

IN THE MATTER OF an Inquiry
pursuant to the *Public Inquiries Act*
2006, SNL 2006, c. P-38.1

- and -

Pursuant to the *Rules of Practice*
and Procedure of the Commission of
Inquiry Respecting the Muskrat Falls Project

Submission of Dwight Ball and Siobhan Coady

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PART I - THE SCOPE AND NATURE OF THE INQUIRY

A Introduction

1. On December 17, 2012 the Government of Newfoundland and Labrador announced the sanctioning of a large scale publicly-funded project for the construction of a new hydroelectric plant with dam infrastructure to be built by the provincially owned energy corporation responsible for electrical generation, Nalcor Energy (“Nalcor”), at Muskrat Falls on the Churchill River in central Labrador, and for the construction of new transmission facilities to carry power throughout the province. The project also included provision for undersea transmission facilities to be constructed by a Nova Scotia utility, Emera Inc., to carry a block of the power generated from the new hydroelectric plant at Muskrat Falls to Nova Scotia. The building of the “Maritime Link” was intended to provide Nalcor with both an equity partner in the project and a route to the North American market for sale of the excess power that would be generated by the project.
2. Construction work on the Nalcor components of the project proceeded almost immediately after sanction and on or about November 29, 2013 the financing of the project was concluded through the entry of various loan agreements by Nalcor. The project financing was supported by legislation requiring that island ratepayers pay for the full cost of the project, and was secured by a federal government loan guarantee and a project completion guarantee provided by the province.
3. The project had been recommended to government by Nalcor on the basis that it represented the least cost option to meet the future electricity demand of consumers on the island system. The project activities of Nalcor had been exempted from oversight by the Public Utilities Board however in 2011 the project underwent a truncated independent review before the Public Utilities Board, which reported to government that it was unable to determine whether the project represented the

least cost option to meet the future electricity demand of consumers on the island system as had been submitted by the project proponent, Nalcor.

4. By June 2017 the original capital cost estimate of the Nalcor project components had increased from \$6.2 billion to \$10.1 billion, and the date for delivery of first power from Muskrat Falls was significantly delayed. The public debt incurred on the project has ballooned and currently amounts to 30% of the entire net debt of the province. There had been public concerns from the outset as to the wisdom and necessity of approving the project, and as the project unfolded serious questions were being raised about the validity of the basic assumptions for the project and the potential impact of the doubling of the cost of electricity for island consumers. As the cost overruns and schedule delays continued to mount, the calls for a public inquiry increased.

5. Accordingly, on November 20, 2017 the Lieutenant Governor in Council directed that a public inquiry be held into the circumstances surrounding the recommending, sanction and construction of the project, and an Order in Council was issued pursuant to the *Public Inquiries Act*, 2006, S.N.L. 2006 appointing Mr. Justice Richard Leblanc as the sole Commissioner, under the designation the “Commission of Inquiry Respecting the Muskrat Falls Project” (the “Inquiry”).

B The Mandate of the Inquiry

6. As is the case in public inquiries in Canada generally, the mandate of the Inquiry is primarily investigative and also advisory. Its investigative mandate may be described as investigating the circumstances leading to the recommendation by Nalcor, and the sanctioning by government of the project, including the impact of the decision to exempt the project from independent oversight by the Public Utilities Board; investigating and determining whether government was fully informed of the risks and problems prior to making the decision to sanction, and whether it thereafter took appropriate and reasonable steps in its oversight of the project; and, investigating why there are such

significant differences between the estimated capital costs of the Muskrat Falls Project at the time of sanction and the costs incurred by Nalcor during the project execution phase.

7. The advisory mandate of the Inquiry is provided for in section 6 of the Order in Council which directs the Commissioner to make those findings and recommendations he considers necessary and advisable related to the matters referred to in section 4 of the Order in Council.

8. In carrying out the extensive investigative mandate of the Inquiry, the Commissioner was specifically directed to consider the matters set out in section 5 of the Order in Council. A matter of relevance to these submissions is the consideration by the Commissioner of participation in the Inquiry by the established leadership of Indigenous groups whose settled or asserted Aboriginal or treaty rights may have been adversely affected by the Muskrat Falls Project, which has been interpreted by the Commissioner to include whether appropriate measures were taken to mitigate against reasonably potential adverse effects to the settled or asserted rights of the Indigenous people.

9. The Commissioner has divided the Public Hearings into three broad phases. The Public Hearings in Phase One, dealing with the period leading to the sanctioning of the project on December 12, 2012, took place between September 17 and December 20, 2018; in Phase Two, dealing with the construction phase of the project (which was ongoing throughout the Public Hearings) between February 18, 2019 and July 5, 2019, concluding with the evidence of Mr. Ball; and, in Phase Three, dealing with policy and systemic matters looking toward the future, between July 16 and July 26, 2019. In addition to the Public Hearings, public consultation sessions were held during the Inquiry in St. John's and Happy Valley-Goose Bay, NL.

