

COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

IN THE MATTER OF the *Public Inquiries Act* (the “Act”)

AND

IN THE MATTER of a Commission of Inquiry respecting Muskrat falls Project and an application pursuant to s.5 for Standing to participate in the Inquiry

APPLICATION FOR STANDING

This is an application for standing submitted by Terry Paddon and Todd Stanley, respectively.

Paddon:

The Applicant, Terry Paddon (“**Paddon**”), states as follows:

1. The Applicant, Terry Paddon, was:
 - a. Deputy Minister of Finance from early 2004 - May 31, 2012;
 - b. Auditor General for the Province of Newfoundland and Labrador from June 1, 2012 – October 31, 2017.
2. While occupying the aforementioned senior role at the Department of Finance, Paddon reviewed the various business cases prepared by Nalcor related to the development of Muskrat Falls, provided advice to the Minister of Finance related to Muskrat Falls, liaising with officials of Nalcor related to the Muskrat Falls Project financing, and participated in a senior committee of officials monitoring issues leading up to the sanction of Muskrat Falls.
3. On June 1, 2012, Paddon was appointed as Auditor General of Newfoundland and Labrador. The Office of the Auditor General in Newfoundland and Labrador is the independent legislative auditor of government, its departments, all agencies of the Crown and Memorial University of

Newfoundland and Labrador. The Office of the Auditor General audits financial statements and other accountability documents, evaluates management practices and control systems and determines compliance with legislative and other authorities.

4. Paddon retired as Auditor General for Newfoundland and Labrador on October 31, 2017.

Stanley:

The Applicant, Todd Stanley (“**Stanley**”), states as follows:

5. The Applicant, Todd Stanley QC, was a solicitor with the Civil Division of the Department of Justice providing legal advice to the Department of Natural Resources from 2001 to 2013. During that period, he also served in managerial roles in the Civil Division of the Department as Manager of the Corporate and Commercial Unit from 2007 to 2010 and as Director of the Civil Division from 2010 to 2013. In 2013 he was appointed Assistant Deputy Minister of the Department; in 2016 Special Counsel to Human Resource Secretariat; and in 2017 as Deputy Minister and Deputy Attorney General of the Department of Justice and Public Safety.
6. While occupying the aforementioned senior roles at the Department of Justice and Public Safety from 2006 to 2013 Mr. Stanley was one of the primary legal advisors to the Department of Natural Resources and to Government generally in respect of issues relating to energy issues including the development of the Lower Churchill Project. This included providing legal advice in respect of:
 - a. Drafting of the 2007 Provincial Energy Plan;
 - b. The development of new legislation and amendments to create Nalcor Energy;
 - c. The development of a legislative framework for the coordination and management of the hydroelectric water resources on the Churchill River;
 - d. Reviewing and commenting on the Terms of Reference to the Public Utilities Board;
 - e. Negotiations with Emera Inc. including participation in the negotiation of agreements regarding the supply of power to Nova Scotia; and,
 - f. Negotiations concerning the 2012 Federal Loan Guarantee Term Sheet and the 2013 Federal Loan Guarantee transaction.
7. In addition to the foregoing, Stanley also provided general and specific legal advice to the

Department of Natural Resources and Government's Executive on a number of legal issues relating to the project and government's involvement in the Project.

8. Stanley resigned as Deputy Minister of Justice and Public Safety on May 11, 2018 and is currently in private practice with the Law Firm Cox & Palmer in St. John's, NL.

Submissions in Support of Standing for Paddon and Stanley:

9. Section 5 of the *Public Inquiries Act, 2006* reads as follows:

5. (1) A commission shall give those persons who believe they have an interest in the subject of the inquiry an opportunity to apply to participate.
 - (2) A commission shall determine whether a person may participate in an inquiry, and how he or she may participate, after considering
 - (a) whether the person's interests 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.

