

**COMMISSION OF INQUIRY RESPECTING
THE MUSKRAT FALLS PROJECT**

The Honourable Justice Richard LeBlanc

**SUBMISSIONS OF THE
MUSKRAT FALLS CONCERNED CITIZENS COALITION**

Introduction

1. The Concerned Citizens Coalition is the corporate manifestation of a group of individuals, long-time observers and ultimately critics of the Muskrat Falls Project, who were granted full standing at this Inquiry. The Coalition thus was given the opportunity to assist this Commission of Inquiry through the cross examination of witnesses and to make submissions with respect to various interim matters and at the conclusion of the reception of evidence.
2. The officers of the Concerned Citizens Coalition are David Vardy, Ron Penney and Des Sullivan. Mr. Vardy had a distinguished career in the public service of the Government of Newfoundland and Labrador, including seven years as Clerk of the Executive Council and a further term as Chair of the Public Utilities Board. Mr. Penney's own distinguished public service career included a term as the Deputy Minister of Justice; he further held senior Executive positions with the Law Society of Newfoundland and Labrador and the City of St. John's. Mr. Sullivan served as Executive Assistant to former Premiers Moores and Peckford and is a successful businessperson. Messrs. Vardy and Penney gave evidence in Phase 1 of the Inquiry and each of these men, sometimes collaboratively, authored many public commentaries which have been entered into evidence before this commission.

3. The Concerned Citizens Coalition does not intend to comprehensively review the evidence considered by this Inquiry, as doing such would be unnecessary and unhelpful. It does intend to broadly review and suggest conclusions from that evidence within the context of the specific areas of Inquiry mandated by the Terms of Reference, as explicated by the Interpretation of the Terms of Reference for the Muskrat Falls Inquiry of March 14, 2018, and to make recommendations.

The Evaluation of Evidence: General Principles

4. It will be necessary for the Commissioner to weigh and, where necessary, choose between conflicting versions of events, or explanations of evidence and events, offered by the witnesses who testified. This is a customary feature of all trials and like judicial processes, including Commissions of Inquiry.
5. This will inevitably involve a determination of credibility: of which witnesses are being truthful, are being accurate, and to what degree this is so. This is, of course, more complex than a determination as to whether a witness is being honest or, alternatively, is being deceptive, though that too may sometimes, unfortunately,

be a necessary task. Rather, it will involve the more complex weighing of the degree to which a witness is able, or inclined, to give honest, forthright and accurate evidence, and degrees of reliability within and among the various witnesses to, and Exhibits entered into evidence before, this Inquiry.

6. The Commissioner must ultimately make these determinations. The Concerned Citizens Coalition respectfully submits that this will require a consideration of, among other things, the demeanour and conduct of a witness and of the consistency of that witness's testimony with other evidence heard by the Commission.
7. With respect to analyzing the demeanour and conduct of a witness, the Commission might wish to consider the following passage from the leading Supreme Court of Canada decision White v. The King (1947) SCC 268, wherein Estey J. stated, in part:

"It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also

important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility."

8. It is, however, also necessary to take into account aspects of a witness's presentation beyond his or her demeanour. With respect to the necessity of evaluating consistency of a witness's testimony with that of other evidence, our Court of Appeal has on many occasions, particularly in R v. Neary [2000 NFCA 22 (CanLii)], relied on the following passage from Faryna v. Chorny 1951 Canlii 252 (B.C.C.A.):

"The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the

probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case...."

9. There is also guidance with respect to a broader, holistic approach to the consideration of witness evidence, as per Bradshaw v. Stenner (2010) B.C.S.C., 1398, wherein MacNaughten J. writes:

"Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (Raymond v. Bosanquet (Township) (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (Wallace v. Davis, [1926] 31 O.W.N. 202 (Ont.H.C.); Faryna v. Chorny, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [Faryna]; R. v. S.(R.D.), 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Faryna at para. 356)."

"It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis

of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993), 1993 CanLII 7140 (AB QB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful. (at para 187).

The Evidence of Certain Witnesses

10. It is, as noted, for the Commissioner alone to consider and determine what, if any, weight to give to the testimony of witnesses. The Concerned Citizens Coalition respectfully suggests that certain key witnesses have, in one or more aspects of their testimony, raised concerns which might lead the Commissioner to regard all or part of their evidence with caution. What follows will be a brief, non-exhaustive consideration of the evidence of several of these key witnesses.

Mr. Danny Williams

11. One unfortunate feature of the evidence of Premier Williams was his tendency to attack the credibility, good faith, judgement or impartiality of witnesses or other persons or institutions whose views differed in respects great or small from his own. There were many such instances including but not limited to his suggestions that Quebec judicial and quasi-judicial bodies were biased against Newfoundland and Labrador; his denigration or minimization, at Exhibit P-0232 and in his viva voce evidence, of the credentials of Mr. Vardy, Mr. Penney, Dr. James Feehan and other critics of the project; and his comments about Mr. Stan Marshall. While none of this goes to his honesty, it does call into question the degree to which it “harmonizes with independent evidence” or whether it is “unreasonable, impossible or unlikely”. In the result, his evidence must be approached with caution.

Mr. Todd Stanley

12. Mr. Stanley testified on October 22, 2018; on redirect, Commission Counsel Learmonth, alleging “contradictions between the evidence that Mr. Stanley gave in cross-examination today and in examination-in-chief today and also in his

interviews”, raised “an issue about Mr. Stanley’s credibility, his personal credibility”.

13. From a close reading of Mr. Stanley’s evidence, particularly his cross-examination by counsel for the Concerned Citizen’s Coalition and on redirect, it is apparent that his (October 22nd) viva voce evidence differs significantly from that contained in his sworn interview [at Exhibit P-00790]. It is further apparent that, in his viva voce evidence, he was choosing his words carefully, being exceptionally mindful of their impact. This might, concededly, be in some circumstances grounds to prefer that evidence. With this particular witness, however, who was at his interview a sophisticated and experienced lawyer, under oath, speaking to matters and in circumstances where there could be no doubt as to the importance of his words, this should not be the case and the Concerned Citizens Coalition respectfully submits that, where they conflict, Mr. Stanley’s interview evidence should generally be preferred over his viva voce evidence.

Ms. Kathy Dunderdale

14. The testimony of former Premier Kathy Dunderdale should be viewed with caution, especially where it is directly contradicted by the evidence of others. Ms. Dunderdale testified to being informed of the cost increase from \$6.2M to \$6.5M

and advising Cabinet of same - something supported by no document nor any other Government of Newfoundland and Labrador witness (Apr 2, 2019 - p. 92). She believed the Department of Natural Resources had the capacity to review Nalcor's cost estimates (pp. 57-60) which is not supported by any other evidence. Ms. Dunderdale stubbornly insisted Government exercised a reasonable degree of oversight and governance of Nalcor despite admitting to numerous issues which were undisclosed to her and which she had wished she had known (p. 64). She had little or no recollection of important telephone calls and meetings, such as those involving NS Premier Darrell Dexter (p. 76). Her evidence must therefore be treated with caution.

Mr. Scott O'Brien

15. Mr. O'Brien's managerial style is discussed in detail below. The Commission heard evidence from at least five witnesses who took great issue with what they described as his bullying, confrontational workplace behaviours. The Concerned Citizens Coalition submits that, in the face of so much evidence, his own denials, combined with his demeanour as a witness, undermine his credibility as a witness. His evidence should, therefore be treated with caution.

Mr. Paul Harrington

16. Mr. Harrington, the Muskrat Falls Project Director and the senior member of the Project Management Team, engaged in numerous behaviours which raise concerns as to his integrity. This non-exhaustive list would include his inappropriate attempts to influence Messrs. Westney and Owen with respect to the Independent Project Review (see in particular exhibit P - 00508); his odd confidences to the Independent Engineer and his editing of document flow to third party reviewers such as MHI and his obstructive behaviours towards EY and oversight effort generally. He was, further, at times evasive and/or reluctant to answer questions during his testimony and, particularly in Phase 1, at times bordering on hostile under examination. For these reasons, his evidence must be

Mr. Edmund Martin

17. Mr. Edmund Martin testified for all or part of seven days, some of them exceptionally long days. He was subjected to sustained examination by a number of lawyers, about events stretching back many years. It would be difficult for anyone to endure such an ordeal unscathed.

18. Mr. Martin was, however, often an evasive, confrontational witness. His evidence frequently clashed with those of other witnesses (even in some cases, with other Nalcor officials) and was often inconsistent with exhibits. Mr. Martin was resolute.

His evidence, however, simply is so inconsistent with that of other witnesses and with documentary evidence as to also be inconsistent with the “preponderance of probabilities”. His evidence must therefore be considered with great caution.

Mr. Jason Kean, Mr. Jim Keating and Other Nalcor Officials

19. It is hardly surprising that, given what appear to be the examples set at the senior levels of Nalcor, other senior members of the executive and of the project management team became associated with activities which appear to have been designed to deceive, or at least activities which were careless in this regard. This can be seen with Mr. Jason Kean’s selective presentation of the John K. Hollman draft report (at P – 00894), an editing which Commission Counsel Ms. Kate O’Brien aptly described as “misleading” and “cherry-picking”. It can also be seen in Mr. Jim Keating’s response to the Bruneau natural gas proposal (discussed below).

20. The Concerned Citizens Coalition is not suggesting that the evidence of everyone associated with Nalcor should be treated with suspicion, it does, however, submit that there appears to have been a culture within Nalcor accepting of shady methods to achieve what it believed to be necessary ends. This is an uncomfortable reality but one which cannot be ignored and shall be at least a consideration in the evaluation of the evidence of every Nalcor witness.

A Consideration of the Evidence

21. Terms of Reference (hereafter all quotations from the Terms of Reference will be bold faced):

4. The Commission of Inquiry 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

(i) The assumptions of forecasts on which the analysis of options was based were reasonable.

