

March 28<sup>th</sup>, 2018

Via email: [admin@muskratfallsinquiry.ca](mailto:admin@muskratfallsinquiry.ca)

Commissioner of Inquiry  
Respecting the Muskrat Falls Project  
5<sup>th</sup> Floor, Suite 502  
Beothuck Building  
20 Crosbie Place  
St. John's, NL  
A1B 3Y8

**RE: Application for Standing & Funding  
Former Government & Officials 2003-2015**

Dear Sirs:

Enclosed please find the Application for Full Standing and Funding on behalf of the group to be known as Former Government Officials 2003-2015, as well as included within the Application for Standing is a request on behalf of the five (5) individual members for Limited Standing, with no request for funding.

Given the unique nature of this Application, we appreciate that it does not fall within the typical format that the Commission may otherwise receive and accordingly should you require any additional information please feel free to contact the undersigned.

Yours truly,



**THOMAS E. WILLIAMS, Q.C.**

TEW:kd  
Encl.

**IN THE MATTER OF** a  
Commission of Inquiry respecting  
The Muskrat Falls Project

**APPLICATION FOR STANDING**

The within Application for Standing is made on behalf of an identified group of individuals who served in the Government of Newfoundland and Labrador as elected public representatives in the capacity as Premier of the Province or Minister of Natural Resources during the period of December 6<sup>th</sup>, 2003 to December 13<sup>th</sup>, 2015 (hereinafter referred to as “2003-2015”) and for purposes of this Application shall be referenced as Former Government Officials 2003-2015 (hereinafter referred to as the “Group”).

The five individuals comprising the Group are as follows:

1. Daniel Williams - Premier  
December 6<sup>th</sup>, 2003 - December 7<sup>th</sup>, 2010
2. Paul Davis Premier  
December 26, 2014 - December 14<sup>th</sup>, 2015
3. Shawn Skinner Minister of Natural Resources  
December 6, 2010 – October 28, 2011
4. Jerome Kennedy Minister of Natural Resources  
October 28, 2011 - January 16, 2013
5. Derrick Dalley Minister of Natural Resources  
October 9, 2013 - December 2015

The Application for Standing which is brought on behalf of the “Group” is twofold: First it requests Full Standing for one General Counsel to represent the collective interests of the Group as a whole; the second request is to provide for Limited Standing on behalf of each of the individual members of the Group to be able to retain their own personal

legal counsel for purposes of representation in the inquiry process if required and as it relates to preparation for and participation in the giving of evidence at the interview and hearing stages. Such legal counsel would be deemed to represent the interest of each individual as it pertains to their personal involvement during the Inquiry process.

There shall be a separate application made solely on behalf of the Group for Funding.

## **BACKGROUND**

The 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 includes underwater transmission infrastructure between the island portion of the Province and Nova Scotia, known as the Maritime Link. Nalcor Energy, a Crown corporation established to oversee power generation projects and other energy projects for the Province, and Emera Inc., a publicly-traded utility company that operates in Nova Scotia, have partnered as regards some aspects of the Project.

The history of the Muskrat Falls Project dates back to the original development of Churchill Falls during the Premiership of Joseph R. Smallwood, who first visited the site in 1949. Hydroelectric development in the Churchill River Basin began in 1969 with a contract signed between Hydro-Quebec and the Churchill Falls (Labrador) Corporation. The Churchill Falls Power Plant officially opened in 1972. Since this time, numerous proposals for the development of the Lower Churchill River and in particular, the Gull Island and/or Muskrat Falls sites, have been considered. All subsequent Premiers including the administrations of Frank Moores (1972-1979), Brian Peckford (1979-1989), Clyde Wells (1989-1996), Brian Tobin (1996-2000) and Roger Grimes (2001-2003) reached various stages of negotiations for the development of the Lower Churchill, without success.

On October 21, 2003, Danny Williams was elected as Premier. The Progressive Conservative Party would remain in power through the subsequent administrations of Kathy Dunderdale (December 3, 2010-January 24, 2014), Tom Marshall (January 24, 2014 – September 26, 2014) and Paul Davis (September 26, 2014 – December 14, 2015). On October 11, 2007, Nalcor Energy was established as a provincial crown corporation pursuant to the *Energy Corporation Act*, SNL 2007 c. E-11.01. Its objective

was to “invest in, engage in, and carry out activities in all areas of the energy sector and elsewhere” and to forecast electricity requirements in the province and bring forward the least cost, long-term option for meeting these requirements. The Muskrat Falls Project was established as a project of the Nalcor Energy in accordance with the *Energy Corporation Act*.