10. On March 14, 2018, Leblanc J. issued a decision addressing the Interpretation of the Terms of Reference for the Muskrat Falls Inquiry. This decision was meant to focus the Inquiry and to inform parties that are applying for standing. It is submitted that in light of this decision it is necessary to examine s.5 of the *Public Inquiries Act, 2006* in the context of the Terms of Reference and the decision addressing its interpretation.

Paddon

11. With respect to Section 4(a) of the Terms of Reference and project sanction, Paddon was Deputy Minister of Finance and in this role had involvement in the review of project scenarios and alternatives, provided both general and specific advice regarding project options to the Minister of Finance and was regularly present at briefing sessions involving Nalcor and elected officials and/or bureaucrats. Section 4(a)(i) of the Terms of Reference specifically requires the Commissioner to look at "*the assumptions or forecast on which the*

analysis of options was based were reasonable”.

Furthermore, given Paddon’s senior position as the Deputy Minister of Finance in government, and the function it involved Paddon can provide a perspective, pre-sanction, with respect to “*what information and, by extension, whether all necessary information, was provided to Government at the time*” and “*whether Government was aware of and appropriately considered all relevant matters prior to its sanction of the project*”. Paddon is familiar with issues surrounding the Muskrat Falls Project before sanction, including the federal loan guarantees, and can ensure his position is accurately represented before the Commission. Furthermore, given Paddon’s role as Deputy Minister of Finance it is anticipated that he will be the subject of testimony that may impact him professionally and personally, and standing will ensure that the Commission has a complete and accurate picture regarding information provided to and from Government, while at the same time the Applicant can ensure his positions are presented in a clear and accurate fashion.

12. With respect to s. 4(b) of the Terms of Reference, the decision of Leblanc J. indicates that in regards “*the matter of construction cost escalation, I (sic the Commissioner) will be considering those matters referred to in sections 4(b)(i) to (vi) as well as other matters related to why construction costs escalated from those projected by Nalcor at the time of sanction of the Project to the eventual and anticipated conclusion of the construction of the Project*”. As Paddon was appointed Auditor General for Newfoundland and Labrador just before project sanction and it is likely that any exhibits and testimony surrounding s.4(b) of the Terms of Reference will include references to Paddon, and he has, therefore, a significant interest in being granted standing in this Inquiry to inform the Commission and present his position and protect his interests and professional reputation.

13. With respect to s.4(c) of the Terms of Reference, Leblanc J. indicates that the Commission will examine the Public Utilities Board exemption including “*the impact of the decision of the PUB on March 30, 2012 wherein it requested an extension of time to conduct its review and the response by Government to this. To be determined as well is whether there was any interference on the part of Nalcor or Government with respect to the PUB's consideration of the Project.*” Paddon is familiar with the Public Utilities Board exemption, which came about during his term as Deputy Minister of Finance but was not involved in any interference issues as referred to

earlier in this paragraph.

14. With respect to s.4(d) of the Terms of References, Leblanc J., indicated in his decision that the Inquiry will review both "*past and present administrations*" and will examine "*the reporting structures between Nalcor and the various government administrators, the governance model 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 and how it progressed. Implicit in such an investigation will be a consideration of the decisions made by Government to continue to proceed with the Project.*" Paddon was Deputy Minister of Finance prior to sanction, and Auditor General for Newfoundland and Labrador post sanction, until his retirement on October 31, 2017. Given Paddon's extensive involvement in this matter over an extended time period and over the life of multiple administrations until his retirement on October 31, 2017, there is a greater likelihood that his interests may be adversely affected by the findings of the Commission than many other individuals. In addition, given Paddon's participation in multiple administrations he will further the conduct of the inquiry as he will provide a certain continuity with respect to the governance model employed for the project and the communications between Government and Nalcor as the project progressed. Paddon's participation is proper and necessary to contribute to the openness and fairness of the inquiry and standing should be granted to ensure that Paddon can respond to any issues which the Commission may raise regarding Paddon's role in the project and to ensure his position is clearly set out before the Commission.