22. With respect to the "forecasts on which the analysis of options was based", perhaps the foundational forecast was the one which appeared to establish a growing demand for power on the Island of Newfoundland. This provided not only the impetus for sanctioning Muskrat Falls but, also, led proponents to argue that time was of the essence. This, the Concerned Citizens Coalition contends,

adversely impacted due diligence across the entire scope of the Muskrat Falls Project.

23. Barely 5 years later, even Nalcor conceded that its own pre-sanction forecast had been significantly overstated [P-01988, p. 26]. With respect to these projections themselves, they were prepared by Paul Stratton, senior market analyst with Newfoundland Hydro. It is our submission that this analysis downplayed or ignored high-quality data (such as demographic trends and housing projections from the Conference Board of Canada) and for this and other methodical and procedural shortcomings (see in particular the Phase 1 Grant Thornton Forensic Audit, P - 00014, at pp. 30-39, and the evidence of Dr. James Feehan, especially with respect to demand elasticity, as heard on October 9, 2018) significantly overestimated power demand. In the result, one of the major justifications for the project – that the power was required, and sooner rather than later – was founded on assumptions which were neither accurate nor “reasonable”.

24. Similarly, the projected costs of the Isolated Island option was ultimately inflated by speculative fuel cost projections. The Concerned Citizens Coalition recognizes the inherent difficulty of estimating fuel costs decades into the future; the very reason that, PIRA, the industry lender for such predictions, will not do so beyond

thirty (30) years. Nalcor's solution to this absence of reliable predictive evidence was to extrapolate uniform fuel price increases for the decades beyond where PIRA was prepared to go. The appropriate, intellectually honest course of action would have been to acknowledge that the information sought was inherently unknowable, rather than to represent, at sanction, that a meaningful comparative costing exercise had been done.

25. It was patently unreasonable to attempt to price a product with the price volatility of these fuels more than a half-century into the future. Even in the brief period of time since the DG-3 final projections were made they demonstrably have been inaccurate, and significantly so.

26. A further assumption on which sanction was based was that there would be an adequate flow of water to, and through, the Muskrat Falls hydroelectric dam so as to allow for the achievement of full capacity at all times. This in turn was predicated on an enforceable water management regime. This issue has been the subject of in camera hearings and confidential exhibits. The Concerned Citizens Coalition, like most parties, was excluded from this process and thus cannot make fully informed submissions. On the basis of such information as was made available to it, the Concerned Citizen's Coalition submits that this assumption was far from reasonable and was, rather, a reckless gamble.

27.4 (a) (ii) "Nalcor considered and reasonably dismissed options other than the Muskrat Falls Project and the isolated Island Option"

28. At DG-1, Nalcor identified, evaluated and dismissed from further consideration a number of energy-generation options. The Grant Thornton forensic audit (P - 00014), at pp. 13-30 concluded that some of these were appropriately eliminated. With certain important exceptions, the Concerned Citizens Coalition would concur with that conclusion.

29. These exceptions are, however, important and represent failures by Nalcor to appropriately consider options which might have been better alternatives to either of the Muskrat Falls or Isolated Island options. These options will be discussed below.

30. While Natural Gas had long been considered as a possible source of fuel for power generation, in early 2012 this option was energized by the work, and proposal, of noted M.U.N. Engineering Professor, Dr. Stephen Bruneau. One might have expected Nalcor to have evaluated Dr. Bruneau's work with interest and cautious enthusiasm. If so, one would have been disappointed.

31. The series of exhibits from P - 01194 through about P - 01313 reveal that Nalcor, rather than engaging in a good-faith evaluation of this option, choose rather to defend its fixed position and worked hard to ensure that a notionally "independent" review of Dr. Bruneau's proposal would, instead, be biased against it. This strategy is apparent throughout, most obviously perhaps in P - 01200. In the result, the work of this serious, accomplished academic and engineer was neither thoroughly evaluated nor fairly considered. It was not "considered and reasonably dismissed" by Nalcor.

32. One further option considered, and rejected ,by Nalcor is that which Grant Thornton has called [at P - 00014, at p. 28] "Deferred Churchill Falls" and which meant the *"continuation of Holyrood operations and additional thermal generation as required for another three decades, and then to commission a transmission interconnection*

between Labrador and the island to avail of electricity production from the Churchill Falls hydroelectric generating facility in 2041 when the current long-term supply contract with Hydro Quebec terminates."

33. This was the option preferred by the officers of the Concerned Citizens Coalition and was a feature of their advocacy, particularly in the pre-sanction years. They believe that Churchill Falls is the long-term solution to our Province's domestic electricity needs and this should be at the centre of long-term electricity policy and planning.

34. The Muskrat Falls business case ignored the fact that the Upper Churchill Power Contract will come to an end in 2041 and that access to adequate low-cost electricity is all but certain at that time.

35. This meant that Newfoundland and Labrador had a short-term problem, one that could have been remedied through a variety of mechanisms such as demand management. Our problem is a seasonal one driven by electric baseboard heating. As witness Phil Raphals testified (October 11 & 12, 2018), a shift to heat pumps financed by government would have reduced that winter load.

36. Dr. James Feehan (P-00321, P-00322 and P-00323) has suggested that more efficient pricing or ratemaking would have been a much less costly solution than Muskrat Falls. By pricing electricity below the short-term marginal cost of energy at Holyrood, Newfoundland and Labrador Hydro was subsidizing electricity rates and encouraging people to use electricity for space heating. Better rate-setting would have reduced the peak winter demand and avoided both the capacity and energy deficits rather than building a large new power plant located far from the Avalon Peninsula. Nalcor did not pursue this approach. Instead Nalcor decided the best approach was to build a major project and create a monopoly through legislation that would make ratepayers captive to an overpriced solution to a problem that might not have existed if proper pricing signals were employed.
37. And even if, as John Mallam and others have suggested, Holyrood simply could not be relied on through 2041, other short-term replacements such as some wind power and combined cycle combustion turbines could have bridged the gap. Nalcor should have thoroughly costed these proposals within context of a high-level review of the "Deferred Churchill Falls" option.
38. Finally, the evidence heard at this Inquiry, most particularly in the examination by Mr. Gilbert Bennett (November 26, 27, 28 and 29, 2019) and Mr. Danny Williams,

suggest that the importation of power from Hydro Quebec was politically toxic and thus never pursued. This too represented a potential lost opportunity.

39. From the foregoing, it is clear that Nalcor did not consider and reasonably dismiss these particular options.

40. 4 (a) (iii) "Nalcor's determination that the Muskrat Fall's Project was the least-cost option for the supply of power to Newfoundland and Labrador Island interconnected system over the period 2011-2067 was reasonable with the knowledge available at that time;"

41. "Reasonable" is ostensibly a lower standard than "correct". In this instance this is a distinction without a difference, as neither the Terms of Reference nor fundamental fairness suggest faulting Nalcor for failing to anticipate or account for unforeseen or reasonably unforeseeable events which might retrospectively question a choice. Such "black swan" events must be fairly considered; but not everything which an interested party might identify as such an event truly, on proper consideration, is one.

42. The "Isolated Island Option" consisted of maintaining Holyrood with the addition of small hydroelectric developments, a wind farm, and CCCT and combustion turbine additions. While it involved some capital cost expenses, a major component of this option would be anticipated fuel costs.
43. The Interconnected Island Option consisted of Muskrat Falls hydroelectric generation and ancillary transmission projects.
44. Nalcor's analysis of the "business case" for each option concluded that the CPW estimate for the Interconnected Island Option was over \$2.4 billion dollars cheaper than was the Isolated Island Option. On the strength of this conclusion, the Muskrat Falls project was sanctioned.
45. The aforementioned Grant Thornton Forensic audit concluded that the Nalcor analysis may have understated the cost of the Interconnected Island option and may have overstated the cost of the Isolated Island Option. This analysis was done before any evidence was heard by this Commission. The Concerned Citizens Coalition submits that the evidence ultimately heard by this Commission reinforces this conclusion to the point where the qualifier "may", can and should be removed and replaced with "did".

46. As noted above, the erroneous load/demand forecast not only served to suggest a pressing need for power that could only be answered by an immediate commitment to Muskrat Falls – it also, inferentially, thus made it necessary to increase fuel projections for the Isolated Island option. This problem was compounded by the speculative and unsupported extrapolation of fuel prices beyond the PIRA projections.

47. With respect to the understatement of the cost of the Muskrat Falls option, the Concerned Citizens Coalition believe that the evidence heard at this Inquiry establishes that:

- (a) *The estimates for project capital costs, most particularly with respect to the Ch – 0007 contract (ultimately awarded to Astaldi) were unacceptably low and the individuals responsible for making them knew or ought to have known that to be so at the time of sanction;*

As will be seen in the next section, it was apparent almost immediately after sanction that contractors' bids were coming in much higher than had been anticipated by the estimated costs. The only reasonable inferences to be drawn from this would be that Nalcor either knew the estimates were too

low or that it simply lacked the competence to estimate accurately. How else could one explain the disparity between estimates represented as reasonable and reliable at sanction which, mere months later, were demonstrably unreliable?

- (b) *That the extent of this underestimation became more obvious still in the months following sanction but preceding financial close, as proposals were submitted in response to the bidding process;*

The cost estimates were significantly inaccurate as had to be known prior to financial close when bids, according to Grant Thornton, were coming in 25% or \$600 million above the estimates. Nalcor thus knew with absolute certainty that its "Base Estimate" was far too low. In effect, Nalcor was given a timely opportunity to cancel the project. Nalcor had the ability to stop construction without funding the remaining cost to complete. However, once the Federal Loan Guarantee was executed Nalcor/Government of Newfoundland and Labrador were committed to funding the project; including the cost overruns.

