BURGESS LAW OFFICES

Suite 308, Terrace on the Square
P.O. Box 23196
St. John's, NL A1B 4J9

R. Paul Burgess, QC
pburgess@burgesslaw.ca
Tel: (709) 757-2500
Fax: (709) 757-2501

January 21, 2019

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

ATTENTION: THE HONOURABLE JUSTICE RICHARD LEBLANC, COMMISSIONER

Dear Mr. Commissioner:

RE: Submission on Nalcor's Application Regarding the Grant Thornton Forensic Audit Report – Construction Phase on behalf of Astaldi Canada Inc.

Astaldi Canada Inc.("Astaldi") responds to the application of Nalcor Energy to suppress portions of the Grant Thornton Forensic Audit Report, Construction Phase (the "Grant Thornton Report"), to effectively prohibit Astaldi from participating in the Muskrat Falls Inquiry and to have a significant portion of Phase 2 conducted *in camera*.

This submission will address the categories of alleged commercially sensitive passages contained in the Grant Thornton Report in the same manner as outlined in Nalcor's application.

At the outset, it is trite to state one of the essential features of a public inquiry is the importance of openness and transparency. Guidance as to relevant considerations for a Commission when asked to conduct hearings *in camera* can be found by referring to rulings in previous commissions and, Astaldi submits, by looking at case law dealing with publication bans.

In this case, Nalcor is not only seeking to have hearings held *in camera*, but also requesting that Astaldi be excluded from such *in camera* hearings, notwithstanding the Commissioner's decision dated April 6, 2018, wherein Astaldi was granted standing further to an explicit recognition by the Commission that Astaldi may be adversely affected by the Commission's findings. We are not aware of any precedent for such a far-reaching request.

As cited by Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice*, (Toronto: Irwin Law Inc., 2009) at 330, quoting Lord Justice Salmon: *"It is...of the greatest of importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for*

the purpose of arriving at the truth [...][T]he public naturally distrusts any investigation carried out behind closed doors" [footnotes omitted].

In the Gomery Inquiry, Commissioner Gomery adopted Justice Iacobucci's test for granting a no-publication order in a civil case. Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice*, *supra*, describes Justice Iacobucci's test for granting such an order in civil litigation as follows, at 337:

> [...] According to this test, it should be granted when:
>
> - such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> - the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> Justice Iacobucci elaborated that the risk must be solidly substantiated by evidence and pose a "serious threat to the commercial interest" in question. [...] [footnotes omitted]

Astaldi submits that, in considering Nalcor's request, the starting point of such an analysis is the recognition that any restriction to access by the public or any interested party to the Inquiry's hearings will undoubtedly detract from the public's confidence in this Inquiry. As such, restrictions such as those requested by Nalcor may be granted only in circumstances where Nalcor can prove to the Commission, with convincing and solidly substantial evidence, the existence of a risk that poses a serious threat to the commercial interests of Nalcor, which risk outweighs the rights of the public and Astaldi, respectively, to an open and transparent proceeding.

In this specific case, notably, Nalcor acknowledges that the suppressed passages will ultimately find their way into the purview of the public and/or Astaldi, stating at page 2, paragraph 3, of its submission: "*This submission is drafted to minimize premature disclosure of the contents of the Construction Phase Report.*" Nalcor does not deny that the information will ultimately be obtained by Astaldi.

Category 1: Estimated and Forecast Costs for Individual Work Packages

Nalcor's application requests that estimated and forecast costs for individual work packages only be disclosed to parties with standing, excluding Astaldi and its legal counsel, and that the use of such information be limited to *in camera* sessions. Nalcor's request is based on its assertion that

the broader disclosure of this information "*would risk encouraging claims by contractors to attempt to take advantage of room in the budget and would compromise the ability of Nalcor to negotiate the cost of any necessary extra work and/or contractor claims for extra payment*".