10. The Commissioner's report, along with any findings and recommendations he deems fit arising from the matters determined during the proceedings, will be provided to the Minister of Natural Resources by December 31, 2019 and released to the public.

C The Terms of Reference and their Interpretation

11. The specific investigative mandate of the Commission is described in the Order in Council, primarily in section 4, the Terms of Reference. The Commissioner's interpretation of the Terms of Reference was released on March 14, 2018, and an Addendum was released on February 7, 2019. Those decisions speak for themselves however, in relation to the breadth of the Terms of Reference, it is noteworthy that the Commissioner has clearly decided that the Terms of Reference will be interpreted as broadly as is possible to ensure that all the appropriate issues raised in the Terms of Reference, and particularly in section 4 of the Order in Council, are dealt with by the Inquiry.

12. Of particular relevance to the participation of Mr. Ball and Ms. Coady, the Inquiry will consider what measures the Ball Government has taken to oversee the Project from and after December 14, 2015, focusing on governance arrangements and decision-making processes as related to the project. The Commissioner's interpretation of the Terms of Reference specifically provided that this aspect of the mandate of the Inquiry includes determining if appropriate measures were taken to mitigate against reasonably potential adverse effects to the settled or asserted rights of the Indigenous people, both at the time of and post sanction, which would include the concerns raised by the leadership of the Indigenous groups about the potential impact of methylmercury in the project reservoir and downstream in Lake Melville and the response of the Ball Government to the issue.

D The Application for Standing by Mr. Ball and Ms. Coady

13. Dwight Ball ("Mr. Ball") is the Premier of Newfoundland and Labrador and the Minister of Intergovernmental and Indigenous Affairs Secretariat and Labrador Affairs. Siobhan Coady ("Ms. Coady") is the Minister of Natural Resources. Both have served in those roles since December 14, 2015, when a new government (the "Ball Government") was sworn into office following the general election of November 30, 2015.

14. The scale and scope of the project has meant that, of necessity, many of the project oversight decisions made since December 14, 2015 were made at the Cabinet table, or within other Departments, however Ms. Coady is the minister directly responsible for the activities of Nalcor and, as Mr. Ball testified, given the serious impacts of the project on the province and Labrador in particular, in his role as Premier and the Minister of Intergovernmental and Indigenous Affairs Secretariat and Labrador Affairs he has maintained ongoing involvement in the oversight of the project. As a result, Mr. Ball and Ms. Coady are the members of the Ball Government who have had the most direct, personal involvement in the oversight of the project since December 14, 2015.

15. The Ball Government assumed office three years post-sanction and as such neither Mr. Ball nor Ms. Coady applied for standing during Phase One of the Inquiry. On December 7, 2018 Mr. Ball and Ms. Coady made a joint application for standing before the Inquiry during Phase 2, which as noted deals in part with the reasonableness and appropriateness of project oversight by the Ball Government in the post-sanction time frame, and during Phase 3 dealing with policy and systemic matters looking toward the future.

16. The request for standing during Phase Two identified the following issues of interest: the factors leading to the December, 2015 decision to order an independent review of the cost, schedule and associated risks for the project (the “EY Review”); the subsequent conduct of the EY Review; the impact of ordering the EY Review and contemporaneous project execution issues upon the governance, reporting and communications relationship of government with Nalcor; the leadership and governance changes occurring at Nalcor in April, 2016; the factors leading to the decision to proceed with the completion of the project; the disclosure to the Ball Government and subsequent reporting to the public of the 2013 SNC Lavalin risk assessment report; and the response of the Ball Government to project execution and environmental issues.

17. During Phase Two of the Inquiry additional issues were raised with Mr. Ball and Ms. Coady including the impact of the cost of the project on the finances of the provincial government, and the Ball Government's plan for rate mitigation which is the subject matter of a separate reference to the Public Utilities Board.

E The Participation of Mr. Ball and Ms. Coady during the Inquiry

18. By a written decision issued on December 14, 2018 the Commissioner granted full standing to Mr. Ball and Ms. Coady during both Phase Two and Phase Three and they have been represented by counsel funded by the provincial government since that date.

19. Both Mr. Ball and Ms. Coady disclosed documents, were interviewed by Commission Co-Counsel, and provided extensive evidence as material witnesses before the Inquiry. In addition, counsel for Mr. Ball and Ms. Coady was in regular attendance during Phase Two for the evidence of relevant witnesses where the personal interests of Mr. Ball and Ms. Coady were potentially engaged, and for a limited portion of the evidence during Phase Three.

F The Focus of the Written Submissions of Mr. Ball and Ms. Coady

20. Given the sheer volume of evidence to be considered by the Inquiry, and the number of important issues which the Commissioner will examine, the written submissions of Mr. Ball and Ms. Coady will be focused on five specific issues falling within the investigative mandate of the Inquiry:

- a) the overall impact of the project on the finances of the province;
- b) the December 2015 decision to order the independent EY Review;
- c) the decision to proceed with the completion of the project;
- d) the leadership and governance changes which occurred at Nalcor Energy commencing in April 2016; and,

- e) the response of the Ball Government to the concerns raised regarding the potential environmental impacts of methylmercury in the reservoir and downstream of the dam.