The likelihood of such a cancellation, however, perhaps can be discounted by evidence contained in the Forensic Audit confirming that Nalcor had committed approximately \$900 million to the project prior to the date of Financial Close. (p.10) Nalcor may have adopted the flawed concept of sunk cost (which meant that they believed the project must not be stopped once such a major commitment had been made). This led them to ignore all the red lights which should have compelled them to consider an “off ramp” to terminate the project.

- (c) *That the Nalcor project team and the executive were, at a minimum, willfully blind in their consideration of strategic and tactical risk and ultimately adopted numbers and P- factors which they knew or ought to have known were simply inadequate for a generation and transmission project of the relative novelty and undeniable complexity of Muskrat Falls;*

The approach taken by Nalcor to “risk” was a focus for much of Phase 1. The Commission heard evidence from Dr. Bent Flyvbjerg to the effect that “one-off” projects such as Muskrat Falls would generally include a cost-risk estimate of at least a P – 80 [P – 00006 at pp. 25-26]. Other independent witnesses generally concurred with Dr. Flyvbjerg. The evidence of former

NL Hydro Senior Engineer John Mallam was, although expressed differently, also consistent with Dr. Flyvbjerg.

Nalcor, on the other hand, insisted on using a P – 50 factor, a deviation from best practices that left the project with little margin of error and thus inherently vulnerable to cost overruns. This approach to risk was, unfortunately, common practice with Nalcor, as seen most shockingly in its approach to schedule risk, which in the lead up to sanction had been identified at P – 3 (a 3% chance of the project being completed on time).

- (d) *Nalcor, at the higher levels of the project team and at the executive level, lacked the specific hydroelectric experience necessary to guide this project through sanction. This inexperience and absence of specific skill set, along with “optimism bias” and an overwhelming desire to develop the hydroelectric capacity of Labrador might serve as an explanation as to why these failures were allowed to happen but there also is circumstantial evidence that there was a conscious effort to “lowball” these costs so as to make the business case for the Muskrat Falls project the stronger option at sanction;*

It is beyond dispute that the “world class” team tasked with bringing Muskrat Falls to sanction were, for the most part, veterans of the gas and oil industry with little experience in the hydroelectric sector. This is perhaps not inherently an obstacle to planning such a project but it is peculiar and, surely, unhelpful to this complex task. It might have, at the very least, resulted in a desire to seek out and work closely with those such as SNC-Lavalin, with acknowledged job-specific expertise.

It is obvious, as will be seen later, that these men worked within a political culture that at multiple levels was committed to developing the hydroelectric potential of Labrador. This is seen most plainly in the evidence of former Premier Williams but, as Dr. Jason Churchill confirms (his report is at P – 00003), its roots reach deep into the culture and politics of our Province. This imperative to develop this power easily morphs into optimism bias and that, undoubtedly, happened here as well.

This is not, the Concerned Citizens Coalition submits, likely the full explanation. Further explanation may be found through a consideration of Exhibit P – 0026, particularly in the handwritten comments throughout and particularly at p. 17. As late as April 2010 Nalcor appeared to be proceeding on the assumption of using “P – 75 capital cost estimates”. Which none of

the individuals present that evening who subsequently were examined on this topic were able or willing to say so, the handwritten comment directly opposite the P – 75 reference – “more stress placed on the project cost – very conservative approach” – provides powerful circumstantial evidence that, in the course of this high-level meeting of politicians, senior public servants and senior Nalcor officials, a decision was made, or at least a process started, that resulted a few months later in the project proceeding as a P – 50 project with a correspondingly lower project cost. This goes well beyond optimism bias and suggests an effort to place a thumb on the CPW-weighting scale.

The Concerned Citizens Coalition submits that the troubling concept of what Dr. Fyvbjerg has labelled “strategic misrepresentation or political bias” (at P – 00004, p 17) must also be considered as a likely explanation for the understatement of project costs (and the related overstatement of isolated island costs). Certain of the proponents of the Muskrat Falls Project, within Nalcor and the Government of Newfoundland and Labrador, were enormously invested in the construction of the dam. Considerable circumstantial evidence, and the cumulative weight of same, suggests that this possibility must be seriously considered.

- (e) *There was an absence of “Checks and balances” that might have put a brake on the rush to sanction. Within Nalcor itself, its Board lacked political independence, specific skills, resources and judgement. The public service simply lacked the expertise to provide the necessary sober second thought; the external experts retained by Nalcor and/or the GNL saw their independence systemically undermined by misinformation and/or selective information and/or unacceptable bullying and other forms of inappropriate pressure;*

The primary check on the executive of any corporation should be its Board of Directors. The evidence of the Board itself, as heard in its testimony on October 15 and 16, 2018 and the commentary on that evidence by Dr. Guy Holburn on 25 and 26 February, 2019, particularly under questioning by counsel for the Concerned Citizens Coalition, reveals that Board to be underqualified, under resourced, and generally not up to the job of directing a multibillion dollar crown corporation. The evidence of Mr. Terry Styles, Board Chair at Sanction, was almost painful to watch as he was forced to defer almost everything put to him to other Board members. He came across as a sincere witness but also as a man who utterly lacked the experience and qualifications to have served in such a position, at such a time.

Evidence has shown that the Government was very deferential to Nalcor and that the normal checks and balances of Government were bypassed. The financial oversight by the Department of Finance and by Treasury Board was absent. While public servants who would ordinarily critically analyze spending proposals were largely kept out of the decision-making process, it is our submission that public officials have a duty to the taxpayer to ensure that this project not only received the normal scrutiny which every other project receives but, given the size of the project and the potential negative impacts which such a risky project posed to the Province, that the scrutiny ought to have been even greater.

There is little evidence of recognition of such a duty or of any serious efforts to insist on the level of scrutiny which this proposal needed. It is our submission that our public service failed us. We needed a public service prepared to tell truth to power but that never happened. In the result, an out-of-control crown corporation, described by Mr. Todd Stanley, legal advisor to the Department of Natural Resources, as a "runaway train", bypassed the normal scrutiny imposed on government departments and the effect of that failure has brought us to where we are today. Our democratic process inevitably produces an executive which is largely composed of non-experts, which is why the strong and expert advice of an independent and non-partisan public service is absolutely essential.

Throughout the life of this project, but particularly at the pre-sanction period, proponents of the project touted certain positive reports and project reviews prepared by 3rd party experts. Even the Grant Thornton forensic audit occasionally relies on these same reports. Following the evidence considered at this Inquiry, we now know that many of these reports were the subject of attempts at improper influence; selective editing; bullying of authors; or similar actions, on the part of Nalcor and its employees and contractors.

We have already seen how Mr. Jim Keating (with the encouragement of Mr. Ed Martin) attempted to influence the ostensibly independent reviews of Dr. Bruneau's natural gas proposal. The MHI report was blemished by the withholding of key information and the heavy editing of the report itself, to the point where the primary author of that report stated, under cross-examination by counsel for the Concerned Citizens Coalition, that he was "angry" at Nalcor. Mr. Derek Owen and Mr. Dick Westney, highly-respected individuals with, between them, a century of relevant project engineering experience, each testified to Mr. Harrington speaking to them in an attempt to influence their independent review in a manner neither had ever otherwise experienced. This is not an exhaustive list of such incidents.

In the result, the effort of these unengaged checks and balances, and of the interference in and undermining of independent third-party reviews, allowed certain of the flawed assumptions on which the Muskrat Falls project rested, especially with respect to its cost and scheduling assumptions, to remain undiscovered and/or unchallenged. No decision flowing out of such process could ever be considered “reasonable”.

- (f) *The political leadership of the Government of Newfoundland lacked the ability and/or the inclination to exercise control over the runaway train that was Nalcor, especially in the period prior to April, 2016.*

The Commissioner has the opportunity to observe the demeanors of the officials of the Government of Newfoundland and Labrador 2003-2015, and to consider their evidence. As a general observation, few if any of them appeared to have a detailed understanding of their portfolios or the ability to critically engage with the complex issues brought to them. This undoubtedly was at least in part due to the “rotating door” at the highest levels of the Government of Newfoundland and Labrador executive, especially in the years 2010-2015. It may also reflect the long shadow cast

by Premier Williams, with his unbounded confidence in the project and his disrespect for critical voices.

The officers of the Concerned Citizens Coalition bring to their current role an understanding that the Ministers of the Crown, as elected officials, cannot be expected to bring specific related expertise to their portfolios. It is nevertheless unfortunate that this particular set of elected officials generally appeared to lack even the inclination to critically examine the evidence before them at sanction and/or to challenge many of the assertions and assumptions underlying the case for Muskrat Falls. There was also the unfortunate spectacle of Minister Kennedy's unfounded personal attack on Mr. Vardy which not only was an affront to a gentleman whose life in the public service led him to receiving an honorary doctorate from Memorial University of Newfoundland but surely must have had a chilling effect on the debate generally. In the result, once again, we have a process so lacking in political oversight that any decision flowing out of it could hardly be considered "reasonable".

- (g) *By its very nature the Muskrat Falls project required engagement with the Province of Nova Scotia and its utility regulator, the UARB. This relationship too was mishandled, to the cost of the Muskrat Falls project and the people of Newfoundland and Labrador and the ultimate underestimation of project cost;*

The decision by Government to sanction the Project and begin issuing construction contracts prior to obtaining the approval of Nalcor's Nova Scotia counterpart, Emera, was reckless. Nalcor and the Newfoundland and Labrador Government were, pursuant to the 2010 Term Sheet, aware that Emera's approval was contingent on approval by the Utility and Rates Board of Nova Scotia (UARB) which, in turn, was necessary for the Province's full compliance with the Conditions Precedent contained in the Term Sheet for the Federal Loan Guarantee.