On September 26, 2008, then Premier Williams and Mark Nui (Grand Chief of Innu Nation), announced commencement of negotiations on the “Tshash Petapen” Agreements (“New Dawn Agreements”) which included the “Lower Churchill Innu Impact and Benefits Agreement.” The Agreements were signed on November 18, 2011.

On November 19, 2010, a partnership between Nalcor Energy and Emera Inc. was announced for the development of hydroelectric power on the Lower Churchill River. The deal was for the development of Muskrat Falls, with power being transmitted for use in Newfoundland and surplus power transmitted to Nova Scotia. Prior to the announcement, Newfoundland and Labrador Hydro, a subsidiary of Nalcor Energy, evaluated alternatives to develop new generation sources. Hydro completed a detailed assessment of alternatives and found that the Muskrat Falls project, with a transmission link to the Island, was the “least cost alternative.” The estimated capital cost of the project was \$6.2 billion.

In June of 2011, the Lieutenant-Governor in Council of Newfoundland and Labrador referred to the Board of Commissioners of Public Utilities Reference Questions and Terms of Reference requesting that the Board review and report to Government on whether Nalcor Energy’s Muskrat Falls Project was the least cost option for the supply of power to Newfoundland residents. The Reference Questions identified two options to be compared: 1) the Muskrat Falls Project and; 2) the “Isolated Island Option” consisting of a combination of small hydro on the Island, along with wind power, refurbishment of the Holyrood Generating Station and other thermal generation. On November 10, 2011, Nalcor Energy filed its Lower Churchill Project plans with the Newfoundland and Labrador Public Utilities Board. Manitoba Hydro International Ltd. (MHI) was engaged as the Board’s independent expert consultant to assist the Board with their review. Their report was filed in January of 2012.

In August of 2011, the Federal/Provincial Joint Review Panel – Lower Churchill Hydroelectric Project released its review of the Lower Churchill Project. The Panel concluded that “Nalcor’s analysis, showing Muskrat Falls to be the best and least-cost way to meet domestic demand requirements, was inadequate and recommended a

new, independent analysis based on economic, energy and environmental considerations.”

In October of 2012, the Province released “Decision Gate 3 cost estimate” for the Muskrat Falls Project in addition to the independent report of MHI. Both confirmed the engineering, costs, and project planning completed by Nalcor and affirmed the Muskrat Falls Project as the least-cost option for electricity generation in the province.

On December 17, 2012, Premier Kathy Dunderdale announced the sanction of the Muskrat Falls Project. Construction commenced soon after. In March of 2014, the Provincial Government established the Muskrat Falls Oversight Committee to strengthen and formalize existing oversight of the Project. The Committee is comprised of senior officials from Executive Council and the Departments of Finance, Natural Resources and Justice in addition to independent members and is supported by a working group.

On November 30, 2015 Dwight Ball was elected as Premier (November 30, 2015 – Present). On December 25, 2015 the Provincial Government announced immediate actions to help address the fiscal situation, which included a comprehensive independent review of the cost, schedule and associated risks for the Muskrat Falls Project. Ernst & Young LLP (EY) was retained to complete the independent review.

On April 12, 2016, Ernst & Young’s Interim Report on the Muskrat Falls Project was released which informed government about material risks and provided recommendations to improve project governance. The Project was to be reforecast for cost and schedule, which was to be assessed by EY prior to submitting their Final Report. The schedule and cost reforecast were anticipated to be completed by the end of May 2016.

On November 20, 2017 Premier Dwight Ball announced that the Province would be proceeding with a public inquiry into the Muskrat Falls Project, in accordance with Part I of the Public Inquiries Act, 2006.

## **ARGUMENT**

### **Approach to Standing**

Given the prolonged period of time involved with the Muskrat Falls Project, including evaluation, assessment, sanctioning and construction phases, the number of interested parties over the course of the last fifteen (15) years is numerous and varied. To place this in context, while the project fell under the auspices of the Government of Newfoundland, thru its provincial energy corporation Nalcor Energy, the Government has seen a host of various players involved in key oversight and decision making positions.

During the period currently under review, there have been five separate Premiers (Williams, Dunderdale, Marshall, Davis & Ball) and six separate Ministers of Natural Resources (Dunderdale, Kennedy, Skinner, Daley, Marshall and Coady). While Premier Ball and Minister Coady remain members of the current Government, all individuals have had critical roles to play at various junctures of the project over this period of time.