21. The approach of Mr. Ball and Ms. Coady in their written submissions will be to refer primarily to their own evidence and identify certain key documentary evidence on the five specific matters referenced above, and to briefly summarize their position on each of the issues. Where necessary and appropriate, their submissions will briefly comment on other evidence. The written submissions will also include a list of important exhibits for the consideration of the Commissioner.

22. Mr. Ball and Ms. Coady will not make any written submissions regarding the advisory mandate of the Inquiry which is solely within the purview of the Commissioner.

PART II - SUBMISSIONS ON THE INVESTIGATIVE MANDATE

A Summary of the Submissions of Mr. Ball and Ms. Coady

23. The purpose of these submissions is to review the evidence regarding the involvement of Mr. Ball and Ms. Coady on specific project oversight issues for which the Commissioner may feel it necessary to make findings as to whether or not the project oversight was reasonable and appropriate.

24. It is submitted that the response of Mr. Ball and Ms. Coady to project oversight issues arising since December 14, 2015 was three-fold: first, attempting to ensure that the Ball Government had the most accurate and up-to-date project information in making the necessary oversight decisions; secondly, recommending and implementing measures to strengthen oversight and governance on the project to ensure accountability and a strong finish; and, thirdly, improving project transparency so that the public was made aware in as timely a fashion as possible of the real status of the project.

25. It is submitted that the evidence will demonstrate that the responses of Mr. Ball and Ms. Coady to each of the project oversight issues reviewed herein were generally reasonable and appropriate, and that they have both conducted themselves in good faith in dealing with the issues.

26. The evidence will demonstrate however that the Ball Government was faced with certain project oversight issues, like the re-assessment of the potential impact of methylmercury in the reservoir and downstream in Lake Melville, in which none of the available options could deliver a response acceptable to all affected groups. This is not an excuse, it is simply the reality of the circumstances after December 14, 2015 that decisions taken in the sanctioning, execution and oversight of the project before December 14, 2015 sometimes forced the Ball Government, like Odysseus sailing between Scylla and Charybdis, to have to choose the lesser of two evils, and its available options were often further limited by the challenging financial position of the province.

27. Finally, the evidence will also demonstrate that the October 26, 2016 commitment of Mr. Ball to the establishment of the IEAC, made on behalf of the Ball Government, was a good faith attempt to develop a consensus-based approach to addressing the legitimate concerns of Indigenous Groups and local communities through an independent information-gathering and advisory body that would provide recommendations to government which would inform its decision-making process. While the evidence showed there were delays in responding to the IEAC recommendations of April 10, 2018, and a miscommunication between the Department of Municipal Affairs and Environment and the Cabinet about the possible time frame for scheduling the work, there was absolutely no evidence of any intentional delay or “scheme” on the part of Mr. Ball or Ms. Coady to avoid undertaking the physical mitigation measure of wetland capping in the reservoir.

B The Impact of the Project on the Finances of the Province

28. Mr. Ball was questioned at the outset of his evidence at the Inquiry regarding the impact of the project on the financial position of the province. Mr. Ball’s key evidence on direct regarding this important issue is found at page 2 of the transcript of his sworn evidence of July 4, 2019:

Q: Mr. Learmonth: There are some documents that I want to go over with you, but before we do that I would like you to give us some information on the impact or effect that the Muskrat Falls Project has had and continues to have on the financial or fiscal position of the government. Can you give us some information on that topic, please?

A: Mr. Ball: Yes, of course. So if you look at the Muskrat Falls Project, I think, first of all, if you think about as a province since Confederation and all the work that’s been done in building all the assets that we would have in Newfoundland and Labrador, we’ve accumulated the net debt of about \$13.8 billion. So to put the Muskrat Falls Project in context of where we are with net debt within our province, nearly 30 per cent of the net debt, \$3.8 billion right now, is connected directly to the Muskrat Falls Project. So it shows how profound the impact it would have on the net debt of our province in just a short period of time and with one project. Added to that, if you look at the increase in rates and to think that we would’ve been in a position, without mitigation, to have rates in our province of nearly 23 cents per kilowatt hour, which would be the most expensive rates that we would see in any Canadian province, it would mean that we are not competitive. So the money that we have to spend to

mitigate rates within Newfoundland and Labrador is money that could be spent on other services like health care, education, infrastructure and so on. So that is the impact of the project in its current state is having on our province.

29. The next key reference in the evidence of Mr. Ball regarding this issue is found at page 82 of the transcript of July 4, 2019:

Q: Ms. Best: But it is a good option, isn't it?