The UARB's imposition of a condition, which was described in its Report as having a value of between \$700 million and \$1.2 billion (in order to meet the "lowest cost option" requirement in that Province) resulted in Nalcor being "forced" to make concessions additional to their original agreement with EMERA. In the Energy Access Agreement subsequently negotiated, Nalcor agreed to supply an average annual commitment of 1.2 TWh until 2041 at rates based on the New England, USA, electricity market in addition to back-stopping future wind power development by Nova Scotia, among other requirements which may restrict Newfoundland and Labrador's ability to enter into additional contracts for firm energy and might very well impose obligations for new electricity capacity which it can ill-afford.

- (h) *The financing structure of the Muskrat Falls project is complex, unorthodox and ultimately appears to understate the true cost of the project by hundreds of millions of dollars.*

The Concerned Citizens Coalition believes it is vital for the Commission to consider an overall assessment of the fiscal impact of the project on the Province as well as the contingent liabilities which the Province may be called upon to pay under the Federal Loan Guarantee (P-00065) and the Power Purchase Agreement (P-00457). The Federal Loan Guarantee agreement imposes certain obligations on the Province during the construction phase, including the obligation to supply sufficient equity financing to complete the project. After construction is completed these financial obligations on the Province (the taxpayer) become annual obligations of the ratepayer, after the start of commercial operations.

Few witnesses before this Inquiry appeared to fully grasp both that the financial model utilized was unorthodox and that it had significant and adverse implications for project costs. The evidence of Ms. Julia Mullaly (29 May and 30 May, 2019) Mr. Craig Martin (June 3, 2019), as elicited under cross-examination by the Concerned Citizens Coalition Counsel, is however somewhat helpful in this regard.

- (i) *The Nalcor executive were directly informed, pre-sanction, by the project management team that the cost and scheduling targets were very aggressive and were unlikely to be achieved.*

This is established most clearly in Mr. Paul Harrington's correspondence to Mr. Stan Marshall of June 4, 2016 (at P – 01962). While we do not regard Mr. Harrington as generally being a credible witness, this correspondence was crafted by senior members of the project management team and it seems unlikely that they would collectively conspire to mislead their new CEO. Indeed, this correspondence may fairly be viewed as their attempt to disassociate themselves from the cost and schedule overruns which had, at the time of writing, become apparent (and, in doing so, hopefully save their own jobs), by asserting that the executive had known from the beginning of the "unlikely probability of achieving (targets)" but, nevertheless, it decided to impose a very aggressive approach to cost and schedule" on the project management team.

Mr. Harrington was pressed as to whom, specifically, had been so informed but had nevertheless decided to set these cost and schedule targets. He (reluctantly) confirmed that it was Mr. Ed Martin.

- (j) *The great frustration, for the Concerned Citizens Coalition, is that there were numerous occasions in which proponents of the Project were urged to proceed carefully; to thoroughly investigate all options; to look critically at received wisdom and unexamined assumptions. These voices of caution went unheeded.*

The August 2011 Report of the Joint Review Panel concluded that “Nalcor’s analysis that showed Muskrat Falls to be the best and least cost way to meet domestic demand requirements is inadequate and an independent analysis of economic, energy and broad-based environmental considerations of alternatives is required.” (P-00041 at page 35) This was not done.

In addition, the Report recommended that there be an “Independent analysis of alternatives to meet domestic demand” which should address the following consideration: “why Nalcor’s least cost alternative to meet domestic demand to 2067 does not include Churchill Falls power which would be available in large quantities from 2041, or any recall power in excess of Labrador’s needs prior to that date, especially since both would be available at near zero generation cost (recognizing that there would be transmission costs involved).” This was never considered.

The inability of the Public Utilities Board to give a definitive answer to the June, 2011 Reference Question should also have sparked in project proponents a resolve to slow down and examine critically their assumptions and evidence. Sadly, this did not happen. Certain proponents, at the highest levels of Government, chose instead to shoot the messenger. The attack on the Public Utilities Board, which was a quasi-judicial body, was such as to lead Board members to believe that they were to be fired (Darlene Whalen, October 25, 2018). This was not only improper in and of itself but must surely have resulted in a chilling effect for other potential critics of the project.

The present officers of the Concerned Citizens Coalition had put enormous efforts into publicizing their concerns and critiques of and with the Muskrat Falls project. Their efforts are described in exhibit P – 00329 and documented in the many attachments thereto.

It cannot thus be said that only hindsight reveals the inherent shortcomings and weaknesses of the Muskrat Falls project costing exercise. They were always apparent, for those willing and able to subject it to critical thinking. Nalcor's determination that the Muskrat Falls project was the least cost option for the supply of power to Newfoundland Island connected system over the period 2011-2067 was NOT reasonable.

48.4. (b) why there are significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction and the costs by Nalcor during project execution, to the time of this inquiry together with reliable estimates of the costs to the conclusion of the project including whether

- (i) Nalcor's conduct in retaining and subsequently dealing with contractors and suppliers of every kind was in accordance with best practice, and, if not, whether Nalcor's supervisory oversight and conduct contributed to project cost increases and project delays,

49. The terms of the contractual arrangements between Nalcor and the various contractors retained in relation to the Muskrat Falls Project contributed to delays and cost overruns, and whether or not these terms provided sufficient risk transfer from Nalcor to the contractors,

50. The overall project management structure Nalcor developed and followed was in accordance with the best practice, and whether it contributed to cost increases and project delays,

51. The overall procurement strategy developed by Nalcor for the project to subdivide the Muskrat Falls Project into multiple construction packages followed industry best practices, and whether or not there was fair and competent consideration of risk transfer and retention in this strategy relative to other procurement models,
52. The largest construction package with respect to the Muskrat Falls hydroelectric project was contract CH-0007. This contract was for the construction of the powerhouse, intake, gated spillway and related generation structures (P - 02712).
53. There were four approved bidders on this contract – two from established North American companies (or joint ventures) with relevant construction experience and two from European companies or joint ventures with heavy civil experience but little or none directly comparable to a hydroelectric project in a northern climate. The two European companies' bids were each almost a billion dollars cheaper than were the bids from the North American companies. CH - 0007 was ultimately awarded, to Astaldi, in November of 2013 [Grant Thornton, P - 01677, from p. 27].
54. Even this low bid was, remarkably, over a quarter of a billion dollars higher than the DG3/sanction estimate for this work package. This, retrospectively, casts greater doubt still on the estimating process leading up to sanction.

55. The decision to award this major construction project to a company with no previous experience in North America let alone experience in Northern Canada, based on a bid considerably lower than those from experienced Canadian contractors, was inherently risky. Nalcor received two very similar bids for the Powerhouse and Spillway structures from highly experienced Canadian based construction consortia that, at minimum, ought to have informed it that other low bid prices may be suspect. Might the choice of Astaldi, notwithstanding Nalcor's claim to an objective bidding selection and assessment process, have been necessitated by Nalcor's low budget estimates which were not tested, except as to process, either by executive review or by independent consultants?

56. CH - 0007 became fraught with conflict and challenges, ultimately resulting in Astaldi being "kicked off the site" in the fall of 2018. As of this writing, Astaldi and Nalcor are mired in litigation and arbitration and Nalcor apparently has potential exposure into the hundreds of millions of dollars.

57. This unquantified potential exposure is in addition to the \$1.207 billion overrun identified by Grant Thornton. This represents approximately a third of project cost overruns.

58. Much of Phase 2 consisted of conflicting evidence as to, as between Nalcor and Astaldi, which one was ultimately responsible for the enormous cost and schedule overruns which have plagued the CH - 0007 contract.

59. The Concerned Citizens Coalition holds no brief for either Nalcor or Astaldi and is of the view that fault can and should be attributed to each of them. Fundamentally however, Nalcor made the decision to award and continue with this contractor and, absent some extraordinary, unaccepted event (a "black swan") that it could not reasonably have anticipated or mitigated, Nalcor ultimately must be held accountable.

60. Performance issues with Astaldi became evident almost from the beginning, as they failed to deliver key personnel to the construction site, failed to attain targets and spectacularly failed to complete the construction of the Integrated Cover System (ICS/Dome). These failures might have served to warn Nalcor as to the limitations and unreliability of their new major contractor, and in fact, senior Nalcor personnel such as Ron Power were aware as early as March, 2014, as to these problems (P - 0311). Nalcor's Project Management Team and executives evidently decided that, having made their decision to award the contract to

Astaldi, the pain of terminating this relationship outweighed the pain of continuing with it. This was done, surprisingly, without the benefit of a formal analysis (until March, 2016) to consider the cost of replacing Astaldi.

61.The relationship continued, however, with Nalcor being the party retaining the risk associated with cost and schedule overruns, rather than transferring it to Astaldi. Thus, when it became obvious that Astaldi could not complete or even continue with the contract, being unable or unwilling to bear the enormous losses consequent to cost overruns, it was Nalcor, through bridging agreements and a completion contract which saw Astaldi receive almost nine hundred million dollars in additional compensation, that absorbed this loss.

62.The Valard Contract is another major example of poor project planning and execution. Adjusted for “transfers from other work packages and scope changes of \$139 million the overrun on this work package is \$649 million”, according to Grant Thornton. It attributes this figure to “a combination of factors including contracts awarded in excess of budget, settlement agreement, and change orders due to items such as geotechnical conditions different from planned and the conductor proud strand issue (net of insurance proceeds) and unallocated budget amounts.” (p.41) The construction of the HV DC Transmission Line was the second largest work package and represented 20% of the total cost variance of \$3.9 billion

as of March 2018”, according to the Forensic Auditor who further observed that only 40% of the engineering on the TL was completed prior to calculation of the Base Estimate. Nalcor had not completed any geotechnical examination along the proposed line, not even enough to establish baseline soil conditions which might have helped the estimators. “We had to make assumptions based on mapping...” stated the Deputy Muskrat Falls Project Director, Mr. Jason Kean, in his evidence of May 6 and 7, 2019.