While it can be said that all share the distinction of having been either Premiers of the Government of Newfoundland and Labrador or Ministers of the Crown or both, unquestionably the individual involvement and interest of each vary to a greater or less degree.

Given the scope of the Terms of Reference of this Inquiry and the Interpretation that Commissioner LeBlanc has applied through his March 14<sup>th</sup>, 2018 report, then undoubtedly each of the Government representatives referenced above will have invaluable evidence to provide at the Inquiry to assist its mandate.

In light of the hands on role that individual Premiers and Ministers had at various stages of the project, then one could not envisage how the Inquiry could fulfill its mandate without the participation of such individuals.

While it may be said that all the Terms of Reference have some bearing on involvement with the role of the Government at any particular point in time, undoubtedly the following Sections have a direct correlation.



Section 4(a) The commission shall 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
  - (b) (v) any risk assessments financial or otherwise, were conducted in respect of the Muskrat Falls Project, including any assessments prepared externally and whether:
  - (d) Nalcor made the government aware of the reports and assessments, and
- 4(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 matter set out in paragraphs (a) to (c), focusing on governance arrangements and decision making processes associated with the project.

Given that a portion of the project activity took place over an initial 9 year period under a different government administration, it is respectfully submitted that this Inquiry has a duty to not only hear from the relevant parties involved during this period in time, but more importantly, to ensure that these former Government officials are provided with the full benefit of procedural fairness and representation that is extended to all current Government officials in a similar and like fashion.

While it is understood that the institution of Government is not recognized by any form of political party affiliation and that it is an institution in and of itself, it must recognize that the mandate and interests of various Government administrations vary over time.

It is anticipated the current Government, as represented by Premier Ball and Minister Coady, will be making Application for Standing and one can only assume, given the relevance of their participation, that the same will be granted. Given the diverse interests of the Government during the 2003 – 2015 period, one would assume that the Inquiry would have a like interest in their full participation.

Recognizing the dilemma that legally the Inquiry cannot have two separate “Government” entities participating at the same time, the within Application for Standing and Funding is made on behalf of the group of Former Government Officials 2003-2015.

It is our submission that although each of the elected officials, both past and present, have served in public office at different times, they are each deserving of equal treatment and recognition before this Inquiry particularly given the remarks pertaining to Fairness as outlined in the Inquiries Guiding Principles and Rules for Procedure.

As outlined under the Standing provisions of the Rules of Procedure Section 8-10 states as follows:

Section 8     Persons, groups of persons, organizations or corporations (“persons” collectively or “person”, individually) who wish to participate may seek standing before the Inquiry. A person who has been granted standing is referred to herein as a “party”.

Section 10    Pursuant to section 5(2) of the *Public Inquiries Act, 2006*, a person may be granted standing by the Commissioner, after considering:

- a)     whether the person’s interest may be adversely affected by the findings of the Commission;
- b)     whether the person’s participation would further the conduct of the Inquiry; and
- c)     whether the person’s participation would contribute to the openness and fairness of the Inquiry.

Accordingly it is recognized that a “Group of Persons” who satisfy the provision of Section 5(2) of the *Public Inquiries Act, 2006* may be granted standing by the Commissioner.



Given the varying terms of office and the positions that each of the individual members held as Premier and Ministers of Natural Resources, it can be undeniably argued that the three prerequisites of Section 5(2) of the Public Inquiries Act, 2006 have been met in all instances.

As was quite readily acknowledged by the Commissioner at para 44 of his Interpretation of the Terms of Reference for the Muskrat Falls Inquiry

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. (emphasis added)**

Furthermore the relevance of the participation of the Group was highlighted at paragraph 31 wherein the Commissioner states:

*"Such an examination will be a broad one and will have to include both the prior government as well as the present government for the Province".*

The challenge to the "Group" was how to provide the level of participation required, while extending the individual right of representation and fairness to all members.

Paramount to these considerations is the Commissioners commitment as outlined in Paragraphs 6 & 7:

*"The Commissioner will be conscious of the need to act efficiently so as to ensure that any costs incurred by the Inquiry are only those that are reasonable and necessary to address the Inquiry's Terms of Reference.*

*In order to avoid duplication and to promote time and costs efficiencies, persons of similar interest are encouraged to seek joint standing."*

Therefore in consideration of the common interest of the "Group" and while maintaining the individual rights and protections afforded to other similar parties appearing before the Inquiry we make the following Application for Standing.

