

## Commission of Inquiry Respecting the Muskrat Falls Project

### Rules of Procedure

The Honourable Richard D. LeBlanc, Commissioner

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#### GENERAL

1. The Commission of Inquiry Respecting the Muskrat Falls Project is an independent commission set up by the Government of Newfoundland and Labrador by way of an Order-in-Council (O.C. 2017-339) pursuant to the *Public Inquiries Act, 2006*, SNL 2006 c P-38.1, as amended, to inquire into: the decision to sanction the Muskrat Falls Project (“Project”); the construction and oversight of the Project’s progress and costs; whether exemption from oversight by the Commissioner of Public Utilities was justified and what impact, if any, such lack of oversight has had on the Project; and whether the Government of Newfoundland and Labrador was fully informed in relation to this Project at the time that it sanctioned the Project, and whether it kept appropriate oversight as regards the progress and costs of construction for the Project.
2. Following the conclusion of the hearings, the Commissioner will make any findings and recommendations he deems appropriate and in the public interest. The findings and recommendations of the Commissioner in this Inquiry will be contained in a report filed upon completion of the Inquiry’s work.
3. Throughout these Rules, the words “Commission” and “Inquiry” are used interchangeably and both refer to the Muskrat Falls Inquiry.
4. Public hearings in St. John’s will be held at the Third Floor, Beothuck Building, 20 Crosbie Place, St. John’s, Newfoundland and Labrador, A1B 3Y8. Public hearings in Happy Valley-Goose Bay will be held at a location to be announced. The Commissioner will set the dates and locations for hearings. Hearings will generally take place between 10:00 a.m. and 4:30 p.m., Monday through Thursday each week.
5. The Commission is committed to a process of fairness, including public hearings and public access to evidence and documents used at the hearings.
6. The Commission 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. The Commissioner will have the ability to do such things as are necessary in this regard, including, but not limited to, determining the witnesses needed to be heard; setting time limits for the presentation of evidence, reports, etc.; and specifying how and when disclosure of documents is to be provided. As well, the Commission will be mindful that the final report from the Inquiry is expected to be filed by December 31, 2019.

7. The Commissioner encourages anyone who may have information that may be helpful to the Inquiry, including documents and the names of witnesses, to provide this information to the Commission as soon as possible.

## **STANDING**

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".
9. Persons who apply for standing will first be required to provide written submissions explaining why they wish standing. The Commissioner will announce when he is accepting written submissions for standing. All written submissions for standing will be made public.
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.
11. The Commissioner may grant standing based on written submissions. Persons applying for standing for whom the Commissioner does not grant standing based on a written submission alone will also be given an opportunity to appear before the Commissioner to

explain their reasons for requesting standing. They will be given twenty (20) minutes to do so, subject to the Commissioner permitting further time as he sees fit.

12. In order to avoid duplication and to promote time and cost efficiencies, persons of similar interest are encouraged to seek joint standing.
13. Parties are deemed to undertake to follow the Rules of Procedure.
14. The Commissioner will determine the extent to which a party may participate. For example, a party may be granted standing for limited issues or portions of the hearings.

## **FUNDING**

15. It is presumed that counsel will be retained at the expense of the witnesses and parties. However, the Commission may make recommendations to the Government of Newfoundland and Labrador regarding funding for counsel and other expenses of parties who have been granted standing.
16. Applications for funding shall be in writing, submitted with an application for standing, and shall contain the following:
  - a) an affidavit stating whether an applicant would be able to participate without such funding, supported by relevant documentation, which may include financial information and, for organizations, financial statements, operating budgets, the number of members and membership fee structure. Applicants should also indicate whether they have contacted other groups or individuals with a view to forming an amalgamated group for the purpose of seeking standing and/or funding and the results of any such contacts;
  - b) a description of the purposes for which the funds are required, how the funds will be disbursed, and how they will be accounted for;
  - c) a statement of the extent to which the applicant will contribute its own funds and personnel to participate in the Inquiry; and
  - d) the name, address, telephone number and position of the individual who would be responsible for administering the funds, and a description of the financial controls that

would be put in place to ensure that any funding provided is disbursed for the purposes of the Inquiry.

17. Applications for funding will be made public, however, personal information, financial or otherwise, contained in any application for funding will be redacted by the Commission upon release or publication.