Clearly, as it relates to Astaldi, this concern is unwarranted and invalid. Astaldi's contract CH0007, the main focus of Nalcor's submissions, has been terminated by Nalcor/MFC; while Astaldi strenuously maintains that such has been a wrongful termination, said termination has been effected and Nalcor, through MFC, has contracted with Pennecon to perform completion work. Those steps are final. Nothing in the Grant Thornton Report can change those facts. Nothing suppressed by Nalcor can affect these work packages or the cost of the project, or provoke any claim by Astaldi, as that claim has already been made.

Category 2: Bid Contents and Evaluations

Nalcor requests that bid contents and evaluations only be disclosed to the parties with standing, excluding Astaldi and its legal counsel, and that the use of such information be limited to *in camera* sessions.

To support their request for suppression of this category of passages in the Grant Thornton Report, Nalcor suggests that the disclosure of bid evaluations to the successful bidder may encourage claims for extra payment after contract award and that the disclosure of bids and bid evaluations to unsuccessful bidders may encourage claims for perceived unfairness in the bidding process.

As previously stated in the context of Category 1, and equally applicable in Category 2, any such disclosure will have no impact on encouraging a claim by Astaldi. Astaldi has already asserted its claims. As outlined during Phase 1 hearings, in Astaldi's submission dated November 13, 2018, regarding the disclosure of alleged commercially sensitive information, Astaldi and Nalcor are engaged in arbitration proceedings, the details of which were outlined in a Notice of Arbitration dated September 27, 2018 and provided by Nalcor to the Commission with its submission, a copy of which is attached hereto for ease of reference as "Schedule A".

For the Commission's information, that arbitration is proceeding and will be discussed in further detail in this submission when addressing Category 3 passages.

For the foregoing reasons, Nalcor has failed to put forward any reasonable basis for suppressing Category 2 passages as they relate to Astaldi.

Category 3 – Astaldi

The final category of passages Nalcor is requesting the Commision to suppress is all matters related in any way to Contract CH0007 for powerhouse and spillway awarded by Muskrat Falls Corporation. To say this is the most far-reaching and troubling aspect of Nalcor's application to Astaldi is an understatement.

As was previously stated, the public's interest in disclosure is a foundational principle of this Commission. Suppression of information by Nalcor in support of its vaguely suggested and unproven private interests would require clear and convincing proof of irreparable harm far outweighing the public interest in disclosure; we have previously proposed an applicable test for considering Nalcor's application. Nalcor's application is devoid of any such proof.

Astaldi submits that Nalcor's institutional interests as a Crown Corporation should parallel those of the Commission in terms of public accountability. Nalcor's attempt to proceed, shrouded in secrecy, is antithetical to Nalcor's powers, duties and responsibilities as a Crown Corporation.

Nalcor's within application directly contradicts its application for standing before this Commission dated March 27, 2018. In its application for standing, Nalcor stated as follows:

> The participation of Nalcor Energy as a party with standing will further the conduct of the Inquiry by allowing Nalcor Energy **to participate fully and openly in public hearings** and to make submissions addressing the issues raised by the terms of reference. It will **contribute to openness and fairness by ensuring Nalcor Energy the opportunity to participate fully in the Inquiry process and to provide helpful information, explanation and commentary."** [emphasis added]

Nalcor recognized that its cooperation would be essential to the openness and fairness of this Inquiry so that the whole story would get told publicly, inclusive of positive and negative elements. In other words, Nalcor took a particular position to further its request for standing, now it takes a contrary position to attempt to protect its position in a private arbitration and in litigation before the Courts of Newfoundland and Labrador. Nalcor's approach and submission ignores the fact that full disclosure to Astaldi is required by Nalcor in the arbitration and court proceedings.

While it is unnecessary to repeat the overall guiding principles enunciated by the Commission, it is helpful to highlight some of the principles brought into play by Nalcor's within application. Those specific principles are cooperation, thoroughness, openness to the public, and fairness.