### **Full Standing**

It is requested that Full Standing be provided to the six members of the group of Former Government Officials 2003-2015 in the following manner:

**That Full Standing be granted for one General Counsel to represent the group of Former Government Officials 2003-2015 as defined and to have full right of participation in all aspects of the Inquiry as it is deemed relevant to the collective interest of the group and to have all rights and privileges associated with the same.**

### **Limited Standing**

Given the relevance of each of the individual member of the Group's evidence and recognizing the individual legal right to procedural fairness and the right of representation, it is requested that Limited Standing be provided to each individual member of the Group of Former Government Officials 2003-2015 in the following manner:

**That Limited Standing be provided to each individual member of the Group such that they are entitled to retain their own separate legal counsel for the purposes of representing the interests of that individual as they may arise during the course of the Inquiry and without limiting the generality of the**

**foregoing, to allow for participation in that individuals preparation and giving of evidence at the interview and hearing stages.**

By granting standing in such a fashion the Commissioner provides the "Group", with the rights and privileges given to any party, while the individual "Group" members' participation is limited to their particular interests. The principles of fairness as outlined in the Lamer Inquiry dictate the same.

Inquiries such as the Gomez, Ara and Air India recognized under their Terms of Reference the principle that:

*The Commissioner be authorized to grant to any person who satisfies him that he or she has a substantial and direct interest in the subject matter of the Inquiry an opportunity during the inquiry to give evidence and to examine or cross examine witnesses personally or by counsel on evidence relevant to the persons interest.*

The necessity for the granting of Standing in the format as presented meets not only the requirements for fulfilling the Inquiries mandate, but equally as important, that the principles of Procedural Fairness are adhered to.

As noted by Author Ronda Bessner in her text: Public Inquiries in Canada: Law and Practice 2017 at p. 115:

**The common law rules of procedural fairness apply to the proceedings of commissions of inquiry. There are two rules of procedural fairness. The first is the right to be heard, which may give rise to participating rights and procedural protections such as notice, disclosure, the right of counsel and the right to cross-examine. The second is the rule against bias – the right to an independent and impartial investigation or decision-maker.**

While it is not the responsibility nor the mandate of the Commissioner to weigh in on political considerations, one cannot ignore that this Inquiry was called at the request of

the current Government administration who have gone to great lengths to assert criticism of the former administration for issues and concerns pertaining to the Project.

Accordingly the Principles of Procedural Fairness dictate that all rights, privileges and protections provided to one administration should be extended to the other regardless of what point in time their involvement occurred. It would not be acceptable that there be any appearance privilege distinguishing the two.

## **CONCLUSION**

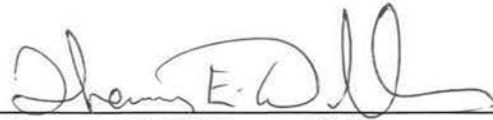
In considering the Rules of Procedure, Section 10 and the *Public Inquiries Act, 2006*, Section 5(2), one must consider the perquisite considerations for being granted standing.

- a) whether the person's interest may be adversely affected by the findings of the Commission;
- b) whether the person's participation would further the conduct of the Inquiry; and
- c) whether the person's participation would contribute to the openness and fairness of the Inquiry

Given the complexity of the Project at issue and the interwoven lines of authority as between Government and Nalcor Energy, as well as the oversight and decision making authority of relevant Government figures at particular points in time, then it certainly can be said that all members of the Group meet the above requirements.

Accordingly it is respectfully submitted that the within Application for Standing on behalf of the Group and its individual members meets all requirements and recognizes and advances the principles of timelines and economic efficiencies as expounded by the Commissioner.

**DATED** at St. John's in the Province of Newfoundland and Labrador this 28<sup>th</sup> day of March, 2018.

A handwritten signature in black ink, appearing to read 'Thomas E. Williams', written over a horizontal line.

**Thomas E. Williams, Q.C.**  
**O'Dea Earle**  
**General Counsel for Former**  
**Government Officials 2003-2015**

**IN THE MATTER OF** a  
Commission of Inquiry respecting  
The Muskrat Falls Project

**APPLICATION FOR FUNDING**

This Application for Funding is on behalf of the Group referenced as Former Government Officials 2003-2015 and who have applied for standing before this Inquiry. The Group is comprised of the following five individuals who served in the capacity as either Premier or Minister of Natural Resources or both during the period from December 6<sup>th</sup>, 2003 to December 13<sup>th</sup>, 2015 inclusive, all whom have had involvement, to varying degrees, in the Muskrat Falls Project.