#### **COMMISSION COUNSEL**

18. The Commissioner will appoint Commission counsel to assist him and to represent the public interest. Commission counsel will ensure that all matters which bear on the public interest are brought to the attention of the Commissioner. Commission counsel will have standing throughout the Inquiry.

#### **DISCLOSURE AND PRODUCTION OF EVIDENCE**

19. Any person served with a summons to produce shall provide all requested information within that person's possession, control or power in the time indicated in the summons to produce or, if no time is indicated, in a timely manner, and in such a form as directed by the Commission. Regardless of whether a party has been served with a summons to produce, all relevant information shall be disclosed and all relevant documents or other things within the possession, control or power of the party shall be produced to the Commission within fourteen (14) days of that party having been granted standing. The obligation to produce shall be ongoing and continuing throughout the course of the Inquiry.
20.
  - a) Where a person or party objects to the disclosure of information or the production of any document or thing, it shall, in any event, be produced in its original, unedited form to Commission counsel who will review it and who will provide an opinion as to the validity of the objection. Should the basis of the objection of the person or party to disclosure be accepted by Commission counsel, the document or thing shall be returned by Commission counsel in the form it was received, without duplication in any manner, to the person or party and the document or thing shall not be used in any manner by Commission counsel.
  - b) Where, as a result of the process set out in (a) above, the person or party and Commission counsel are unable to agree regarding the disclosure and production

- sought, Commission counsel (or both Commission counsel and the person or party jointly) shall make an application to the Supreme Court of Newfoundland and Labrador. That application shall be directed to the attention of the Chief Justice, or his designate, who shall then proceed with the matter in as expeditious a manner as he/she determines is appropriate.
- c) Any other applications within the jurisdiction of the Supreme Court of Newfoundland and Labrador shall be made to that court. The application shall be directed to the Chief Justice, or his designate, who shall then proceed to deal with the matter in as expeditious a manner as he/she determines is appropriate.
21. The term “relevant” is intended to have a broad meaning and includes anything that touches or concerns the subject matter of the Inquiry or that may directly or indirectly lead to other information that touches or concerns the subject matter of the Inquiry.
22. The terms “document” or “documents” are intended to have a broad meaning and include, without limitation, the following mediums: written, electronic, text, cellular or social media messaging, audiotape, videotape, digital reproductions, photographs, films, slides, maps, graphs, microfiche, metadata, and any data and information recorded or stored by means of any device.
23. The originals of relevant documents or other things are to be provided to the Commission counsel upon request.
24. Counsel to parties, parties and witnesses will be provided with documents and information, including statements or transcripts of anticipated evidence, only upon giving an undertaking that all such documents or information will be used solely for the purpose of the Inquiry and, where the Commission considers it appropriate, an undertaking that its disclosure will be further restricted. The Commission may require that documents provided, and all copies made, be returned to the Commission if not tendered in evidence. Counsel are entitled to provide such documents, records or information to their respective clients only on terms consistent with the undertakings given and upon the clients entering into written undertakings to the same effect. These undertakings will be of no force regarding any document or information once it has become part of the public record. The

Commission may, upon application, exempt from the provisions of the undertaking any document or information in whole or in part.

25. Documents or other things received from a party, or any other organization or individual, shall be treated as confidential by the Commission unless and until they are made part of the public record or the Commissioner otherwise declares. This does not preclude the Commission from producing a document or other thing to parties, their counsel, or a proposed witness prior to the witness giving his or her testimony or as part of the investigation being conducted. Nor does it preclude the Commission from providing a document or other thing to experts or consultants retained by the Commission.
26. Commission counsel will endeavour to provide in advance to both the witness and to the parties, those documents or other things that will likely be referred to during the course of the testimony of that witness. Given the volume of documents that the Commission is expected to receive and review as part of its investigation, neither the parties nor their counsel will receive all documents. Commission counsel will provide documents to parties and their counsel based on the principles of relevance, fairness and proportionality. Documents may be redacted by Commission counsel prior to circulation to remove information that is privileged or of a sensitive or confidential nature.
27. A party who believes that Commission counsel has not provided copies of relevant documents must bring this to the attention of Commission counsel at the earliest opportunity. The object of this rule is to prevent witnesses from being surprised with a relevant document that they have not had an opportunity to examine prior to their testimony. If Commission counsel decides the document is not relevant, it shall not be produced. This does not preclude the document from being used in cross-examination by any of the parties. Before such a document may be used for the purposes of cross-examination, a copy must be served by the party or party's counsel intending to use it on Commission counsel and all parties not later than 48 hours prior to the testimony of that witness, subject to the discretion of the Commissioner.