Astaldi submits that Nalcor's application to exclude it from attending the hearings highlights the fact that Astaldi's interests will be front and centre before the Inquiry. To exclude Astaldi, and withhold information in the manner Nalcor requests, would be unfair and breach the principles of natural justice. Should Nalcor be successful on the within application, Astaldi would not even be apprised of the allegations made against it, much less have an opportunity to respond to said allegations, which, if left unrefuted, could cause detrimental reputational damage to Astaldi.

As per Simon Ruel, *The Law of Public Inquiries in Canada*, (Toronto: Thomson Reuters Canada, 2010) at 134:

> Potential damage to reputations in the context of a public inquiry is the over-arching factor suggesting a high degree of procedural fairness. While risks of prejudice to reputations have to be balanced with the broader social interest in proceeding with a public inquiry, the adherence to strong procedural safeguards will be essential to ensure that reputations are not unduly jeopardized, particularly considering the looseness of the evidentiary standards before a commission of inquiry, and that potential damage to reputations is multiplied considering the usually large publicity surrounding inquiry proceedings and broad circulation of their reports. [footnotes omitted]

As stated above, Astaldi's contract CH0007 has been terminated by Nalcor/MFC, a wrongful termination in Astaldi's estimation, but an effective termination nonetheless. Nalcor, through MFC, has contracted with Pennecon to perform completion work. Astaldi has made its claims arising therefrom. Astaldi, despite procedural resistance, has caused an arbitral tribunal to be constituted to hear its claim. Those steps are final. No further disclosure can change them.

With respect to the arbitration process, the Arbitration Tribunal has not yet determined what procedures will be followed. The Contract provides that the laws of Newfoundland and Labrador shall apply to the Contract. The Arbitration provision specifies that the Arbitration is to be seated in Toronto, Ontario. It does not otherwise specify what procedural law is to apply.

Astaldi has submitted that procedural law of the seat of the Arbitration applies, which is the procedural law of Ontario. Muskrat Falls Corporation has submitted that the law of Newfoundland and Labrador should apply, both as to substantive and procedural matters. Neither party has identified any significant difference in the procedural requirements as may pertain to production obligations.

The Tribunal has already, in the limited context of a motion by Astaldi, made extensive production Orders. It appears likely that the scope of production in the Arbitration will be analogous to the ordinary scope of production in an ordinary action, whether in Newfoundland and Labrador or Ontario.

The dispute resolution provisions of CH0007 relied upon by Nalcor in its application to the Commissioner protect Nalcor if Nalcor can make out grounds before the arbitrators for such protection. Nothing in that Contract, nor in the terms of the private arbitration, supports secrecy and suppression of documents.

The effect of Nalcor's application is to invite the Commissioner to pre-emptively rule on a matter of producibility in a private arbitration.

As previously indicated to the Commission, Astaldi, Nalcor and Muskrat Falls Corporation are engaged in numerous legal actions involving third party suppliers, employees and sub-contractors which have been commenced in the Supreme Court of Newfoundland and Labrador. The same issues that are before the Arbitration Tribunal are before our Courts so, at the very least, all relevant documentation will be necessarily provided by Nalcor to Astaldi.

It is noteworthy that nowhere in Nalcor's application does it assert that the passages it is attempting to suppress from Astaldi or the public are irrelevant to the Commission nor the Arbitration Tribunal or the Supreme Court of Newfoundland and Labrador in ongoing litigation. Presumably, Nalcor is not suggesting the Arbitration Tribunal or the Supreme Court of Newfoundland and Labrador should not receive and review relevant documentation and information in their respective proceedings and, in turn, that Astaldi is not entitled to the production of relevant information.

The Commission exists to get to the bottom of sanctioning and cost and schedule growth on this Project, for the benefit of the people of Newfoundland and Labrador. The Commission, by its very guidelines, is not interested in the existence or administration of a private arbitration seated in Ontario calling Nalcor and Muskrat Falls Corporation to account for its conduct.

Conclusion

Astaldi respectfully submits that Nalcor has failed to show that the suppression of any part of the Grant Thornton Report is warranted in the circumstances and requests that Nalcor's application should be dismissed and that the Grant Thornton Report be disclosed forthwith to all parties with standing, including Astaldi, without redaction.

