-133 based upon the approach taken in the *Report of the Independent Advisor into the Allegations Respecting Financial Dealings Between Mr. Karlheinz Schreiber and the Right Honourable Brian Mulroney*, First Report, Schedule 2.

risks, governance, arrangements and decision-making processes associated with the Project.

[28] To me, the public interest engaged or to be served by the Terms of Reference is a need to review the overall integrity of the process leading to sanction of the Muskrat Falls Project as well as that followed in its construction, including the parts played in the process by Nalcor and the Government of Newfoundland and Labrador.

[29] Generally speaking, it is clear to me that the Order in Council, and specifically section 4, is geared to focus the Commission's work and mandate, primarily at the least, on the business case put forward by Nalcor leading to the official sanction of the Muskrat Falls Project by Government in December 2012 as well as the reasons why the costs of construction of the Project have escalated from the initial estimates made. By business case, I mean specifically the case advanced by Nalcor, and accepted by the Government, for the need, financial viability, costs and benefits of the Muskrat Falls Project. Really what is primarily being asked of the Commission is to explain what was done by Nalcor and the Government of Newfoundland and Labrador to cause the Muskrat Falls Project to be sanctioned, whether the analysis done by Nalcor and the Government was reasonable considering best industry practice and why the Project cost has escalated so significantly.

[30] Also to be considered is why the Project was exempted from PUB scrutiny, notwithstanding that ultimately a reference was made to the PUB to compare two potential options for supplying power to the island part of the Province. Once that assessment by the PUB was commenced, the Government decided it would not give the PUB the extension of time that it requested to complete its work. To assess the possible impact of the PUB exemption or lack of scrutiny of the development, costs and operation of the Project, the Commission will be investigating the full circumstances surrounding the PUB's degree of involvement.

[31] Based upon section 4(d), it will also be necessary for the Commission to investigate the involvement of the Government in the Project prior to sanction and whether it was fully informed and was made aware of any risks or problems anticipated with the Project so as to assess whether it had "sufficient and accurate

information upon which to appropriately decide to permit the Project to proceed". Once sanction was given, the Commission of Inquiry must consider what measures the Government has taken to oversee the Project. In doing so, the Commission is directed to focus on governance arrangements and decision-making processes as related to the Project. Such an examination will be a broad one and will have to include both the prior governments as well as the present government for the Province.

[32] All of what I have stated above leads me to conclude that the Government's focus in drafting and approving the Terms of Reference found in the Order in Council is very much based upon the Project's viability, risks, costs and benefits and the consideration of these by Nalcor and the Government at the time of sanction and thereafter.

[33] I will now consider each of the four Terms of Reference set out in section 4 of the Order in Council as well as some other matters in more detail as to specific areas to be addressed.

2. Section 4(a) Project Sanction

[34] In regard to the matter of sanction, I am satisfied that the Order in Council requires that the Commission investigate and consider what Nalcor knew, or was reasonably expected to know, at the time it proposed the Project for sanction, whether the information was accurate and further, what information and, by extension, whether all necessary information, was provided to the Government at the time.

[35] Based upon some of the submissions filed, I agree that as regards Project sanction, it will be important for the Commission of Inquiry to obtain historical information concerning the development of the Churchill River and the events leading up to the eventual proposal to proceed with the Muskrat Falls Project. Consideration will also have to be given with regards to the assumptions and forecasts made by Naclor, including projected annual supply requirements and whether they were reasonable based upon accepted industry practice. Importantly

as well, will be a determination of what options, if any, other than the Muskrat Falls Project and the Isolated Island Option as referred to in the Terms of Reference, were considered by Nalcor and when were they in fact considered, if at all. Furthermore, the Decision Gate process and the reasonableness of capital cost estimates used fall within the mandate of the Commission.

[36] I am also satisfied that, in considering the issue of recommending the sanction of the Muskrat Falls Project, consideration should be given to Nalcor's involvement and reaction to the Joint Environmental Review Panel Report, particularly as regards the adequacy of Nalcor's consideration of other options for power supply, environmental monitoring and the issue of water management rights based upon existing Churchill Falls contractual obligations.