A: Mr. Ball: Well, I would suggest that if anything (inaudible) – is now contributes - or attributes 30 percent of the net debt of this province, a province that's been around for nearly 70 years or 70 years and we're seeing 30 percent of our net debt attributed to one project in the last seven years, given all the other development that would have occurred in our province to get 13.8, I would say that this project has had a long-term profound impact on our province.

30. In his evidence Mr. Ball described the impact of the project on the finances of the province as “long-term” and “profound” based primarily on two factors, its impact on the net debt of the province and the requirement to divert dividends from provincial oil and gas investments to a rate mitigation plan to ensure the competitiveness and affordability of the electricity rates in the province. From the time of swearing in of the Ball Government the challenging financial position of the province has often significantly limited its options in responding to the issues arising on the project.

C The Decision to Order the EY Review

31. Mr. Ball and Ms. Coady were immediately involved in the decision of the Ball Government to order the EY Review, which was announced on December 21, 2015, one week after the new government was sworn into office. The decision was announced to the public in CIMFP Exhibit P-03452, and the exhibit references some specific reasons for the decision to order the EY Review.

32. The evidence of Mr. Ball on direct regarding the factors leading to the EY Review specifically referenced the presentation made on December 4, 2015 by Mr. Edmund Martin, then the CEO of Nalcor, and the Nalcor “Transition Team Presentation Deck” dated December 4, 2015 (CIMFP Exhibit P-02676). The relevant page reference in Exhibit P-02676 is page 46.

33. Mr. Ball's evidence on direct regarding this issue begins at page 9 and page 11 of the transcript of his sworn evidence of July 4, 2019:

Q: Mr. Learmonth: And how soon after you formed your government on December 14, 2015, did you become aware of the Astaldi problem?

A: Mr. Ball: Well, as I said, during the transition you would have all your various agencies in. And Nalcor would've been one of the agencies that would've been in early, and they came in on December 4. So there was a presentation that we were given about where things were, you know, primarily with the Muskrat Falls Project, but other lines of business associated with Nalcor were also discussed.

But in the (Nalcor) presentation there was no mention of the – in any dollar sense, of what was required to support an issue that was arising with Astaldi. So, there was a verbal comment that was made by the CEO at the time, Ed Martin, to say that there was some \$200 million to address an outstanding issue with Astaldi. And I was also told that there were discussions that had been ongoing for 12 to 18 months at various levels with Astaldi. And this took me by surprise, simply because in September of 2015 I had asked for an update on the financial affairs of the province to the former premier, but I also asked for an update on the Muskrat Falls Project. And we also had updates in September of 2015 that took us to the \$7.6 billion, I think, at the time.

Page 11:

Q: Mr. Learmonth: So this is only a week after your government was formed. Why did you feel that it was important at this early stage to undertake such a comprehensive review of the Muskrat – financing of the Muskrat Falls Project?

A: Mr. Ball: It's somewhat connected to the discussion that would have occurred on December 4 in our transition presentations. So, waited to get a Cabinet in place on December 14 and Minister Coady would have been sworn in as minister.

But also, you know, given the fact that there were surprises at the December 4 meeting, I think putting someone like EY in there to do an independent review was about transparency and making sure that the most relevant and up-to-date information around cost and risks – cost and schedule and associated risk – that we needed to get an handle on this, because we really need to figure out, first and foremost, you know, what was really going on in this project. And this would have been the first step.

...

Q: Mr. Learmonth: Yeah. So would it be fair to say at this time you didn't feel that you had – that you may not have had the total picture and you just wanted to get an independent review so you knew where government stood on the Muskrat Falls Project in terms of the schedule and cost?

A: Mr. Ball: You know, that's correct, and obviously, I was aware that as we were seeing costs increasing and now knowing that it was, you know, going to go up from the – move from the 7.6 number that was given out – given to the province in

September, realizing that all of this cost would be borne by ratepayers. So, it was important to me that we get a handle on this as quickly as possible.

34. In her evidence Ms. Coady referenced a telephone call she received from Mr. Martin on or about December 15, 2015, the day after she had been sworn in as the Minister of Natural Resources, at page 2 and page 4 of the transcript of her sworn evidence dated Thursday, June 27, 2019:

Q: Mr. Learmonth: So what was your reaction, generally – in general, to receiving this news about the Astaldi problem (by telephone on or about December 15, 2015)?

A: Ms. Coady: I was concerned that it was not in the schedule of September, so my immediate thoughts were, well, what else isn't in the schedule – the cost and schedule that was released in September? If that wasn't in there, then what else, and this had been going on for quite some time? And the fact that the former administration knew that and it had not been disclosed, or had not been dealt with, concerned me greatly, and that it was relatively – it was important to the point of being – needed to be done within the next number of days, that he wanted to speak with me and the Premier about this, important issue, you know, so....

So that caused me great concern. Like, I am starting to get, even at that earliest conversation, a sense that we didn't have the full picture of Muskrat Falls. So it helped inform me as to, well, you know, as we were – in my thinking and in the thinking that we, as government, were forming the development of the – of whether or not, you know, to conduct an investigation into the costs schedules and associated risk that helped to inform that piece of work.