Yours very truly,
BURGESS LAW OFFICES

R. PAUL BURGESS, QC

RPB/sp
Encl.

SCHEDULE "A"

IN THE MATTER OF an
Arbitration under the **ARBITRATION ACT**
RSNL1990 CHAPTER A-14 as amended

BETWEEN:

ASTALDI CANADA INC.

Claimant

-and-

MUSKRAT FALLS CORPORATION

Respondent

NOTICE OF ARBITRATION

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27 September 2018

Counsel for Claimant

Duncan W. Glaholt
Glaholt LLP
#800, 141 Adelaide St. W.
Toronto M5H 3L5 Ontario
Canada

Astaldi Canada Inc. (hereafter "**Astaldi**") submits this Notice of Arbitration to **Muskrat Falls Corporation** (hereafter "**MFC**") pursuant to Article 31 and Exhibit 16 of a Civil Works Agreement dated 29 November 2013, as amended from time to time thereafter (hereafter the "**Agreement**").

1.0 Description of the Agreement

1. Astaldi submits this Notice of Arbitration pursuant to Article 31 and Exhibit 16 of Civil Works Agreement CH0007 dated 29 November 2013, updated and amended in various respects including a Bridge Agreement dated 27 July 2016, a Completion Contract dated 1 December 2016, a 2017 Settlement Agreement dated 14 December 2017, a Re-Advance Agreement dated 11 June 2018, and an Incentive Funding Contract dated 6 September 2018.

2. Article 31.4 of the Agreement provides that:

> If the Dispute is not resolved with the assistance of the Dispute Review Board, a Party may by Notice to the other Party require the Dispute to be resolved by binding Arbitration in accordance with Exhibit 16 - Dispute Resolution Procedures.

3. Article 1.19 of the Agreement provides that:

> This Agreement shall be construed and the relations between the Parties determined in accordance with the Applicable Laws of Newfoundland and Labrador and Canada, including any limitation periods, and reference to such Applicable Laws shall not, by application of conflict of laws rules or otherwise, require the application of the Applicable Laws in force in any jurisdiction other than Newfoundland and Labrador. Except for Disputes required to be resolved in accordance with Article 31, the parties hereby irrevocably attorn to the Courts of the Province of Newfoundland and Labrador and Canada for the resolution of any dispute arising hereunder.

4. Exhibit 16, Part B, cl.1.4 of the Agreement provides that:

> If any provision of [Exhibit 16 Part B] is inconsistent with or contrary to a mandatory provision of the *Arbitration Act*, c. A-14, RSNL 1990, the mandatory provision of the arbitration legislation shall be applied.

5. Exhibit 16, Part B, cl.5.1 of the Agreement provides that:

> The arbitration shall be conducted in Toronto, Ontario, Canada at a location to be determined by agreement of the Parties.

6. Exhibit 16, Part B, cl. 10.3 of the Agreement provides that:

> The arbitrator may [...] make an interim order on any matter with respect to which a final award may be made, including an interim order for preservation of property which is subject matter of the dispute.

7. Astaldi states that the arbitration provisions of the Agreement are separable from the other provisions if MFC's conduct throughout has rendered the balance of the Agreement unenforceable.

8. Astaldi states that:

(a) all matters between the parties to which this arbitration relates have progressed through senior project managers, project sponsors or representative Vice Presidents, and Chief Executive Officers of each company without resolution;

(b) the parties have either agreed that the matters to which this arbitration relates shall proceed directly to arbitration, or, alternatively, MFC is estopped from requiring a Dispute Review Board to be empaneled to review the matters to which this arbitration relates; and,

(c) the provisions of the Agreement regarding appointment of a Dispute Review Board are permissive in nature, objectively futile, and have either been waived or rendered unenforceable by the conduct of the parties.