63. It was decided to construct this project pursuant to an Engineering, Procurement, Construction, Management model (EPCM) and SNC Lavalin was awarded that contract. Nalcor was dissatisfied with their performance and changed it to an Integrated Management Team with SNC Lavalin taking a subordinate role. While there is evidence that SNC Lavalin did not perform well in the initial stages of the contract, they did have considerable experience in Hydro projects while the senior management team of Nalcor had very little, and the effects of that lack of experience was demonstrated throughout the construction phase of the project.

64. Serious issues also arose with respect to the conduct and workplace practices of certain members of the Nalcor Project Management Team. Outside personnel such as Tim Harrington of Cahill-Ganotec were surprised to find that Project Manager Scott O'Brien and other key members of the Project Management Team were not

on site other than for occasional visits. Notwithstanding his denials, the Commission heard convincing evidence from multiple parties as to Mr. O'Brien's confrontational, dictatorial and non-collaborative management style (See in particular the examination of Mr. O'Brien and his cross-examination by counsel for the Concerned Citizen's Coalition on May 30 and 31, 2019).

65. Mr. O'Brien might have been exceptionally bullying and confrontational in his dealings with Nalcor's contractors and other collaborators in the Muskrat Falls Project but, generally, Nalcor seems to have had challenging relationships with most of these parties. All of their major relationships – particularly with Astaldi and SNC-Lavalin – seem to have been difficult ones. Confrontation and distrust seem to have been standard features of these relationships along with what appears to have been unusual degrees of litigiousness. A certain hard-headedness might be expected in such complex and consequential commercial relationships. Surely, however, the behaviours of Mr. O'Brien and certain of his colleagues cannot be considered in "accordance with best practice" and must inevitably have contributed to cost increases.

66.4(b)(v) any risk assessments, financial or otherwise, were conducted in respect of the Muskrat Falls Project, including any assessments prepared externally and whether

- (A) the assessments were conducted in accordance with best practice,
 - (B) Nalcor took possession of the reports, including the method by which Nalcor took possession,
 - (C) Nalcor took appropriate measures to mitigate the risks identified, and
 - (D) Nalcor made the government aware of the reports and assessments, and
- (vi) the commercial arrangements Nalcor negotiated were reasonable and competently negotiated;

67. The Concerned Citizens Coalition takes no serious issue with the manner in which the Westney Group conducted the several risk assessments it did for Nalcor and accepts that they were conducted in accordance with best practices. It clearly is an industry leader in this arcane and complex area of engineering and project management. It therefore was an appropriate choice to be retained for these assessments. Messers Westney and Dodson were impressive witnesses; their evidence was helpful, reasonably independent and plainly put.

68. SNC-Lavalin also, in or about the Spring of 2013, conducted its own risk assessment. While it might not be shown the same deference as the Westney risk

assessments, having not been informed by the same degree of detailed and sensitive information as was provided to Westney by the Project Management Team, it nonetheless was a serious attempt at risk quantification by an organization with great experience in hydroelectric development in northern Canada and with its own privileged access to relevant project information. It also, in hindsight, has proven to be substantially correct.

69. While the evidence on this point is uncertain and perhaps contradictory the Concerned Citizens Coalition submits that it does establish that:

- (a) Mr. Paul Harrington, at least, was offered a copy of this report at or about the time it was created; and
- (b) this establishes that any failure on Nalcor's part to thus come into possession of it was because it did not want to take possession; and that
- (c) the reasons offered by Mr. Harrington for refusing to take possession are unpersuasive and should not be accepted.

70. These ostensible reasons (as offered by Mr. Harrington in his June 5 and 6, 2019 testimony) appear to have been that: SNC-Lavalin had ulterior motives for creating this report (and ultimately for releasing it in 2016), seeing it as an opportunity to re-establish their EPCM role within the project; and that it was dated, uninformed by sensitive information and in any event had been superseded by Westney reports and Nalcor's own risk-mitigation efforts.

71. SNC-Lavalin's motives are, it is submitted, irrelevant to whether or not the report should have accepted: this would, to borrow a phrase, go to weight rather than admissibility. Likewise, with the other proffered reasons. The true reasons for refusing this report, it is submitted, are ones unflattering to Nalcor; hubris; the siege mentality and tension that tainted so many of Nalcor's relationships; and a desire not to be confronted with information that might challenge the assumptions and courses of action preferred by Nalcor.

72. The evidence is overwhelming that none of these risk assessments was provided to Government (either the executive or the public service) in a timely fashion. Alternatively, if provided, they were decontextualized and/or buried within a mountain of data so as to render them inaccessible to an unsophisticated reader

(which, unfortunately, is an accurate description of the political and public oversight of this project). This is confirmed by the fact that virtually none of the government ministers or senior public servants who testified before this Inquiry had the slightest idea as to what a "P-Factor" even was.

73. Nor can it be said that Nalcor "took appropriate measures to mitigate the risks identified". Such mitigation could have taken the form of greater detail in the estimates and similar efforts to eliminate uncertainty and thus "risk" [a course of action which Nalcor, unconvincingly, claims to have followed) or, it might have required the adoption of cost and schedule estimates that would prudently be required to reduce the said risk. This is a course of action which Nalcor could not or would not do. The true reason why this is so may not be seen, as noted above, in the handwritten notes on p. 17 of Exhibit P - 00206. A "very conservative" approach would inevitably suggest higher estimates for project costs and schedules. These were realities that neither Nalcor nor its political masters were prepared to accept.

74.4(c) whether the determination that the Muskrat Falls Project should be exempt from oversight by the Board of Commissioners of Public Utilities was justified

and reasonable and what was the effect of this exemption, if any, on the development, costs and operation of the Muskrat Falls Project;

75. The Public Utilities Board would have normally had the authority to decide on the Muskrat Falls project but it was exempted by the Government, as permitted under the Electrical Power Control Act.

76. The Lower Churchill projects, consisting of Gull Island and Muskrat Falls, were conceived as primarily export projects, with no impact on rate payers, so the original exemption made some sense. Once however it was decided that Muskrat Falls would be primarily a domestic project to be fully paid for by island ratepayers it ought to have been put under the normal regulatory authority of the Public Utilities Board, requiring approval of the capital expenditure.

77. Two of the officers of the Coalition, Ron Penney, Chair, and Dave Vardy, Secretary, asked the then Government to lift the exemption of the project. (P-00330)

78. The Government declined to do so but did in 2011, agree to do a reference to the Public Utilities Board asking the Board to provide advice on whether Muskrat Falls

project or the isolated island option was the best alternative over a 50-year period.
(P-00331)

79.Evidence before the Inquiry demonstrates that Nalcor was not cooperative with the Board and failed to provide the requested documentation in a timely fashion, contrary to their promises to do so. This caused a delay in the deliberations of the Board (This theme of failure to cooperate in providing information and resisting independent reviews, including efforts to alter independent reviews, is seen throughout the evidence considered by the Inquiry).

80.The Board was not provided with the additional time it asked for so it could take into account the latest estimates and, as a result, rightfully declined to answer the reference question.

81.The reason given for the refusal to provide the additional time was the urgency to make a sanction decision but, in the end, that decision was delayed so the Board could have been given the additional time it requested (and the delay in financial close added many more months to the final decision to proceed with the project).

82. Contrast this with what occurred in Nova Scotia where their regulatory body, the Nova Scotia Utility and Review Board (UARB) was given full authority over the contract between Nalcor and Emera.

83. In addition, the Nova Scotia Board required Emera to negotiate an energy access agreement giving Emera the right to purchase surplus power at market prices, limiting the flexibility of Nalcor to enter into other contracts. What started out as a project for Newfoundland has turned into one primarily for the benefit of Emera and Nova Scotia.

84. In conclusion, while the decision from decades ago to exempt the Public Utilities Board from oversight over export projects may be understandable, this exemption should have been lifted when Muskrat Falls emerged as not only a project primarily to meet domestic energy needs but as one to be entirely paid for by domestic ratepayers, through a Power Purchase Agreement imposed on Newfoundland Hydro and whose conflicted, ineffective Board of Directors was obviously in no position to conduct effective oversight. The Public Utilities Board could have stepped into this role. It might have been an early, effective means of imposing discipline and clarity on the sanction process, acting as a brake on the runaway Nalcor train.

85.The Public Utilities Board, instead was, as has been demonstrated through the evidence of Ms. Maureen Greene (October 24, 2018), Mr. Fred Martin (October 24, 2018), Ms. Darlene Whalen (October 25, 2018) and Mr. Andy Wells (October 25, 2018), denied the information they needed to answer the reference question, set up to fail.

86.When they did indeed “fail”, insofar as they declined to answer the Reference Question, the reaction from Premier Dunderdale and her government was to “shoot the messenger” [see P – 00601, P – 00727 and P – 00728 in particular]. This attack on a quasi-judicial body was such that their Board Vice Chair testified that she fully expected that she and her fellow commissioners would be fired.

87.This response by the Government of Newfoundland and Labrador is worthy of condemnation in its own right. It is also necessary to consider the chilling effect this would have had on anyone who did not wish to act as a cheerleader for Muskrat Falls. It was now not even an option to reserve judgement or to seek more, or better information. This attack, along with others including the aforementioned attack on Mr. David Vardy, surely created an atmosphere where it would be

difficult to have a thorough public debate about this massive and momentous public project.

88.4(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 matters set out in paragraphs (a) to (c), focusing on governance arrangements and decision-making processes associated with the project.

89. The Concerned Citizens Coalition is firmly of the view that all of these questions must be answered in the negative. The Government of Newfoundland and Labrador was not fully informed, by Nalcor, of “risks or problems anticipated with the Muskrat Falls Project”. It therefore lacked “sufficient and accurate information upon which to appropriately decide” sanctioning and oversight decisions and related matters.