#### **WITNESS INTERVIEWS**

28. Commission counsel will interview, under oath or upon affirmation, persons who have information or documents which have any bearing upon the subject matter of the Inquiry

and may be helpful in fulfilling the Commission's mandate. Persons who are interviewed are welcome, but not required, to have legal counsel present. Persons may be interviewed more than once.

29. Witnesses are advised that section 25 of the *Public Inquiries Act, 2006* provides that no adverse employment action shall be taken against any employee who, acting in good faith, has given information to an Inquiry.
  30. Following the interview, the Commission will prepare a transcript or a summary of a witness's anticipated evidence and before that witness testifies before the Commission, will provide a copy of the transcript or summary to the witness for his or her review.
  31. The witness interview transcript or summary, after being provided to the witness, will be shared with parties. Before being given a copy of the witness interview transcript or summary, parties will be required to sign an undertaking that they will use the witness interview transcript or summary only for the purposes of the Inquiry.
- 31.1
- a) If a witness refuses to be interviewed by Commission Counsel or by another person or persons conducting an investigation in connection with the Inquiry (an investigator) or if a witness refuses to answer a question or questions, where the Commissioner expects the witness's evidence to advance the thoroughness or fairness of the Inquiry, the Commissioner may summon that witness to give evidence at a hearing.
  - b) Rules 32, 33, 34, 35, 36 and 44 apply to such a hearing.
  - c) A hearing under this section will be closed to the public.
  - d) The persons entitled to be present at a hearing under this section are the Commissioner, Commission Counsel, an investigator where necessary, the witness and the witness's counsel.
  - e) A witness at a hearing under this section shall be examined by Commission Counsel or by an investigator.
  - f) A hearing under this section will be recorded and transcribed. The recording and transcript of the hearing, after being provided to the witness, will be provided to the parties. Before given a copy, parties will be required to sign an undertaking that they will use the transcript and recording only for the purposes of the Inquiry.

- g) Parties may:
  - i) within two weeks of receiving the transcript or recording, apply to object to any evidence given in the hearing under this section on any ground that would be available at a public hearing, and
  - ii) if Commission Counsel do not call the witness at a public hearing, apply to have the witness called at a public hearing for cross-examination.
- h) The transcript and recording of a hearing held under this section will be treated as a confidential exhibit unless the Commissioner orders otherwise.

## **EVIDENCE**

- 32. The Commissioner may receive any evidence he considers to be helpful in fulfilling the Terms of Reference and mandate of the Inquiry. The strict rules of evidence used in a court of law to determine admissibility of evidence will not apply.
- 33. Witnesses who testify will give their evidence under oath or upon affirmation. However, the Commission is entitled to receive relevant evidence at the Inquiry even where no oath or affirmation has been given where such is permitted by the Commissioner.
- 34. It will be the practice of Commission counsel to issue and serve a subpoena (summons to witness) upon every witness before he or she testifies.
- 35. Witnesses are entitled to have their own counsel present while they testify. Counsel for a witness will have standing for the purposes of that witness's testimony.
- 36. Witnesses may be called to testify more than once.
- 37. In the ordinary course, Commission counsel will call and question witnesses who testify at the Inquiry. Counsel for a witness may apply to the Commissioner to lead a particular witness's evidence-in-chief. If counsel is granted the right to do so, examination shall be confined to the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Commissioner.
- 38. In the ordinary course, the order of examination will be as follows:



- a) Commission counsel will lead the evidence from each witness. Except as otherwise directed by the Commissioner, Commission counsel are entitled to ask both leading and non-leading questions;
  - b) Parties will then have an opportunity to cross-examine the witness to the extent of their interest. The order of cross-examination of each witness will be determined by the parties and, if they are unable to reach agreement, by the Commissioner;
  - c) Counsel for a witness will examine last, unless he or she has questioned the witness as examination-in-chief, in which case there will be a right to re-examine the witness; and
  - d) Commission counsel will have the right to re-examine the witness last.
39. a) If Commission counsel elect not to call a witness or to file a document as an exhibit, a party may apply to the Commissioner to do so or to have the Commissioner direct Commission counsel to do so where the Commissioner is satisfied that the document or the evidence of the witness is necessary.
- b) As this Commission of Inquiry has a finite time to complete its work, the Commissioner may limit the number of witnesses to be called, permit evidence to be tendered by means other than through calling a witness and may place limits on the time for examination and cross-examination of witnesses. In doing so, the Commissioner will be mindful of the mandate of the Inquiry as well as ensuring fairness to all of the parties.
40. All hearings are open to the public; however, the Commissioner may exclude the public from a hearing, or from part of it, where he decides that the public interest in holding the hearing, or a part of it, in public is outweighed by another consideration, including the consequences of possible disclosure of personal matters, public security or the right of a person to a fair trial.
41. Applications from witnesses or parties to hold any part of the hearing in the absence of the public should be made in writing to the Commission at the earliest possible opportunity.
42. Exhibits may be entered as confidential exhibits. Confidential exhibits will not be viewable by the public during the hearings and will not be made public. Public exhibits may be redacted to remove information that is privileged or of a sensitive or confidential nature.

The transcripts and public exhibits from the hearings will be made available as soon as reasonably possible for public viewing and shall be placed on the Commission's website ([www.muskratfallsinquiry.ca](http://www.muskratfallsinquiry.ca)). If any part of the hearings is held in the absence of the public, the transcripts and exhibits from that part of the hearing will only be made available for public viewing at the Commissioner's discretion and then on such terms as he may direct.

43. The use of television cameras or other electronic or photographic equipment in the hearing room will be permitted at the discretion of the Commissioner.

#### **RIGHT TO COUNSEL**

44. Witnesses and parties are entitled, but not required, to have counsel present while Commission counsel interviews them and also when they testify.

#### **NOTICES REGARDING ALLEGED MISCONDUCT**

45. The Commissioner will not make a finding of misconduct on the part of any person unless that person has had reasonable notice under section 5(4) of the *Public Inquiries Act, 2006* of the substance of the alleged misconduct and was allowed full opportunity during the Inquiry to be heard in person or by counsel.
46. If any person or party believes that it is necessary to adduce documentary evidence or to call evidence to respond to allegations of possible misconduct for which a section 5(4) notice has been received, then that person or party may apply for leave to call that evidence or may request that Commission counsel call such evidence. If relevant and responsive to issues raised in the section 5(4) notice, leave will be given by the Commissioner. Cross-examination in respect of such evidence shall be limited to matters adduced in evidence during the examination-in-chief of the witness, except with leave of the Commissioner.
47. Any section 5(4) notices will be served on a confidential basis to the person to whom the allegations of misconduct refer.

**RESEARCH, SUBMISSIONS AND PUBLIC MEETINGS**

48. The Commission may utilize a range of research and other processes to ensure that parties and the public have a meaningful and ongoing opportunity to participate where such research or processes are deemed by the Commissioner to be necessary. Amongst the various initiatives which may be adopted, the Commission may:
- a) Commission research papers from recognized experts on a broad range of relevant topics. The structure and format of the research papers will vary but will generally include an analysis of relevant issues, potential options (if applicable) and a bibliography;
  - b) invite and consider written and/or oral submissions from parties and the public about any matter, including any research papers;
  - c) convene meetings or forums (the format of which may vary but which shall be recorded) to discuss issues raised by the Inquiry; and
  - d) post the research papers and other relevant research materials and submissions on its website.
49. In the ordinary course, persons or parties will attend any public meetings in person unless the Commissioner orders otherwise.

**AMENDMENT TO RULES OF PROCEDURE**

50. These Rules may be amended and new Rules may be added if the Commissioner finds it necessary to do so to fulfill the Commission’s mandate and to ensure that the process is thorough and fair.
51. The Commissioner may extend or abridge any time prescribed by these Rules.

**BREACHES OF RULES OF PROCEDURE**

52. The Commissioner shall deal with a breach of these Rules as he sees fit including, but not restricted to, revoking the standing of a party or imposing restriction on the further participation in or attendance at the hearings by any party, counsel, individual, organization or member of the media.

**SERVICE**

53. Documents may be served on a party by:
- a) Email or facsimile to the party's legal counsel with acknowledgement of receipt;
  - b) Personal service or an alternative to personal service in accordance with the Rules of the Supreme Court, 1986, SNL 1986 c 42, Sch D.;
  - c) Any other such method as mutually agreed between Commission counsel and the party or the party's legal counsel;
  - d) Or as otherwise directed by the Commissioner.

**Commission of Inquiry Respecting the Muskrat Falls Project**

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