The five individuals comprising the Group are as follows:

1. Daniel Williams - Premier  
December 6<sup>th</sup>, 2003 - December 7<sup>th</sup>, 2010
2. Paul Davis Premier  
December 26, 2014 - December 14<sup>th</sup>, 2015
3. Shawn Skinner Minister of Natural Resources  
December 6, 2010 – October 28, 2011
4. Jerome Kennedy Minister of Natural Resources  
October 28, 2011 - January 16, 2013
5. Derrick Dalley Minister of Natural Resources  
October 9, 2013 - December 2015

It is to be noted that the Group has applied for Full Standing before the Inquiry and Limited Standing in their individual capacity. The within Application is a request for Funding is for one General Counsel and related expenses for attendance at the Inquiry to represent the collective interests of the Group, not to cover costs of counsel on an individual basis if such Limited Standing is provided.



As outlined in the Group's Application for Standing, the Terms of Reference of the Inquiry cover a time span lapsing two separate Government administrations and as recognized by the Commissioner; *such examination will be a broad one and will have to include both the prior government as well as the present government for the Province.*" Therefore it is recognized that the attendance of these former government officials is essential to fulfill the mandate of the Inquiry.

Given that the Group represents a former government administration then it is submitted that given the requirements of the Principles of Procedural Fairness they would be funded in the same manner as the present government administration. In light of such analogy, the Application for Funding is to a greater or lesser degree redundant given that both government administrations would be considered to be self-funded in such instance. In light of the potential for conflict of interest as between the two government administrations as it pertains to the matters under review, it is necessary that the Commissioner give consideration to recommending funding for outside counsel for the Group as they appear before the Inquiry in their capacity as Former Government Officials, 2003-2015.

In light of the fact that the Group was assembled solely for the purposes of the Inquiry, as a collective body they do not have any sources of revenue and have endeavoured to organize in such a fashion so as to add efficiencies and reduce costs to the Inquiry.

The Group seeks funding for one general counsel and related expenses, but has committed to utilizing their own time and resources to the degree possible for support to legal counsel.

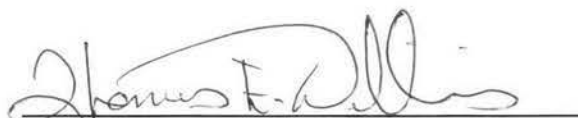
While the Rules of Procedure for the Inquiry request that parties submit with their Application an Affidavit containing relevant financial information (ie. statements, operating budgets and fee structure) given that the Former Government Officials 2003-2015 was assembled solely for the purposes of this Inquiry, no such information exists.

In the event that the Commissioner requires any additional information or elaboration in respect to the above request, legal counsel would be pleased to discuss the same.

Accordingly based upon the unique nature and circumstances surrounding the Groups request for Standing, it is respectfully requested that the Commissioner consider

recommending funding for the Former Government Officials 2003-2015 so as to ensure equal representation and due process for all.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 28 day of March, 2018.

A handwritten signature in black ink, appearing to read "Thomas E. Williams", written over a horizontal line.

**Thomas E. Williams, Q.C.,  
O'Dea Earle  
General Counsel for Former  
Government Officials 2003-2015**

April 3<sup>rd</sup>, 2018

Via Email: [admin@musktratfallsinquiry.ca](mailto:admin@musktratfallsinquiry.ca)

Commission of Inquiry  
Respecting the Muskrat Falls Project  
5<sup>th</sup> Floor, Suite 502  
Beothuck Building  
20 Crosbie Place  
St. John's, NL  
A1B 3Y8


**RE: Muskrat Falls Inquiry Hearing for Standing and Funding -  
Former Government Officials 2003-2015**

Dear Sirs:

Further to our Application for Standing and Funding submitted to the Inquiry on Friday, March 30<sup>th</sup>, 2018, we wish to advise that both our Applications for Standing and Funding require amendment in that we are adding a sixth (6th) individual to the Group being Former Premier Tom Marshall who served as Premier of the Province from January 24<sup>th</sup>, 2014 to September 26<sup>th</sup>, 2014 and as well served as Minister of Natural Resources from January 16<sup>th</sup>, 2013 to October 9<sup>th</sup>, 2013. We understand that Mr. Marshall had filed his own individual Application but has since withdrawn the same and given that his participation in the Inquiry proceedings will be equally as valuable as the remaining members of the Group, then we would ask that his name be included and considered as part of the Group referred to as "Former Government Officials 2003-2015."

We trust the above is satisfactory should you have any issues or concerns, please feel free to contact the undersigned.

Yours truly,



THOMAS E. WILLIAMS, Q.C.

TEW:kd