90. Nalcor certainly deserves criticism for its many, repeated failures to appropriately inform the public service and the cabinet (or, for that matter, its own independent Directors). This is found not only in its inability or refusal to proactively provide crucial and necessary information, such as updated cost and scheduling

information, but also in its resistance to the limited efforts at oversight which the Government of Newfoundland and Labrador did attempt to exercise.

91. There are many examples of such failures to provide such information.

Particularly egregious ones including the failure, by Nalcor, to properly advise its shareholder, the Government of Newfoundland and Labrador, of the Westney risk assessments; of the cost increases between the sanctioning of the project and financial close; and of the lengthy delays throughout 2014 and 2015, in the reporting of actual and projected project cost increases (Grant Thornton Forensic audit, P - 01677).

92. Nalcor had a duty to fully inform its shareholder of all matters within its knowledge relevant to sanction and oversight. No party to this Inquiry appears to have disputed the existence of this obligation, The Concerned Citizen's Coalition submits that this would not only include a duty to disclose but, also, a duty to answer queries in a complete, forthright manner. Such clarity was often lacking in Nalcor's communications to its shareholders.

93. None of these failings absolve the Government of Newfoundland and Labrador from its own failures to properly inform itself with respect to sanctioning and oversight issues.

94. As is noted throughout this brief, particularly with respect to the sanction process, this was a failure of each of the public service and of the cabinet and of a number of the individuals who occupied offices within each of those branches of government. It is also a failure of process, in that Nalcor bypassed the ordinary reporting paths for crown corporations and, rather, sometimes dealt with the Premier's office and sometimes the Department of Natural Resources or other departments. In the result Nalcor was a "runaway train" with, at best, unclear lines of accountability and authority.

95. The Concerned Citizens Coalition was appalled with the exceedingly poor "paper trail" that came to the Inquiry's attention in respect to financial analysis performed by the Government, independent of Nalcor. This would include Cabinet Submissions pre and post-Sanction and "briefings" held between the Nalcor CEO and the Premier, (apparently a frequent occurrence and the principal source of contact at a high political/governmental level). Notwithstanding the representations of Premier Williams and others, there is little evidence, in fact, of

a vigorous vetting process within Government, or really of any vetting process at all.

96. These issues were especially acute in the Government of 2003-2015 (or at least, with respect to the latter half of the life of that Government which included much of the period of time that was the focus of this Inquiry). This undoubtedly was in part a function of the high turnover or rotation of Ministers, and even Premiers, during these years. If, as Minister Dalley, suggested (during his testimony of February 27, 2019) it took a Minister many months to get an understanding of the Natural Resources portfolio, then none of the four ministers who occupied that ministry between 2010 and 2015 would have ever really had the opportunity to get comfortable and informed in that portfolio. The same would have been true of Finance, and even of the Premiership. In these circumstances, even the most capable and informed of Ministers or Premiers would have struggled to keep up; to hold Nalcor accountable or even attempt to do so. This era was aptly labelled, by one local commentator, as “turmoil, as usual”.

97. From the evidence of Premiers Williams, Dunderdale, Marshall and Davis, it appears that none of these individuals appeared to question or challenge Nalcor

in any meaningful way. There was, rather, an acceptance of whatever was presented to them and a reflexive defence of the project and of the allegedly “world class” team tasked to build it.

98. Minister Kennedy, from his own evidence and corroborated somewhat from his cabinet colleagues, does appear to have at least attempted to examine and challenge Nalcor and its proffered information to a greater extent than did his colleagues. There is no evidence, however, that his efforts succeeded in meaningfully informing the sanction debate and his attack on critics of the project (as noted above with respect to Mr. David Vardy) and his department’s publication of pro-Muskrat Falls propaganda in the months leading up to sanction detracted from, rather than contributed to, an informed debate.

99. It is clear that Nalcor, through its then CEO, Ed Martin, controlled the flow of information and policy advice to the Government, bypassing the normal checks and balances of Government through its public service and cabinet committees, such as Treasury Board. Public servants acquiesced in this decision-making approach and in some cases, became proponents of the project or, as with Clerk of the Executive Council Robert Thomson, smug critics of the critics (see P - 01113). The evidence shows that the public service of the Province was derelict in their duties to protect the public interest.

100. The efforts to provide additional oversight commenced by Premier Marshall were ill-considered. An experienced politician such as he ought to have known that such a Committee required engineering and financial competencies at a high level. An oversight committee composed of senior public servants who owed their positions to an administration who sanctioned such a politically charged project was doomed from the beginning, and the later addition of outside individuals did not change the essential flaw in its composition.

101. It is our submission that the Government ought to have gone outside the public service and recruited members such as the former CEO's of Newfoundland and Labrador Hydro, and retired heads of major construction companies or utility companies.

102. There is no evidence that the Oversight Committee provided any significant value to the project or insured that the Government had up to date information on costs and schedule. Though the Oversight Committee employed the services of EY, a Consultant, the Commission received evidence that the Committee sided with Nalcor and its claims to "commercial sensitivity". This occurred even as the Crown Corporation fought to keep information from being released in the latter

days of the Administration of Premier Paul Davis to the effect that its September, 2015 project cost update was not realistic.

103. The new Liberal government elected on November 30, 2015 had an opportunity to reassess the project. They did announce on December 21, 2015 that EY had been engaged to do a review of costs and schedule performance, along with key risks. EY had already been engaged by the previous government, through the Muskrat Falls Oversight Committee.

104. It appears that the new government relied upon the same Oversight Committee and the same external consultants, namely EY. What EY was asked to do was a continuation of the work they had already begun under the Oversight Committee. EY were not asked to examine the costs that needed to be incurred to finish the project and to compare it with the cost of stopping it. They were not asked to examine the benefits and costs of other options such as completing the transmission lines, while terminating the generation project. The new government relied upon the same internal advisors who had advised the previous government and they relied upon the same external consultants. They did not challenge the assumptions on which the project was sanctioned, neither the cost estimates, the demand projections, the power supply options nor the business case.

105. Ron Penney and David Vardy wrote Premier Dwight Ball on March 1, 2016 (P - 02145), proposing the creation of a Blue-Ribbon panel to review the options on behalf of the new government. They received no reply to their letter. Messrs Penney and Vardy later learned that Nalcor had been asked to provide a briefing note dated March 7, 2016 on terminating the project which is on the record of the Inquiry at P-02390. The briefing note warned against the dire impact of terminating the project. On May 16, 2016 Penney and Vardy commented on the briefing note in the Uncle Gnarley Blog (P-04081) and pointed out its shortcomings.

106. The Inquiry record provides evidence that Nalcor was the only agency whose views were sought on termination of the project. The response received from Nalcor was highly predictable, given that Nalcor had been the champion for the project. The record also reveals no evidence that government's external advisor, EY, were asked to examine termination options or to challenge the assumptions on which the project was sanctioned. There is nothing on the record to show that the Oversight Committee or the senior public service of the Province advised a re-examination of the wisdom of continuing with the project or undertaking a comprehensive benefit cost analysis of future costs and benefits of continuation versus termination. The evidence is that the new government did not seek advice

from knowledgeable people outside of government nor were they receptive to the advice which was tendered by people like Penney and Vardy.

107. Each of Ministers Coady and Premier Ball testified to the effect that they had lost confidence in the CEO and Board of Nalcor very early on in their tenure but did not take immediate steps to replace both. It appears that their removal occurred by accident rather than by design and it was fortuitous that Mr. Stan Marshall had retired as CEO of Nalcor and was willing and able to take responsibility.

108. The Liberal government was thus also derelict in its duty to challenge Nalcor and the Project. They inherited this catastrophe and were ineffective in their response to it.

109. The combined, compounding failures of Nalcor, the public service and the executive denied the people of Newfoundland and Labrador an informed sanction debate. These failures, unfortunately persisted after sanction and the citizens of our Province were thus further denied responsible and effective oversight of the construction phase.

110.5(e)the need to balance the interests of ratepayers and the interests of taxpayers in carrying out a large-scale publicly-funded project.

111.The impact of the Muskrat Falls project on the fiscal capacity of the Province is quite large and often understated. The financial costs described by Nalcor do not include an allowance for equity funds used during construction of the plant and Labrador Transmission Assets. The \$2.6 billion in financing costs make zero provision for these equity costs and are understated. Furthermore, there is a tendency to present the direct costs only, thereby understating the overall costs by omitting any financing costs. When revenue requirements for 2021 are taken as representative of the overall cost of the project the effect is to downplay the fact that the Province has invested more than \$4 billion in equity which the Province has first had to borrow. If all costs were placed on a cost of service basis the 2021 revenue requirements would be in the order of \$1 billion. It is only by using this metric that a full assessment can be undertaken of the combined burden placed on both ratepayers and taxpayers.

112.The Concerned Citizens Coalition is concerned that the limited Terms of Reference did not allow this Inquiry to conduct a complete analysis of the fiscal impact of the project on the Province, with particular reference to the demands which the project will place on the Province over the next 50 years. Slow

population growth, combined with consumer resistance to higher rates, along with the massive cost overruns, will make it close to impossible for Newfoundland and Labrador Hydro to extract the large revenues required to meet its obligations to other Nalcor subsidiaries including the Muskrat Falls Corporation (MFC).

113. The Concerned Citizens Coalition believes it is vital for the Commission to consider an overall assessment of the fiscal impact of the project on the Province as well as the contingent liabilities which the Province may be called upon to pay under the Federal Loan Guarantee (P-00065) and the Power Purchase Agreement (P-00457). The Federal Loan Guarantee imposes certain obligations on the Province during the construction phase, including the obligation to supply sufficient equity financing to complete the project. After construction is completed these financial obligations on the Province (the taxpayer) become annual obligations of the ratepayer, after the start of commercial operations.