2.0 Issues in dispute

2.1 MFC's "pain share" scheme

9. At the time of or shortly after entering into the Agreement, MFC came to realize that it had underbudgeted the cost of the Muskrat Falls project, originally projected to be a $6.2 Bn, 824 mw hydro-electric power generation project connecting the Province's enormous Lower Churchill River/Muskrat Falls electrical generation capacity to local markets and markets in Nova Scotia and the northeastern United States.

10. MFC and its sole shareholder, Nalcor Energy (hereafter "**Nalcor**"), thereupon and in an effort to transfer financial obligations and responsibility from themselves and others for whom they were legally responsible, developed and implemented a "pain share" scheme whereby Project cost growth and schedule extension risk would be passed down to Astaldi regardless of liability or the role of MFC or its other contractors in causing cost growth and schedule extension.

11. While the precise date and particulars of MFC's pain share scheme have always been and remain within the exclusive knowledge of MFC and Nalcor, MFC subsequently conducted itself in furtherance of these improper, undisclosed and extra-contractual objectives to acquire and exercise a complete discretion over all issues of scope, price and time that were otherwise the subject of the parties' Agreement:

(a) MFC sought and obtained full discretionary power to affect Astaldi's legal and practical interests;

(b) MFC sought and obtained from Astaldi un-restricted, executive level access to otherwise confidential financial information of both Astaldi and its parent company and guarantor Astaldi S.p.A and regularly accessed and monitored that information;

(c) MFC used the confidential financial information so obtained to manage and control Astaldi's cash flow to suit MFC's objectives under its pain share scheme;

(d) MFC acquired and exercised direct discretionary control over Astaldi's solvency and used this control to keep Astaldi on the brink of financial default particularly during times of negotiation of compensation and schedule revision events;

(e) Rather than provide proper contractual funding when earned and due, MFC insisted on a system of extra-contractual cash advances reimbursable at the sole discretion of MFC;

(f) MFC directed extra work and accelerated work knowing that Astaldi was unable to fund such work without corresponding compensation, but then denied Astaldi that compensation to precipitate a financial crisis and bargain for harsher, more one-sided commercial terms;

(g) MFC made assurances to Astaldi that extra work and schedule acceleration efforts would be would be compensated, and then either reneged on such assurances or qualified them out of existence once MFC had the benefit and Astaldi the burden of such extra work or schedule acceleration;

(h) Although MFC was legally responsible to Astaldi under the Agreement for the performance of all other contractors on the Project ("Company's Other Contractors"), MFC pursued its "pain share" scheme to impose upon Astaldi the immediate consequences of MFC's mishandling and the breaches of Company's Other Contractors;

(i) MFC extended its discretionary power and control over all aspects of scope, price and time, improperly and extra-contractually and in furtherance of MFC's attempt to impose ever greater "pain share" upon Astaldi and without due regard for the legitimate legal, practical or commercial interests of Astaldi, and in way that was self-serving and contrary to Astaldi's interests;

(j) MFC selected Astaldi as the repository for all blame and damages that would otherwise have accrued to MFC's account for cost growth and schedule delay on the Muskrat Falls Project;

(k) MFC negligently and intentionally interfered in the contractual relationships of Astaldi with its subcontractors and suppliers and misrepresented of the state of payments and availability of funds for the payment of subcontractors and suppliers, encouraging subcontractors and suppliers to lien the Muskrat Falls Project; and,

(l) MFC's imposed pain share scheme is inimical to Astaldi's reasonable expectation of honest performance of the Agreement by MFC, and the Agreement and all subsequent amending agreements and all performance security acquired by MFC under or pursuant to the Agreement and its amendments are unenforceable by MFC.