[37] As regards section 4(a), it will be necessary for me to consider whether appropriate costing and accounting processes were utilized in determining costs for the options considered and ultimately was the Muskrat Falls Project the least cost option for the Province.

[38] Notwithstanding there is no specific reference in the Order in Council to Nalcor's actions in its dealings with Emera Inc., I am satisfied that the contracts negotiated and agreed upon with Emera Inc. can be reasonably linked to the development and sanctioning of the Project and, perhaps, to the Federal Loan Guarantee being provided. Certainly the impact of the decision by the Nova Scotia equivalent to our PUB respecting their failure to approve the initial agreement negotiated, what notice of that decision was taken by Nalcor and the Government at the time as regards continuing to move the Project forward and how this impacted negotiations between Nalcor and Emera Inc. will be relevant considerations for the Commission. As a result, I am satisfied that consideration must be given to the negotiations leading up to the contracts with Emera Inc. and the ultimate costs and benefits for the Project as a result of those contracts with Emera Inc. In considering this, I must also consider whether or not the negotiations conducted by Nalcor were in fact appropriate and reasonable based upon the information available at the time and matters such as best industry practices.

[39] As a result of these findings, the areas discussed above will be within the focus of the Inquiry's investigation. By considering these matters, and others, that may arise as information flows, I hope to be able to make an appropriate determination as to what happened with regards to how this Project was proposed as the least cost option for the purposes of sanction by Nalcor and whether Government was aware of and appropriately considered all relevant matters prior to its sanction of the Project.

3. Section 4(b) Project Execution and Cost Escalation

[40] As regards the matter of the construction cost escalation as dealt with in 4(b) of the Order in Council (with some overlap with section (d) as regards government oversight), I will be considering those matters referred to in sections 4(b)(i) to (vi) as well as other relevant matters related to why construction costs escalated from those projected by Nalcor at the time of the sanction of the Project to the eventual and anticipated conclusion of the construction of the Project.

[41] While there is some overlap between the issues to be considered under terms 4(a) and 4(b), matters for consideration under 4(b) will include such things as Nalcor's ability to oversee and manage a project of the magnitude of the Muskrat Falls Project, whether construction scheduling for the Project was reasonable, whether the contractual arrangements with contractors, subcontractors, consultants and others, including embedded contractors, were appropriately entered into in accordance with industry best practice, whether any reports or risk assessments were obtained by Nalcor, who they were shared with and how they were responded to by Nalcor. One such report will be the SNC Lavalin Report dated April 23, 2013 which will merit particular attention by the Commission. As well, I must consider whether appropriate or proper consideration was given and actions taken regarding potential risk to the environment, human safety and property related to the stability of the North Spur and methylmercury contamination. How these reports or assessments were received by Nalcor and whether they were made available to the Board of Nalcor as well as the Government will also be a part of the investigation to be conducted.

4. Sanction 4(c) PUB Exemption

[42] As regards section 4(c) and the exemption from PUB scrutiny of the Muskrat Falls Project, the Commission will have to look into why any development in the Lower Churchill River was initially exempted in 2000, why, notwithstanding that exemption, the Government decided to make a “supplemental” but limited reference for a review of the options for development to the PUB in 2011 and whether Nalcor provided appropriate and timely information to the PUB to allow the review as mandated. Also to be considered is the impact of the decision by the PUB on March 30, 2012 wherein it requested an extension of time to conduct its review and the response by Nalcor and the Government to this. To be determined as well is whether there was any interference on the part of Nalcor or the Government with respect to the PUB’s consideration of the Project. Ultimately, I will have to consider whether what occurred related to the PUB was in the public interest and whether the failure of the PUB to review the Project impacted the development, costing or operation of the Project.

5. Section 4(d) Government Oversight

[43] As regards section 4(d) of the Terms of Reference, as stated earlier, the question that ultimately arises is whether or not the Government was appropriately informed and in a position to determine that the Muskrat Falls Project was the least cost option for the supply of power to the island portion of the Province. In that regard, for the purposes of sanction, the actions of Government and its officials prior to the sanction of the Project will have to be fully scrutinized. This will include a consideration of the legislative and regulatory regime, and any changes made to this as the Project progressed, as well as decisions made to facilitate financing of the Project.

