

REPLY TO: GEOFFREY E. BUDDEN
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File No.: G 8872

January 21, 2019

The Honourable Justice Richard LeBlanc, Commissioner
Commission of Inquiry Respecting the Muskrat Falls Project
5th Floor, Suite 502, Beothuck Building
20 Crosbie Place
St. John's, NL
A1B 3Y8

Dear Commissioner,

**RE: Grant Thornton Forensic Audit Report – Construction Phase
Review for Commercial Sensitivity
Nalcor Energy Submission – Part 1**

This is the Response of the Concerned Citizen's Coalition (hereafter "the CCC") to Nalcor's Application (1st Part) of January 17, 2019. We note that we have had little time to prepare this response and have not yet have the opportunity to review the Submissions of Commission Counsel or other parties (other than Nalcor), nor have we seen the 2nd Part of Nalcor's Application. Consequently, should the Commissioner ultimately grant Nalcors request to hold certain sessions *in camera*, we request the opportunity to make further submissions as to how that process should unfold, particularly with respect to the parties and not just their counsel having the opportunity to attend such sessions.

The CCC acknowledges that the Commissioner, in his consideration of Nalcor's (1st part) Application of January 17, 2019, must balance the general principle of full disclosure, in a public setting, of all matters relevant to the Terms of Reference, with the specific duty, founded in these same Terms of Reference and earlier interpretations of same by this Commission, to protect Nalcor from harm consequent to the inappropriate public release of commercially sensitive information. The CCC submits that this Commission, in order to comply with the general principle of full, public disclosure, should interpret the commercial sensitivity exclusion in the narrowest of possible terms.

The CCC understands Nalcor's submission on this Application, stated broadly, to be that it's position in ongoing or future litigation with third parties, such as Astaldi, could be harmed if information to which those parties would not otherwise be entitled to, or presumably aware of, is publicly revealed through this Inquiry. It notes that "while the arbitration tribunal has direction to order production of relevant documents, the typical standard for relevance in commercial arbitration is whether a document is both 'relevant to a matter or issue and material to its outcome [p. 4]'" . It further notes that "these provisions are an example of how the scope of documentary and evidentiary

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production is narrower in the arbitration than it would be under the Rules of the Supreme Court, 1986, and much narrower than Nalcor's obligation to produce to the Commission documentation and information that is related to the Terms of Reference".

What Nalcor fails to acknowledge, however, is that even if information is disclosed through the Inquiry that truly is neither relevant nor material to the matters subject to the arbitrated dispute, the arbitrator(s) of that dispute would simply, as per their governing standard for admissibility (relevant and material), refuse to admit it into evidence in that proceeding. In circumstances of non-arbitrated disputes, Nalcor would have similar, if not greater protections, in our own or other courts of competent jurisdiction. Where, then, is Nalcor's risk?

The CCC notes that it is not unusual for Public Inquiries to delve into issues, and to consider evidence, highly relevant to ongoing civil litigation. Indeed, most, if not all of the high-profile Public Inquiries in Newfoundland and Labrador's recent past (the Hughes Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints; the Lamer Inquiry into certain convictions; the Cameron Inquiry on Hormone Receptor Testing; the Wells Offshore Helicopter Safety Inquiry) have all taken place concurrent with civil litigation between and among certain of the parties. That appears not to have been an inhibiting factor in the scope of the evidence examined in said Inquires.

The CCC further submits that, while evidence may well emerge from this Inquiry that is harmful to the commercial interests of Nalcor, the Inquiry is only the mechanism, or process, by which that harmful evidence sees the light of day. It is not the role of this Inquiry to protect Nalcor from the consequences of its actions or failures to act, let alone to protect the leadership team of Nalcor, past and present, from embarrassment or perceived harm consequent to what they did, or did not do. We respectfully urge the Commission to be vigilant to avoid being used as such a shield.

In conclusion, we note that this Inquiry is itself a response to the concern of the citizens of Newfoundland and Labrador with respect to the functioning of their Government and Newfoundland and Labrador's most significant Crown corporation. The evidence of Phase 1 has only, it is submitted, deepened that concern. To now restrict access to the evidence heard by this Inquiry will bewilder and anger the public and undermine further its trust in our Government and its institutions. This must, if at all possible, be avoided.

All of which is respectfully submitted.

Yours truly,
BUDDEN & ASSOCIATES



GEOFFREY E. BUDDEN

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