12. Examples of MFC's implementation of its pain share scheme in breach of contract, breach of fiduciary duty and breach of duty of honest performance include but are not limited to the following:

(a) MFC's arbitrary imposition of $8.1 million holdback on earned milestone payments;

(b) MFC's arbitrary and discretionary slow down of earned payments;

(c) MFC's refusal to permit Astaldi to integrate schedule information with that of Company's Other Contractors;

(d) MFC's arbitrary allocation of fault to Astaldi for crane rail repair caused by MFC's defective design;

(e) MFC's initial denial of contractual entitlements to escalation, followed by admission of liability and then arbitrary stoppage of payment;

(f) MFC's direction and discipline of key Astaldi staff;

(g) MFC's admission of Astaldi's entitlement to extension of time and commensurate compensation, and then arbitrary stoppage of payment on such compensation;

(h) MFC's failure or refusal to process change requests for admitted costs;

(i) MFC's failure or refusal to pay approved progress payments when due;

(j) MFC's negligent and intentional interference with subcontractors and suppliers, and misrepresentation of the state of payments and availability of funds for the payment of subcontractors and suppliers"; and

(k) MFC's commitment in June and July of 2018 to process payments to Astaldi on an expedited basis to specifically support Astaldi's cash flow needs, and then in July of 2018 reneging on that promise in order to impose new, harsh and unfair commercial terms.

13. Notwithstanding MFC's breaches of contract, fiduciary duty and duty of honest performance, Astaldi has continued to perform its contract, and supply work, services and materials to MFC when and how demanded by MFC, in good faith and full dedication to the Project, and with the reasonable expectation of fair dealing and honest performance on MFC's part.

14. Further particulars of MFC's breaches will be provided during the course of this arbitration.

2.2 The consequences of MFC's pain share scheme

15. As a direct result of MFC's implementation of its pain share scheme, and breaches of contract, fiduciary duty and duty of honest performance:

(a) The Agreement and its subsequent amendments, including the Bridge Agreement dated 27 July 2016, a Completion Contract dated 1 December 2016, a 2017

Settlement Agreement dated 14 December 2017, a Re-Advance Agreement dated 11 June 2018, and any subsequent agreements no longer represent the bargain between the parties with respect to scope, price or time. The Agreement, its subsequent amendments and any subsequently executed Term Sheets are all unenforceable at the instance of or for the benefit of MFC.

(b) The true agreement between the parties, in all but name alone, is for the Work to be completed on a cost reimbursable or *quantum meruit* basis.

(c) MFC has constituted itself Astaldi's fiduciary in completing the Work described in the Agreement and has breached that duty.

(d) Contract scope has become a moving target within the discretionary and unilateral control of MFC and the Agreement is no longer applicable in that regard.

(e) Contract time has become at large, within the discretionary and unilateral control of MFC, and the Agreement is no longer applicable in that regard.

(f) Contract price, as set out in the Agreement, has been abandoned or superseded and MFC is obliged to compensate Astaldi for all work done and all services and materials supplied on a cost reimbursable, *quantum meruit* or *quantum valebant* basis, with industry standard overhead and profit in each case.

(g) Having by its conduct converted the Agreement into a fully cost reimbursable agreement, MFC is obliged to conduct itself honestly and transparently in the facilitation of Astaldi's ability to continue the Work to completion on that basis. Astaldi is entitled to, and is ready, willing and able to complete the Work on that basis.

(h) MFC must be deprived of the benefit of its improper and undisclosed MFC pain share scheme.

16. Alternatively, if by its conduct MFC has not become Astaldi's fiduciary in the completion of the Work as a result of implementing the MFC pain share scheme, and has not breached its fiduciary duty and duty of honest performance as pleaded above, and if the Agreement remains enforceable at the hands MFC, which is not admitted but denied, then Astaldi states that MFC is liable to Astaldi in damages for negligence and breach of contract in an amount equal to the difference between the price of the original Agreement, and Astaldi's incurred cost at completion, including reasonable overhead and profit.

3.0 Request that the dispute be arbitrated

17. Astaldi requests that all disputes between Astaldi and MFC be arbitrated before a tribunal composed of three members pursuant to Exhibit 16, Part B, cl. 8.2 of the Agreement.