[44] Section 4(d) also requires me to investigate the measures taken by Government to oversee the Project’s execution. As there were different government administrations in place at various times, my review will involve both the past and present administrations. I am satisfied that I will need to examine the reporting structures between Nalcor and the various government administrators, the governance models employed and the communications between the two entities as

the Project progressed. The Commission will examine both what Government knew and what it ought to have known as well as what it did to ensure reasonable and appropriate oversight of the Project as it has progressed. Implicit in such an investigation will be a consideration of the decisions made by Government to continue to proceed with the Project.

6. Role of Indigenous People

[45] A number of submissions received concerns the impact of the Project on Indigenous people and the Labrador environment, including methylmercury contamination and the alleged instability of the North Spur. While environmental issues do not only affect Indigenous people, Indigenous groups have raised them as important concerns for their communities.

[46] There is no direct reference in section 4 of the Order in Council to environmental considerations or the impact on Indigenous people. Section 5(a), however, requires that I consider participation in the Inquiry “by the established leadership of Indigenous people, whose settled or asserted Aboriginal or treaty rights to areas in Labrador may have been adversely affected by the Muskrat Falls Project”. This does not mean necessarily that participation must occur nor does it dictate what that participation should be. It might be argued that this particular provision does not in any way influence the Commission’s mandate as it merely provides for consideration as to participation in the Inquiry by the established leadership of the Indigenous people.

[47] Having said this, it is obvious to me that the Lieutenant Governor-in-Council intended that the established leadership of the Indigenous people would have a part to play in this Inquiry. If that is so, the part that they should play would be in areas of concern or of interest to those Indigenous people. I note that paragraph 4(b)(v)(a) refers, as regards the issue of the cost escalation of the construction of the Project, to any risk assessments, financial or otherwise, conducted in respect to the Muskrat Falls Project. At present, while I do not have full information, I am aware that certain assessments likely were conducted, specifically risk assessments concerning environmental issues prior to, as well as subsequent to, sanction. I have decided here that a contextual and purposive review of the Order in Council permits me to

investigate into what consultation occurred between the established leadership of the Indigenous people and Nalcor as well as the Government prior to sanction, what risk assessments and reports were done as regards the concerns of the Indigenous people, whether these assessments were appropriately and reasonably considered by Nalcor and the Government and whether appropriate measures were taken to mitigate against reasonably potential adverse effects to the settled or asserted rights of the Indigenous people both at the time of and post sanction. In investigating these matters, I will not be determining any claims or treaty rights for any of the Indigenous people as this clearly does not fall within the Commission's mandate.

7. Looking Forward

[48] One further matter raised in some of the submissions is a purported "democratic deficit" apparent in the whole of the Muskrat Falls Project process. Pursuant to section 6 of the Order in Council which requires me to make recommendations related to the matters raised in sections 4 and 5 of the Order in Council, I am satisfied that the Commission's mandate permits me to look to the future. As such, it is apparent to me that some of the Commission's effort will need to focus on such things as the future role of Crown Corporations in large-scale projects and, specifically, governance and transparency issues related to public accountability. Any systemic issues impacting the appropriate sanctioning and execution of large-scale projects will need to be considered as well. Public involvement and processes to permit input can also be addressed. As such, the Commission will need to consider how these and other matters related to the future can be part of the Commission's considerations. Having said this, it is not within the Commission's mandate to somehow reconsider the whole of the democratic process in this Province as seems to be suggested in some of the submissions received.

[49] Section 5(e) requires that the Commission, in carrying out its Terms of Reference, consider the need to balance the ratepayers' interests with those of taxpayers in carrying out a large-scale publicly-funded project. At this stage of the Inquiry, I take this to mean that the Commission must look to how to balance or apportion the financial costs of an electrical generation project like Muskrat Falls as between power consumers and all of the Provinces' taxpayers. This is not a simple

task to undertake but the Commission will have to bear this in mind as it moves forward.