Page 4:

Q: Mr. Learmonth: Tab 5 is Exhibit P-03452. This is another release dated December 21, 2015, from the Executive Council and Natural Resources, and it's entitled Government Opens Books on Muskrat Falls Project. The second paragraph reads:

"Given cost overruns, schedule changes and baseline updates on the Muskrat Falls Project, it is prudent for the Provincial government to review the project's cost and schedule to determine if there are any critical risks moving forward. Ernst & Young will undertake a comprehensive, independent review and identify opportunities for corrective action, if necessary. This type of due diligence is not uncommon in major capital projects and we are moving ahead with the work immediately."

All right, now this is only a week after your government was formed. Why was such an early decision made to undertake this review? What was the reason for engaging EY to do this work just one week after your government was formed?

A: Ms. Coady: There had been concerns expressed around the Muskrat Falls Project since its inception. There had been cost and schedule concerns as recently as September 2015 leading into the 2015 election. There had been an update.

There had been a call to me (on or about December 15, 2015) by Mr. Martin indicating that there were additional pressures.

35. Mr. Martin confirmed that at the December 4, 2015 transition team meeting he verbally disclosed that, in addition to the project capital cost amount of \$7.65 billion announced in September 2015, there was \$200-\$250 million required from government to address an ongoing contractual issue with Astaldi. Mr. Martin testified that he did not have a recollection of a telephone call with Ms. Coady on December 15, 2015.

36. It is submitted that the factors leading to the December 2015 decision to order the EY Review of the cost, schedule and associated risks on the project were as follows:

- a) There had been significant cost overruns, schedule changes and baseline updates to the Muskrat Falls Project since the project was sanctioned on December 17, 2012, most recently in the project update announced by Nalcor on September 29, 2015;
- b) Mr. Ball and Ms. Coady had concerns about a lack of transparency on the part of the previous government and Nalcor about the project. Those existed prior to the November 30, 2015 general election but were heightened immediately following the election by the Nalcor transition team presentation on December 4, 2015 and the telephone call to Ms. Coady from then Nalcor CEO Mr. Edmund Martin on or about December 15, 2015;
- c) Mr. Ball and Ms. Coady were both very concerned that the information the Ball Government was receiving about the project from Nalcor was not reliable or up to date, and they felt needed to ensure that the Ball Government had independent, accurate and up-to-date information around the cost, schedule and associated risks as a first step to making necessary decisions about the future direction of the project.

37. It is further submitted that the December 2015 decision to order the independent EY Review of the cost, schedule and associated risks on the project was a reasonable and appropriate project

oversight measure directed by Mr. Ball and Ms. Coady, and one that contributed to transparency and placing the project on a stronger footing going forward. The EY report, CIMFP Exhibit P-01984 was received and considered by the Ball Government, and released in a timely fashion on April 12, 2016 to inform the public of the real status of the project and to improve transparency on the project.

D The Decision to Proceed to Complete the Project

38. The decision of the Ball Government to proceed to complete the project is an issue which the Commissioner will consider, and the evidence shows it was under review by March 2016. The issue is canvassed in CIMFP Exhibit P-03589, a briefing note provided by Nalcor at the request of Ms. Coady entitled “Implications of Cancelling or Significantly Delaying the Muskrat Falls Project”.

39. The key evidence of Mr. Ball on direct regarding this issue is found at page 17 and page 18 of the transcript of his sworn evidence of July 4, 2019:

Q: Mr. Learmonth: Tab 68, Exhibit P-03589 is a Briefing Note, Confidential and Commercially Sensitive.

The title is: “Implications of Cancelling or Significantly Delaying the Muskrat Falls Project”. I take it that at this time, in March 2016, government was considering the option of either cancelling or significantly delaying the Muskrat Falls Project. Is that correct?

A: Mr. Ball: You know, I think when we made comments we wanted to make sure we explored as many options that we had available: you know, splitting up the project, just finishing the transmission line, leaving the generation and so on. You know, but we knew, or I felt at least, that there really wasn’t much of an option once the project was sanctioned, given the, you know, the legal commitments that have been made, the commitments that had been made to Emera, the federal loan guarantee being in place, also the money that was spent already.

And not all the money that was spent or committed was actually, you know, at the project site. Some – there was some work that was being done in other countries. And the fact is the reliability if – we had seen and experienced DarkNL so reliability within the system, you now, was obviously a problem as well.

So, shutting the project down with, you know, billions of dollars spent and committed, legal agreements in place with Emera was not seen to be an

option.

Q: Mr. Learmonth: ...
And we see on page 5 of Exhibit P-03589 there's reference to page 5 to 19 of this document which has been redacted. And these were the legal opinions so you – can you, without going into any of the details of what is said in the legal opinions, can you confirm that the government sought legal opinions as well as made a, you know, a business judgment on this matter?