18. Astaldi seeks:

(a) A declaration that:

(i) apart from separable arbitration provisions, the provisions of the Agreement and all subsequent amendments to scope, price and time are inoperative or unenforceable in the circumstances or have been superseded in the circumstances;

(ii) Astaldi is entitled to compensation and shall be compensated by MFC on a restitutionary *quantum meruit* and *quantum valebant* basis for full value of all work done, materials supplied and services rendered by Astaldi to MFC since 29 November 2013;

(iii) MFC by its conduct has undertaken and is charged with fiduciary duties and obligations to Astaldi, including but not limited to the duty to fully and accurately communicate with Astaldi regarding all work performed and to be performed on an ongoing basis and to fairly compensate Astaldi for such work and that MFC has breached those fiduciary duties;

(iv) MFC by its conduct has waived or is estopped from alleging any purported default of Astaldi under or advancing claims or seeking relief pursuant to the Agreement including but not limited to any termination rights, or claims upon contract security, parental guarantees of Astaldi S.p.A, letters of credit, or exercise of rights of set-off, pending final Award in this matter; and

(v) Having by its conduct converted the Agreement into a fully cost reimbursable agreement, MFC is obliged to facilitate Astaldi's ability to continue the Work to completion on that basis, and Astaldi is entitled to, and is ready, willing and able to complete the Work to completion on that basis.

(b) Interim relief including but not limited to:

(i) a temporary and continuing order, or partial interim award to preserve the jurisdiction of the arbitral process mandated by the severable provisions of the Agreement by prohibiting MFC from taking any steps to place Astaldi in default under the terms of the original Agreement, or to terminate that Agreement, or to remove Astaldi from the Project, or to remove scope of Work from Astaldi or otherwise interfere with its site presence;

(ii) a temporary and continuing order, or partial interim award to preserve the jurisdiction of the arbitral process mandated by the severable provisions of the Agreement by prohibiting MFC from making any claim upon, or drawing down upon any security for the Work under the original Agreement, including but not limited to any and all performance bonds, advance payment guarantees, letters of credit, parental guarantees by Astaldi S.p.A, or common law or contractual rights of set off or deduction, until such time as the issues in this arbitration including all rights and

remedies in relation to the Work and Agreement security have been finally determined;

(iii) an order or interim partial award finding and declaring that MFC is required to continue funding Astaldi labour, subcontractors, suppliers and material purchases on and for the Project, as Astaldi's fiduciary, and on a timely cost reimbursable basis, until further order of this tribunal, or final Award in this arbitration.

(c) An Award fairly and completely compensating Astaldi for all work, services and materials supplied to the Project, including reasonable overhead and profit.

(d) An Award of damages in the amount of $500,000,000 for MFC's negligence, breach of contract, breach of fiduciary duty and breach of its duty of fair dealing.

(e) Such further and other relief as counsel may advise and the arbitrators permit so as to completely resolve the issues between the parties in this case.

4.0 Names and Addresses of the Parties

19. **Claimant:**

Name:	Astaldi Canada Inc.
Address:	780 ave Brewster, Suite 03-300 Montreal, Quebec Canada H4C 2K1
Telephone:	1-514-933-5525

Legal Representatives of Claimant:

Name:	Duncan W. Glaholt
Firm:	Glaholt LLP
Address:	141 Adelaide Street West, Suite 800 Toronto, Ontario Canada M5H 3L5
Telephone:	1-416-368-8280
Facsimile:	1-416-368-3467
E-mail:	dwg@glaholt.com

20. **Respondent:**

Name:	Muskrat Falls Corporation
Address:	350 Torbay Road Plaza, Suite 2 St. John's, Newfoundland Canada A1A 4E1
Telephone:	1-709-733-1833
Facsimile:	1-709-754-0787
Email:	scotto'brien@lowerchurchillproject.ca

5.0 Name of proposed arbitrator (along with resume)

21. Astaldi nominates the following to serve as an arbitrator in this dispute:

Stephen Morrison, LL.B., C. Arb, C. Med, FCIArb

Arbitration Place Toronto
Bay Adelaide Centre West
333 Bay Street, Suite 900
Toronto ON M5H 2R2