114. At the heart of the financial arrangements is the Power Purchase Agreement (PPA) (P-00457) which is an unusual agreement between two crown corporations, both of which are subsidiaries of Nalcor. It is unusual in many respects. One is that there is no fixed price or rate. Another is that it is a take-or-pay contract. One of the parties to the PPA is Newfoundland and Labrador Hydro and its role is to serve the electrical requirements of ratepayers and to protect their interests.

Muskrat Falls Corporation is the other signatory and its role is to build the project and to recover its costs from ratepayers, through Newfoundland and Labrador Hydro. Section 14.1 of the PPA describes an event of default. Such an event places Newfoundland and Labrador Hydro in a very difficult position. The Coalition has been trying without success to determine if the Province would automatically stand in the place of Newfoundland and Labrador Hydro were it unable to pay MFC. We believe that greater clarity on what would happen is needed in order for the Commission to assess the project's financial impact on the Province. This matter was raised by Grant Thornton in their report on the federal loan guarantee and the power purchase agreement (P-00454, page 38) and remains unanswered.

115.If Newfoundland and Labrador Hydro cannot provide sufficient revenues to meet these financial obligations does this mean the Province must provide the funding? Do these financial obligations include operation and maintenance costs, thereby committing the Province to operating the assets even when the business case for such operations would demand a shutdown? If there is no obligation on the Province then how can the base block payments be made? Does the federal loan guarantee provide recourse to the Province from default by Newfoundland and Labrador Hydro even though Newfoundland and Labrador Hydro debt is not subject to guarantee and its assets have not been pledged as security? Is the

Province responsible for the liabilities incurred by NL Hydro through its power purchase agreement with Muskrat Falls Corporation?

116. In calculating its net debt, the Province subtracts the value of its financial assets from its liabilities. The Province's equity investment in Muskrat Falls is currently based on cost rather than market so the net debt remains unaffected by the cost. At what stage will demonstrable erosion of equity demand a write down of asset value and require that net debt reflect such a write down? What would be the impact on the net debt of the Province if the Province had to write off the value of its equity invested in Muskrat Falls? What would be the impact of so doing on our credit rating?

117. The question of intergenerational impact needs to be considered when addressing proposals to mitigate the costs of Muskrat Falls. Governments often seek to relieve the burden on the present generation by shifting it to future generations, either by borrowing or by engaging in sleight of hand conversion of liabilities into assets. There is always the temptation, amply demonstrated by crown utilities across Canada, to capitalize expenses and to defer cost recovery into the future. The hybrid cost recovery approach adopted for Muskrat Falls generation assets and for the Labrador Transmission Assets (LTA) linking Muskrat Falls and Churchill Falls (63% of direct project costs of \$10.117 billion) is based on

a combination of cost of service and the “PPA approach” whereby energy cost per KWh is escalated by 2% annually for 50 years, thereby remaining constant in real terms. The cost of service approach, applied to the Labrador Island Link (37% of direct costs) places a large burden of costs on the present generation. The hybrid approach, tilted toward PPA style cost recovery, transfers a large share of the costs to future generations, with the taxpayer, through the provincial Treasury, playing the role of banker or financial intermediary.

118. Expert Pelino Colaiacovo of Morrison Park, in testimony on July 18, 2019, suggested that future ratepayers on the Island interconnected system will enjoy lower power rates for the last 30 years of the 50-year planning period than they would have experienced on the Isolated Island System. For the first 20 years the rates charged to Interconnected Island ratepayers will be higher than they would have been on the Isolated Island System. They make up for the first 20 years because of the lower rates in the last 30 years. He suggests some further shifting of cost to future generations of ratepayers may be in order.

119. We disagree for a number of reasons. First, the notion that Muskrat Falls will offer lower rates in future years (say from year 20 to 50) than the Isolated Island option does not take into account evolving technology, which may invalidate these purported savings. Second, the lower rates in future depend on load growth,

which may not materialize. Third, if the Province decides substantially to eliminate the future return on its equity investment, while continuing to run heavy deficits, the effect will be to shift the burden to future taxpayers. Fourth, it is unfair to future generations to burden them with the mistakes for which this generation is responsible, particularly when the Province is already carrying the largest per capita debt of any Canadian Province. The Concerned Citizens Coalition believes that any further shifting of costs to future generations should be resisted.

120. Under the Muskrat Falls Exemption Order 2013-343 the PUB has been directed to include all Muskrat Falls “costs, expenses or allowances, without disallowance, reduction or alteration of those amounts, in Newfoundland and Labrador Hydro’s cost of service calculation in any rate application and rate setting process, so that those costs, expenses or allowances shall be recovered in full by Newfoundland and Labrador Hydro in Island interconnected rates charged to the appropriate classes of ratepayers”. Concern has been expressed by the Commissioner himself that the costs are to be passed on to ratepayers without independent review. The position of the Concerned Citizens Coalition is that all of the costs of Muskrat Falls should be subject to a test of prudence by the PUB and the PUB should examine all costs to ensure that ratepayers are charged only for expenses that are both prudent and attributable as costs incurred for the benefit of ratepayers.

121. On July 19, 2019 the Commissioner drew particular attention to costs associated with the marketing of surplus power and invited advice from the parties. This was discussed in cross examination of expert witness A J Goulding who advised that where export revenue is used to reduce customer rates it is reasonable for prudent marketing costs to be charged to ratepayers. The Concerned Citizens Coalition agrees with this position and recommends that the PUB be charged to determine the prudence of the costs incurred in export marketing and to assess which costs should be ascribed to ratepayers as a part of its overall monitoring of all Newfoundland and Labrador Hydro costs charged to ratepayers. In assessing the prudence of these costs, the Board should consider whether the contracting out of this marketing function might be more cost effective rather than for Nalcor to maintain its own export marketing operation.

Other considerations

122. The foregoing sections address matters explicitly raised in the Terms of Reference. These Terms of Reference are, however, to be interpreted broadly [“Interpretation of the terms of Reference For the Muskrat Falls Inquiry”; March 24, 2018; Leblanc J; paras 23-34] and in that spirit the Concerned Citizen’s Coalition respectfully submits that this Commission can and should address certain matters that arose in the course of the Hearings and which do not necessarily fall within any of the specific questions and topics set out in the Terms of Reference.

123. The Coalition has been long concerned about the stability of the North Spur and have asked the Government to appoint an independent expert panel to review the concerns expressed by Dr. Lennart Elfgren, Dr. Stieg Bernander and Hydro engineer, Jim Gordon. That request has been ignored. While The Commissioner has allowed this evidence to be submitted and we urge him to make a recommendation that such a panel be appointed, which may still be useful even after impoundment.

124. The matter is made more relevant, and important, because it is clear from their viva voce evidence that Nalcor's executive team, Messers Gilbert Bennett and Stan Marshall, simply have not engaged with the latest reports from Drs. Bernander and Elfgren [as found at P - 00434] and that, it further appears, nobody else within the Government of Newfoundland and Labrador or within Nalcor has either. All we have are polite assurances and, given all that we have learned about the value of such assurances, these cannot suffice.

125. The Concerned Citizens Coalition is of the view that the Joint Review Panel deserved much more attention than it received from the provincial and federal

governments which appointed it. The panel recommended an independent financial analysis of the project before sanction and that the availability of Churchill Falls power should be central in any decision on the Lower Churchill. They recommended that stakeholders be consulted through integrated resource planning, which would have considered both supply and demand side options. An IRP approach would also have reviewed alternatives to Muskrat Falls much more thoroughly. In many respects the report was given short shrift.

126. Chapter 15 of the report deals with environmental management, including adaptive management and dispute resolution. The panel saw the need for need for independent oversight of environmental mitigations, as well as monitoring and adaptive management. The panel proposed third-party adjudication in the event that complaints cannot be otherwise resolved to the satisfaction of both Nalcor and the complainant.

127. The Concerned Citizens Coalition believes that if the province had taken a stronger approach in implementing the panel's recommendation that major issues such as methylmercury and the North Spur would have been addressed on a timelier basis. Site occupation and hunger strikes were a response to the lack of an independent third party which could assess complaints independently of Nalcor.

They were evidence of the lack of adaptive management rather than proof of its effectiveness.

128. The Government of Newfoundland and Labrador should have recognized that Nalcor as a Crown Corporation needed more independent oversight, not only of costs and schedules but also of environmental impacts. To this end the environmental regulator the Department of Municipal Affairs and Environment, needed to operate at some arm's length from Government as the proponent of the project. There is no evidence that any such separation was considered necessary. Both Governments should have been more receptive to the panel's recommendations and created better mechanisms for dispute resolution independent of Nalcor.

129. The Government of Newfoundland and Labrador did establish an independent process to deal with methyl mercury through the Independent Expert Advisory Committee (IEAC), but the IEAC was created at too late a stage. Its progress was thwarted by Government inaction at the eleventh hour.

130. Unfortunately, there was no corresponding advisory mechanism similar to the IEAC created for the North Spur. The people who live below the dam live in the

shadow of a continuing threat which remains unresolved. The Coalition continues to recommend creation of such an independent panel with the authority to conduct its own research into the risk and the remediation undertaken to date and provide expert opinion on the safety and stability of the natural dam which is the North Spur.

131. The power contract between CFL(Co) and Hydro Quebec should have been central to planning for future power requirements in the Province. The availability of low-cost power from Churchill Falls after 2041 should have limited major investment in new generation projects with high capital costs, such as Muskrat Falls. The Concerned Citizens Coalition does not believe that the transmission investments associated with Muskrat Falls will enhance our bargaining position with Quebec after 2041. Underwater transmission cables have long been in use internationally and their technical feasibility was never in question. It is far too early to conclude that the risk of iceberg interference with subsea cables in the Strait of Belle Isle has been effectively minimized. The economics of building long distance transmission lines from Churchill Falls to New England markets remain uncertain.