Page 18:

A: Mr. Ball: - but I'm not quite sure. But I think, you know, with the opinions and given the commitments, and the legal requirements and the legislative requirements that were put in place, I think most people would agree that, you know, once we got past the sanction and now we're into a point where there's billions, you know, committed, it would have been very difficult to turn back.

40. The next references in the evidence of Mr. Ball regarding this issue are found at page 42 of the transcript of July 4, 2019:

A: Mr. Ball: ...So the decision to move forward, I think we've addressed that earlier, given the fact that we had billions of dollars either spent or committed, we had a reliability issue, we had a federal loan guarantee and we would've still been responsible for the billions that have already been spent and we had commitments made where we would see delivery of major components of this project that would've been delivered to this province and we would've been able – had to accept.
So given the billions that have already been invested in this, you know, shutting the project down without answering these questions, we did not see that as a viable option at that time.

41. The evidence of Ms. Coady on direct regarding this issue is found primarily at page 11 and page 12 of the transcript of her sworn evidence dated Thursday, June 27, 2019:

Q: Mr. Learmonth: Obviously, this topic was under consideration at this time. Is that correct? The possible cancellation or significantly delaying the Muskrat Falls Project?

A: Ms. Coady: I will say it was part of my due diligence to ask for information and to have legal review of information to ensure both I was being thorough and diligent. I will say, and I know it's been before the Commission just as it was before me, that once you look at the contracts for, for example, Nova Scotia, once you understand the implications of the federal loan guarantee, you intuitively know that the implications of cancelling or – cancelling the project were too significant in order to be able to do so, but that did not stop me from asking – I think it did not stop me from asking the questions.

Q: Mr. Learmonth: And so having carried out your due diligence, I take it you came to the conclusion that it was not feasible or reasonable to terminate the contract. Is that correct?

A: Ms. Coady: Correct. I think that it is very evident by the contracts that had been set, it was very evident by the commitments that had been made to Nova Scotia, very evident by the federal loan guarantee, very evident by other contracts and knock-on effects to those contracts, and very evident by the implications to Newfoundland and Labrador if we did shut down the project, that it would not be in the best interest of the province to do so.

42. In addition, Stan Marshall, Nalcor CEO, testified that he briefly considered the idea of cancelling or delaying the project but summarily dismissed the idea. It is submitted that the factors leading to the decision to proceed to complete the project were as follows:

- a) Legal advice obtained from internal and external counsel and analysis, including from EY, on re-scoping or splitting the project and moving ahead with the transmission only;
- b) By that time there had been billions of dollars of project cost incurred on the Nalcor project components, and billions of dollars more were committed in existing contracts;
- c) There had been significant legal commitments entered into by Nalcor with Emera Inc. guaranteeing the delivery of power to Nova Scotia through the Maritime Link;
- d) There had been significant legal commitments entered into by the provincial government under the project financing which included a project completion guarantee;
- e) In the event of cancellation of the project, there would still be a reliability issue with respect to the island system; and,
- f) Mothballing costs and potential environmental issues with shutting down the project.

43. The issue of whether to cancel or delay the project, or to proceed to complete the project, was one of the issues faced after December 14, 2015 in which the Ball Government had to choose between the lesser of two evils, and for which regardless of the decision taken no consensus was possible. It is submitted that Mr. Ball and Ms. Coady exercised appropriate due diligence, considered

the available options, and reasonably and appropriately concluded and recommended to the Ball Government that it was in the best interests of the province to proceed to complete the project.

E The Leadership and Governance Issues at Nalcor

44. The interactions which took place from December 4, 2015 onward between Nalcor executives and Mr. Ball and Ms. Coady, and their political staff and senior civil servants, raised serious concerns within the Ball Government about financial, leadership and governance issues at Nalcor. These concerns were if anything heightened by the information briefings and independent advice provided by EY about the project review and the Astaldi Canada contract issue during the Ball Government's first months in office.

45. Mr. Ball testified at length about the EY project review and the Astaldi issue, and the difficulties he personally encountered with ensuring that Nalcor executives facilitated proper project oversight. A representative excerpt is found as follows at page 20 of the transcript of July 4, 2019:

A: Mr. Ball: My experience given – you know, being in the room by – at this point three or four times with EY and Nalcor officials would've been in the room at one time, it was – seemed to me I was always constantly having to remind the officials at Nalcor to share the information; that EY is really an extension of government and we've asked them to go in and do this review of cost and schedule and associated risks.
So they're an extension of us and it seemed to me I was having to constantly remind people at Nalcor at the time to share the information, to work with them, to co-operate with them. And, once again, reminded them that this group is in there, if you're proud of the work that you're doing, this will only validate the work that you're doing.
And I think at this point I would like to say there's a lot of good people that work at Nalcor. There's a lot of good people that work on that project, and I know many of them. But at the executive level, we were not seeing the level of co-operation with consultants, you know, that I would've liked to see at the time. And so I was constantly reminding people to co-operate and if you're right, this will validate your work.