T: +1 (416) 848 0203
F: +1 (416) 850 5316
smorrison@arbitrationplace.com

22. Mr. Morrison's resume is enclosed with this Notice of Arbitration as Appendix A.

6.0 Place of arbitration, rules of law and language of arbitration

23. By virtue of Exhibit 16, Part B, cl.5.1 of the Agreement, the seat of this arbitration is Toronto, Ontario.

24. By virtue of Article 1.19 the substantive law to be applied is the law of the Province of Newfoundland and Labrador.

25. Astaldi requests that the place of the arbitration be Arbitration Place, 333 Bay Street, Toronto, Ontario, Suite 900.

RESPECTFULLY SUBMITTED ON BEHALF OF ASTALDI CANADA INC. THIS 27th day of September 2018:

Duncan W. Glaholt
Glaholt LLP
Counsel for Astaldi Canada Inc.

Appendix A

ARBITRATION PLACE
An all-encompassing approach

About | Arbitrators | Partners | Resources | News & Events | Contact

Arbitration Clauses

Appeal Rules

FAQ

Stephen Morrison, LL.B., C.Arb, C.Med, FCIArb

Contact Information
T: +1 (416) 848 0203
F: +1 (416) 850 5316
E-mail

Stephen Morrison graduation with honours from Osgood Hall Law School in 1976 and was called to the Ontario bar in 1978. Following a career in criminal law, in 1982, Stephen co-founded The Rose Corporation, a land development and investment company where he served as president and in-house legal counsel until 1999. The Rose Group, at various times, owned or controlled private and publicly-traded enterprises in automotive parts manufacturing, telecommunications, general insurance, oil and gas exploration, retirement living, hotels, film studios, mini-warehousing, and financial services. Stephen has gained valuable practical and legal experience in all facets and dimensions of these activities, including land acquisition, development approvals, financing, construction contracting, environmental matters, joint venture arrangements, and public/private partnership structures.

Stephen is regularly engaged in the resolution of commercial disputes, including matters arising from development and construction projects, financing failures, delay and impact claims, contract tendering issues, environmental problems, insurance coverage disputes, and breach of trust claims. He has a firm grasp of the law in these areas and a detailed understanding of many development, construction, architectural, engineering, and environmental remediation technologies. Stephen was also a panelist with the Condominium Dispute Resolution Centre and regularly acts as a neutral in the resolution of disputes in this area.

As a result of his combined business and legal background, Stephen has a unique ability to fashion practical resolutions to complex disputes. He understands that the parties prefer workable solutions to protracted litigation. As a mediator, Stephen brings a facilitative and imaginative approach to the resolution of difficult conflicts. A good listener, he helps each party to identify and rank its needs. A creative thinker, he assists the parties to find inventive ways of meeting those needs. A persistent facilitator, he is unrelenting in his pursuit of an agreement. And, as someone who loves a challenge, Stephen especially enjoys cases involving complex, multi-party disputes. In his role as an arbitrator, Stephen understands that the parties are entrusting to him the fair resolution of a dispute that they have been unable to settle themselves in a timely and cost-efficient manner. Second only to his determination to render an equitable and legally correct decision is Stephen's commitment to ensuring that, regardless of the outcome, all parties feel confident that they have been heard and understood. He delivers clear, well-reasoned, and timely written decisions.

Stephen's commitment to excellence in practice has been recognized by the ADR Institute of Canada by granting him the designations Chartered Arbitrator and Chartered Mediator. He is also a Fellow of the Chartered Institute of Arbitrators.

Contact

General E-mail Inquiry

Arbitration Place Toronto
Bay Adelaide Centre West
333 Bay Street, Suite 900
Toronto ON M5H 2R2
T: +1 416.848.0203
F: +1 416.850.5316
View Map

Arbitration Place Ottawa
World Exchange Plaza
100 Queen Street, Suite 940
Ottawa ON K1P 1J9
T: +1 613.288.0228
F: +1 613.946.1693
View Map