8. Matters Not to be Considered

[50] Having concluded as I have regards the Commission's mandate, I want to go on to address certain matters raised in some of the submissions that I have determined are not within the scope of the Inquiry.

[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 employer 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.

[54] I will also investigate what analyses, risk assessments, etc., were done as regards environmental concerns and whether these were appropriate and reasonable in the circumstances based upon accepted industry standards and the knowledge that the parties had at the various times when the analyses or risk assessments were completed. Included in this will be a review of the measures taken, if any, to address any legitimate environmental concerns. I will not, however, assess the correctness of the positions taken by the various parties. As well, I am satisfied that the Terms of Reference do not permit me to conduct any further environmental assessment and nor does the time I have to conclude this Inquiry permit this.

[55] Some submissions suggest that I have the authority, or should exercise my authority, to order the shut down of the Project based upon environmental concerns. I have no such right or authority based upon the terms set out in the Order in Council.

[56] Also raised in one of the submissions is Nalcor's adherence to environmental permits. In my view, this is not a matter for consideration by the Commission pursuant to the Order in Council. Nalcor's adherence to environmental permits is only relevant if failure to comply with those permits contributed to any escalation of construction costs or delay. As a result, the general topic of adherence to environmental permits is not a matter that I find is relevant to the Terms of Reference.

[57] As regards the issue of water management rights, I am satisfied that this is relevant as regards, particularly, the matter of the sanction of the Project. However, having said that and while evidence will obviously be received as to what consideration was given with regards to water management rights as a result of the Upper Churchill hydro development, it would not be appropriate for a Commission of Inquiry to look into or to speak to matters that are presently in litigation before the Courts. Therefore, it is my intention here to investigate what analysis or assessment, if any, was made by Nalcor and by Government with regards to any concerns about water management rights for the Project. I do not intend to opine in

any way as to whether any such assessment was correct or incorrect and I will, of necessity, be cautious so as to ensure that the work of the Commission does not negatively impact the interests of this Province as well as the positions taken by Nalcor and/or Government before the Courts respecting ongoing litigation.

[58] Finally, the issue of protests and the police and Department of Justice reaction to those protests has also been raised as being relevant to the mandate set out in the Order in Council. I am satisfied that there is no connection or relevance of these protests to the Terms of Reference, other than potentially as to whether or not the protests that occurred impacted the costs or scheduling of the Project. Other than that, I do not intend to consider what transpired as a result of the protests or demonstrations that occurred and the subsequent reaction by the police and/or the justice system. Such is clearly not within the mandate given to me.

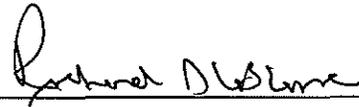
CONCLUSION

[59] In interpreting the Terms of References, I have borne in mind on a contextual and purposive basis what it is that the Lieutenant Governor-in-Council is seeking this Inquiry to determine. As alluded to earlier, I have also borne in mind that I have a limited timeframe, namely until December 31, 2019, to conclude my work.

[60] As a result, I have interpreted the mandate of the Commission in what I consider to be an appropriately broad manner. As stated earlier, upon further information being provided and considering the relevance of that information to the mandate and scope of the Inquiry, I reserve the right to expand or restrict my interpretation of the Terms of Reference as deemed appropriate.

[61] It is my hope that this interpretation of the Order in Council will help focus the Inquiry and also assist parties in determining whether or not it is appropriate for them to seek standing at the Inquiry.

[62] Finally, I wish to acknowledge the effort that went into and the thoughtfulness of the submissions that were provided to me to assist in my interpretation of the Commission's Terms of Reference. Each submission has been carefully considered by myself. I now direct that each of the persons or groups making submissions be provided with a copy of this interpretation. As well, this interpretation is to be published on the Inquiry's website and copies can be provided upon request.

A handwritten signature in black ink, appearing to read "Richard D. LeBlanc", is written above a solid horizontal line.

JUSTICE RICHARD D. LEBLANC
COMMISSIONER