46. The evidence shows that by March 2016 Mr. Ball had directed, on more than one occasion, that Nalcor should cooperate with the EY project review, and that Mr. Martin should consult with

EY in his management and potential resolution of the Astaldi Canada Inc. contract issues which were perceived by the CEO as a loss of confidence in his abilities. The evidence indicates that by March 2016 Ms. Coady and Mr. Ball were actively discussing whether it was necessary to implement measures to strengthen oversight and governance at Nalcor to ensure a strong finish on the project.

47. On April 12, 2016 the EY Report was publicly released. The report concluded that the September 29, 2015 cost and schedule forecast was not reasonable at the time of the forecast, primarily due to the increased cost, schedule impacts and material risks associated with the Astaldi Canada Inc. contract. On April 14, 2016 the provincial budget was brought down and statements were made both in the Budget Speech delivered by the Minister of Finance, the Hon. Cathy Bennett, and in interviews held with the press, which were interpreted by Mr. Martin and by Mr. Ken Marshall, Chair of the Board of Nalcor, as being unfairly critical of the performance of Nalcor.

48. On April 16, 2016 Mr. Martin called Ms. Coady and requested a meeting with the Premier and the Minister of Natural Resources, which was scheduled for April 17, 2016. Ms. Coady, who arranged the meeting of April 17, 2016, described the call and meeting in her evidence at page 17:

A: Ms. Coady: He was – Mr. Martin has a very even tone, as you can appreciate because you – he’s been before you. However, he was quite animated that morning, animated for Mr. Martin, and I took it that he was quite, you know, upset and concerned, upset – you know, he referred to his family, he referred to his reputation, he referred to – that he wanted to have a meeting with myself and the Premier. I hung up the phone from Mr. Martin, I – and I spoke to the Premier. We set up a meeting for Sunday night, and that – I phoned back Mr. Martin, he said he would return to the city to have that meeting on Sunday evening.

Mr. Martin expressed his concerns around the – you know, the Budget Speech and the subsequent media. He basically said to the Premier and to me – he presented I’m gonna say three options or ultimatums. One is we come and support him and the project and he would remain; two is he could stay for a year and then depart; or three, he would – he would have- he would leave. The second option of him leaving after a year was taken off the table. Both the Premier and Mr. Martin said that doesn’t really – it really isn’t an option. So, the options were: support the project and the leadership team publicly, or

Mr. Martin would have to – would have to leave. That was what he presented to the Premier and me that evening.

49. The evidence of Mr. Ball regarding the meeting of April 17, 2016 is found at page 23 of the transcript of July 4, 2019:

A: Mr. Ball: Yeah, so coming out of the meeting on April 17 we had a frank discussion, a respectful, I would say, professional discussion. And at that meeting there was no doubt that Mr. Martin was concerned about some of the things that he'd heard about Nalcor. And the discussion was along the lines, you know, that he was asking me to publicly support Nalcor and his leadership as CEO. He had said also he could leave and the third thing that we discussed was he could actually stay a year and we'd get into some kind of transition. So now we're talking about parting ways and there was an ultimatum and I felt that this is where it was going if I did not publicly support and that's not something – I made it quite clear – that I was prepared to do. The words and language that it would've - I would've used in the meeting, that I'm not prepared to be the cheerleader for CEO – or for the CEO or for Nalcor at this point. So, we agreed. What I asked to do was take this away and would – that we would then meet again on Tuesday, April 19. And that was the second meeting that I had with Mr. Martin.

50. The evidence of Mr. Ball regarding the further meeting of April 19, 2016 is found at page 24 of the transcript of July 4, 2019:

Q: Mr. Learmonth: And what transpired at that second meeting on April 19?

A: Mr. Ball: That second meeting on April 19 – once again, we just revisited the – and summarized what happened on Sunday night. And I made it quite clear that I was not going to be a cheerleader that he was expecting me to be for him or for Nalcor at this point that we did have some serious issues that we needed to work through and that we agreed that he would step down as CEO of Nalcor the following morning.

51. The Commissioner has decided that the question of whether or not Mr. Martin was constructively dismissed as a result of what transpired is not within the Terms of Reference or the investigative mandate of the Inquiry. An issue of relevance for the mandate of the Inquiry, however, is the reasonableness and appropriateness of the response of the Ball Government, and in effect Mr. Ball, to the conditions Mr. Martin placed on his continuation as the Nalcor CEO. Mr. Ball testified about his response as follows at page 45 and page 46 of the transcript of July 4, 2019:

Q: Mr. Budden: And I don't mean that in a personal way. Were you sorry to see him gone as CEO? Did it disappoint you that he was no longer CEO?