15. Paddon has a significant interest in the subject matter of this inquiry given the significant roles and functions he performed throughout the life of the Muskrat Falls Project. As a result of the various duties he performed as the Deputy Minister of Finance and subsequent Auditor General for the Province of Newfoundland and Labrador until his retirement on October 31, 2017, Paddon has a perspective with respect to the project, communications with the Premier and Cabinet, communications between Government and Nalcor, and any advice provided with respect to the project and its oversight from conception to sanction, as Deputy Minister of Finance, and to post sanction, as the Auditor General of Newfoundland and Labrador until his retirement on October 31, 2017. Paddon's participation will further the conduct of the inquiry and contribute significantly to the

openness and fairness of the inquiry.

16. Paddon has been notified that he will be subpoenaed to testify during the inquiry considering the significant role he played and the functions he performed during the life of the Muskrat Falls Project until his retirement on October 31, 2017. It is also likely that there will be a significant number of exhibits involving Paddon which will be entered into evidence. Paddon has a significant interest in all the evidence that will arise at the hearing, and in particular any testimony arising out of the exhibits and documents he prepared, authored, or reviewed. Given the interest that Paddon will have in this evidence his personal interests could be adversely affected and standing is necessary to ensure his rights and professional reputation are protected and that the evidence that the Commission receives is fair, complete and accurate.
17. As for funding, the Government of Newfoundland and Labrador has committed funding in respect Paddon's testimony, as a non-party, during Phase I of the Inquiry, and an application has been made to the Government of Newfoundland and Labrador for additional funding if Paddon is granted standing. The right is reserved to apply for funding later if the Government of Newfoundland and Labrador does not commit additional funding.

Stanley

18. With respect to Section 4(a) of the Terms of Reference and project sanction, the Applicant was legal advisor to the Department of Natural Resources at the times leading up to Project sanction. According to the decision of Leblanc J., an examination of section 4(a) "*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 Government at the time.*" The Applicant has a perspective both pre and post sanction that will help inform the Commission.

Furthermore, given the Applicant's positions as legal advisor to the Department of Natural Resources, Stanley can provide a unique perspective with respect to "*whether Government was aware of and appropriately considered all relevant matters prior to its sanction of the*

project" and after sanction was granted. Stanley is familiar with issues surrounding the Muskrat Falls Project before and after sanction, including the creation of Nalcor Energy, the development of the water management regime, the forwarding of terms of reference to the Public Utilities board, Government's involvement in Nalcor's negotiations with Emera, the development and negotiation of the 2013 Federal Loan Guarantee, and Government's overall relationship with Nalcor Energy and can ensure his position is accurately represented before the Commission. Furthermore, given the Applicant's role with respect to a variety of matters relevant to the Commission's mandate it is anticipated that he will be the subject of lengthy testimony that may impact him professionally and personally, and standing will ensure that the Commission has a complete and accurate picture regarding information provided to and from Government, while at the same time the Applicant can ensure his positions are presented in a clear and accurate fashion.

19. With respect to s. 4(b) of the Terms of Reference, the decision of Leblanc J. indicates that the Inquiry is to consider how *"reports and assessments received by Nalcor and whether they were made available to the Board of Nalcor as well as the Government will also be part of the investigation."* As solicitor for the Department of Natural Resources, Stanley was directly involved with the communications between Nalcor and Government, on various aspects of the projects, including attendance at Nalcor briefings of Government senior executives. As it is likely that both exhibits and testimony surrounding s.4(b) of the Terms of Reference will include significant and numerous references to Stanley he has a significant interest in being granted standing in this Inquiry to inform the Commission and present his position and protect his interest and professional reputation.