132. Nalcor Energy has been given broad powers as a "for profit" crown corporation with a mandate to conduct commercial operations. These powers should be

reviewed by a committee of the legislature. In particular the public's access to information should be paramount in weighing any consideration of "commercial sensitivity".

133. The Williams administration established Lower Churchill development as an immediate priority when it came into power in November of 2003. Gilbert Bennett was one of the first to be hired in developed a team to develop a project on the Lower Churchill. From 2005 until 2010 the focus was on Gull Island, either to feed an aluminum plant in the Province or for export through Quebec. The record shows that \$140 million (P-01321) was spent on Gull Island up to 2018. In 2010 the emphasis shifted to Muskrat Falls when the Term Sheet (P-00227) of November 18, 2010 was signed with Nova Scotia, committing the Province to developing the project for both the Island market but also for Nova Scotia. The business case was predicated on the projected capacity deficit forecast in 2015 and the energy deficit predicted in 2021 (P-00077, page 3) as well as on the replacement of Holyrood.

134. Reliability considerations will call for continuing emergency power on the Avalon, probably at Holyrood, as Muskrat Falls cannot be relied upon as a full replacement for the Holyrood thermal plant. The scale of the forecasted capacity and energy deficits did not warrant a project on the scale of Muskrat Falls. In light of the downward revisions which Nalcor has made in its load forecast since project

sanction there is little question but that the demand projections for Muskrat Falls were contrived, as were cost estimates. The business case for Muskrat Falls to meet the needs of the Island is very questionable.

135. The business case for exports is also highly questionable and has been questionable for some time. Several experts testified on the matter of export markets. Morrison Park (P-04445, page 32) provided evidence on Hydro Quebec's export sales price from 2003 to 2018. These data demonstrates a strong downward trend over that period, suggesting that export sales were unlikely to sustain the high costs of Lower Churchill power, whether sourced from Gull Island or Muskrat Falls.

136. A J Goulding (P-04457) has offered expert opinion on the need for future power in the Province, as well as in our export markets. He cited Newfoundland and Labrador Hydro's 2018 Reliability and Resource Adequacy Study (P-03658) which concludes that up to 2028 there is no need for incremental capacity. From 2028 to 2038 there is unlikely to be any large incremental requirement for power. Mr. Goulding also looked at the export prospects in the US for the Province's renewable energy, including hydro-electric resources. He identified transmission constraints in the Maritimes and that the cost of renewable energy from Newfoundland and Labrador is likely to be high relative to locally sourced

renewable power in the New England region of the United States of America. Key considerations are slowing demand, constrained transmission access and a preference in the US for closer and cheaper energy resources.

Recommendations

137. On July 19, 2019 the Commissioner advised he is continuing to receive confidential reports on the final cost of the project and will continue to receive them up to the completion of his final report. In addition, he is receiving confidential information from individual contractors. He sought advice from parties as to how he can share information without breaching the confidentiality of the undertakings he has made both to Nalcor and to individual contractors.

138. The Concerned Citizens Coalition proposes that this information be shared with the forensic auditor, Grant Thornton, and that the forensic auditor provide a summary of this information to the parties up to the time of the Commissioner's final report.

139. The Concerned Citizens Coalition is concerned that the forensic audit will be stranded when the Inquiry is finished. The forensic audit remains incomplete and will remain so unless steps are taken to continue the engagement. The Concerned

Citizens Coalition believes that the forensic audit should be continued by the PUB and that they be retained to finish the audit after this Inquiry has been completed and its report filed. In light of the outstanding claims it may be necessary to delay the final audit until at least a year after full power is achieved but an interim report should be released by the PUB to the public by the end of 2020.

140. The evidence from expert witnesses testifies to the importance of a strong PUB with the power to review all major projects and to exercise oversight over them. The model of the Nova Scotia UARB with respect to the Maritime Link is instructive. The Commission might consider recommending that no further exemptions be given to diminish the powers of the Board. Any uncertainty about the power of the Board to conduct a robust integrated resource planning process, as recommended by the Joint Review Panel, should be resolved in favour of that option.

141. The Inquiry has heard evidence about the large expenditures on the Gull Island project. MFI Exhibit P-01321 discloses that \$140 million had been spent up to 2018. The concerned Citizens Coalition submits that the final Report of this Commission should include a statement of the expenditures and commitments related to Gull Island along with a recommendation as to whether a forensic audit, external to Nalcor and its audit processes, should be conducted of these expenditures.

142. The Inquiry has learned that the government has no established framework for the evaluation of risks associated with major projects. The Concerned Citizens Coalition respectfully recommends that this Inquiry should recommend that as a matter of priority such a risk framework should be developed and that an appropriate independent oversight body should ensure that risk policies are being implemented to mitigate all risks. This risk assessment framework should address the level of engineering design which must be undertaken before projects are approved and must provide for "exit ramps" so that cost overruns or other changes in circumstances can prompt a review of all options, including the option to terminate.

143. A major concern of the Coalition has been the load growth projections used by Nalcor Energy and the failure of Nalcor Energy to consult broadly with stakeholders, particularly Newfoundland Power, in the preparation of their forecasts. Projections of demand for power are extremely complex and they become increasingly unreliable over a long period of time such as 50 years. Demographic factors play a vital role and our understanding of the factors that influence births, deaths, in-migration and out-migration is evolving slowly. Equally important in understanding the demand for power is its affordability when large rate increases are imminent. The Concerned Citizens Coalition

respectfully recommends that utilities be directed to work more closely together and to forge a consensus on the need for additional power based on robust and comprehensive research which includes affordability as a major factor, of equal importance to family formation, end-use modelling, and estimates of disposable income, gross domestic product and population growth. At its heart the affordability question must focus on the ability of low-income people to cope with large increases in energy and heating costs.

144. In other jurisdictions, increasing competition is available to reduce costs, particularly at the generation level. With the monopoly powers granted to Nalcor Energy the regulatory environment is hostile to new entrants. The Coalition believes that the regulatory structure created to support Muskrat Falls will continue to burden the economy with a deadweight loss, one which includes a crushing fiscal impact and a weighty burden on low income households. The Concerned Citizens Coalition respectfully recommends that the Commission consider the monopolistic structure of our power industry in framing its recommendations to government and that it propose an orderly dismantling of the monopoly powers of Nalcor and open the path to new entrants who offer generation proposals based on advancing technology for the use of renewable energy.

145. We should not repeat the mistake of exempting Muskrat Falls from PUB review.

The potential development of Gull Island in the future should be subject to the full and unfettered review and approval of the PUB before proceeding, even if Gull Island is solely for export, given the risks to the taxpayer.

146. We think there is merit to the suggestion from Stan Marshall that Deputy Ministers from relevant Departments, such as Natural Resources and Finance, should be ex officio members of the Nalcor Board, as was the case a number of years ago.

147. The Concerned Citizens Coalition further submits, in response to evidence heard by the Commission, the following as suitable recommendations for inclusion in the final report:

- (a) That policy recommendations from Crown Corporations be subject to the same rigorous analysis and cabinet committee review as submissions from Government Departments.
- (b) The Nalcor Board ought to be paid the same rate of compensation as other Tier One Boards. While the rates are far below private sector

rates for directorships and will likely limit the pool of candidates to Newfoundland and Labrador residents or expatriates, directors should at least be paid the nominal compensation paid to directors on other government boards.

- (c) That the Commission recommend to Government that, notwithstanding the present terms of the Power Purchase Agreement, the Muskrat Falls Exemption Order be amended to allow the PUB to monitor the final costs of the project before they are presented to ratepayers through Newfoundland and Labrador Hydro and that the Public Utilities Board be allowed to conduct a review of cost allocation policies along with a prudence review before Newfoundland and Labrador Hydro recovers these costs from ratepayers. This review should include all costs, including the cost of marketing surplus power into export markets. This amendment to the Exemption Order will effectively reinstate the oversight powers of the PUB.
- (d) That government should not exempt future power generation, transmission or distribution projects from the jurisdiction of the PUB and any uncertainty concerning the power of the Board to undertake integrated resource planning or any such planning process which

engages stakeholders should be resolved. Appropriate amendments to legislation should remove the power of the executive branch of government to make such an exemption.

- (e) That the Inquiry include in its final report a statement of the expenditures and commitments related to Gull Island along with a recommendation as to whether a forensic audit, external to Nalcor and its audit processes, should be conducted of these expenditures.
- (f) That Nalcor and certain of the individuals in positions of authority within this crown corporation, including at least Edmund Martin and Paul Harrington, are deserving of strong censure by the Commission for their conduct in the sanctioning and execution of the Muskrat Falls project.
- (g) That the Inquiry give appropriate weight to the failures of the Williams, Dunderdale, Marshall, Davis and Ball administration and include in its final report an account of their actions with respect to these matters.

- (h) That the Inquiry recommend the introduction of policies governing risk assessment along with appropriate oversight over the execution of risk management. This risk assessment framework should address the level of engineering design which must be undertaken before projects are approved and must provide for “exit ramps” so that cost overruns or other changes in circumstances can prompt a review of all options, including the option to terminate.
- (i) That the Commission recommend the utilities work more closely together in framing projects to meet future electrical needs and to conduct research on the drivers of electrical demand, with attention to affordability and the impact of higher rates on low income people as well as examining other drivers of electrical demand, such as family formation, end-use modelling, and estimates of disposable income, gross domestic product and population growth.
- (j) That where the PUB is not a suitable oversight body to assess major capital projects initiated by the Government, legislation is recommended for project's having a capital costs exceeding \$300 million where in specific requirements of oversight are mandated

including professional expertise and the inclusion of “arms-length” technical and financial assessments.

All of which is respectfully submitted this 9th day of August, 2019.



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