20. With respect to s.4(c) of the Terms of Reference, Leblanc J. indicates that the Commission will examine the Public Utilities Board exemption including *"the impact of the decision of the PUB on March 30, 2012 wherein it requested an extension of time to conduct its review and the response by Government to this. To be determined as well is whether there was any interference on the part of Nalcor or Government with respect to the PUB's consideration of the Project."* Stanley is familiar with the Public Utilities Board exemption and assisted in reviewing and commenting on the Terms of Reference to the Public Utilities Board. Therefore, Stanley's participation as a party with standing will enhance the examination of this aspect of the Terms of Reference and allow for a more thorough review of this issue.

21. With respect to s.4(d) of the Terms of References, Leblanc J., indicated in his decision that the Inquiry will review both "*past and present administrations*" and will examine "*the reporting structures between Nalcor and the various government administrators, the governance model 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 and how it progressed. Implicit in such an investigation will be a consideration of the decisions made by Government to continue to proceed with the Project.*" Given Stanley's extensive involvement in this matter over an extended time period and over the life of multiple administrations, there is a greater likelihood that his interests may be adversely affected by the findings of the Commission than many other individuals. In addition, given Stanley's participation in multiple administrations he will further the conduct of the inquiry as he will provide continuity with respect to the governance model employed for the project and as the project progressed. Stanley's participation is proper and necessary to contribute to the openness and fairness of the inquiry and standing should be granted to ensure that Stanley can respond to any issues which the Commission may raise regarding the Stanley's role in the project and to ensure his position is clearly set out before the Commission.
22. The Applicant has a significant interest in the subject matter of this inquiry given the significant roles and functions he performed throughout the life of the Muskrat Falls Project. Because of the various duties he performed as the solicitor for the Department of Natural Resources the Applicant has a unique perspective with respect to the project, communications with the Premier and Cabinet, communications between Government and Nalcor, and any advice provided with respect to the project and its oversight from conception, to sanction, to post sanction. Stanley's participation will further the conduct of the inquiry and contribute significantly to the openness and fairness of the inquiry.
23. Stanley has been notified that he will be called to testify during the inquiry considering the significant role he played and the functions he performed on a daily basis during the life of the Muskrat Falls Project. It is also likely that there will be a number of exhibits involving Stanley which will be entered into evidence. Stanley has an interest in all the evidence that will arise at the hearing, and in particular any testimony arising out of the exhibits and documents he prepared, authored, reviewed or approved. Given the interest

that Stanley will have in this evidence his personal interests could be adversely affected and standing is necessary to ensure his rights and professional reputation are protected and that the evidence that the Commission receives is fair, complete and accurate.

24. It is acknowledged that all or at least significant portions of Stanley's knowledge set out above, and any testimony Stanley would provide as a witness, will be subject to the solicitor and client privilege in favour of the Government of Newfoundland and Labrador. Stanley is aware that Government has not waived privilege over matters as part of the Commission process and nothing set out above is to be interpreted as being contrary to such privilege. It is acknowledged that coordination between counsel for Stanley, the counsel representing the Government, and Commission counsel as to the nature and extent of any such testimony, and the logistics for such testimony, will be required.

25. As for funding, the Government of Newfoundland and Labrador had committed funding in respect Stanley's testimony, as a non- party, during Phase I of the Inquiry, and an application has been made to the Government of Newfoundland and Labrador for additional funding if Stanley is granted standing. The right is reserved to apply for funding later if the Government of Newfoundland and Labrador does not commit additional funding.

Relief Requested:

26. Considering the foregoing, the Applicants, Terry Paddon and Todd Stanley, respectively, hereby request standing before the Commission of Inquiry respecting the Muskrat Falls Project for Phase I of the hearing. They each reserve the right to apply for further standing in the later phases, or any of them, of the Inquiry, if it is determined this is necessary. If standing for Phase I of the Inquiry is granted to both Applicants, they respectfully request that they will be referred to on the List of Parties, collectively, as "Former Civil Servants of Government NL".

DATED at St. John's, in the Province of Newfoundland and Labrador this 9th day of October 2018.

Gerlinde van Driel QC
Van Driel Law


Solicitors for the Applicants