A: Mr. Ball: I had a job to do; it was to make sure that we put – that we had the leadership in place, that we had a board in place; so for me it really wasn't about individuals. I mean anyone that would sit into a room and watch someone walk out, I mean, that's not a moment you celebrate. You know, people's lives are impacted here, there's families that are impacted. But a decision had to be made and I could not go out and be a cheerleader or a supporter- which I was asked to do – and that was the ultimatum that was given to me. I was not going to do that. And so the decision, and so- happy to see someone go, it wasn't like that. It's – you've got a job to do, I've got to now put a new leader in place and at some point we're going to strengthen the board, and we've got to protect the people of our province, you know, from a project that we saw – and I think Mr. Marshall mentioned yesterday he framed it up as a crisis- my job was to deal with the Muskrat Falls Project on top of all the other issues in 2016 that we were dealing with in this province- and there were many.

52. It is submitted that the evidence indicates that Mr. Martin placed conditions on his continuation as CEO and Mr. Ball reasonably and appropriately concluded that, of the two options presented by Mr. Martin, his departure as CEO was in the best interests of the project at that time.

53. The additional measures planned by the Ball government to strengthen oversight and governance on the project and at Nalcor were hastened by the resignation of the Nalcor Board of Directors announced on April 20, 2016 by Mr. Ken Marshall in Exhibit CIMFP P-00408 based on a loss of confidence in the Board demonstrated by the Budget Speech and by reaching directly through to terminate the CEO, Mr. Martin. As noted, the latter statement is not borne out by the evidence, however the issue of relevance for the Inquiry is the reasonableness and appropriateness of the response of the Ball Government, and Mr. Ball and Ms. Coady, to this project oversight issue.

54. Both Mr. Ball and Ms. Coady were cross-examined at length on the question of whether their response to the leadership and governance issues was timely and appropriate. Mr. Ball testified as to the measures implemented in the aftermath of the departure of the CEO and the resignation of the Board of Directors as follows at page 46 of the transcript of July 4, 2019:

Q: Mr. Budden: Might not the government – knowing that there was an unhappiness in Mr. Martin – might not the government had been proactive rather than leaving it to him, I guess, to rush back from his vacation, demand a vote of confidence, and the next thing there's this drama that unfolds in public.

A: Mr. Ball: I certainly wouldn't frame it up as being chaotic. When you look at the changes that have been made really from January of 2016, and now we find ourselves in around the April 20 timeframe so we quickly had a seat, I think, within – we'd just come off a budget – in less than a week, we just had Budget 2016 that had been out, now we're into a situation where the CEO is moving out, we got a new CEO in place swiftly. We put in – we had a new board that was in place before that week was over, if I remember correctly. So I would not consider that, you know, chaotic. We were fully in control and we had the CEO in place, we had a new board in place. Even with the board resigning en masse, we put a new board in place swiftly. So I think our response time was very appropriate and very direct given the circumstances that we were into.

Q: Mr. Budden: You would concede it was reactive rather than being proactive?

A: Mr. Ball: What I would say is we had a discussion and the outcome of the discussion was that we were gonna put in place a new CEO. I think anybody that – nobody in this province – if the CEO walked out, nobody in this province would've expected that within a matter of, you know, hours really, that we're gonna see a CEO replacing – a replacement like Stan Marshall as a new CEO of Nalcor. So you can call it reactive, if that's the word you want to us. I want to say that, you know, we appropriately responded to what we were dealing with.

55. In 2016 the Ball Government expanded the Board of Directors and also took steps in March 2017 to bring in additional subject matter expertise to strengthen the Oversight Committee established as a committee of very senior bureaucrats under the previous administration in March 2014. In 2017 EY were brought back to assess the implementation of their recommendations in the April 8, 2016 report, and EY released a report on August 31, 2017, CIMFP Exhibit P-03408 confirming the positive response of Nalcor and government to the recommendations.

56. Ms. Coady testified as follows as to the timeliness of the oversight measures implemented in the aftermath of the appointment of the new CEO in June 2016 and the replacement and expansion of the Board of Directors appointed through the Independent Appointments Commission:

Q: Mr. Budden: Okay, and you believed that those other steps were necessary, predicate steps before the Oversight Committee could be expanded?

A: Ms. Coady: I would not say one was more important than the other. You know, I think it was essential to have an expanded board of directors. That is your first level of accountability, right? So you have a, you know, a CEO that understands the project, understands what you're doing. That's the one level of accountability. The board of directors, expanded board of directors, independent board of directors ensuring that was in place was critical, and then ensuring that you have good oversight, understanding what was happening with EY, understanding where, you know, all the – implementing the recommendations of EY were all very important steps and expanding the oversight was another important step.

That's your opinion. I can tell you that my opinion is we worked as expeditiously as we could to fulfill all of our obligations. We had a project that was not performing effectively. We had important work to be done around the board of directors, important work to be done within Indigenous groups, important work to be done with some contracts. We had a situation where these things were happening in real time and there are other functions within government that were happening as well and we – the independent oversight was put in place as quickly as we possibly could. It's an important step, I completely agree, but, you know, not everything can happen in the one day.

57. It is submitted that the evidence clearly indicates that Ms. Coady and Mr. Ball acted reasonably and appropriately regarding the governance and oversight measures implemented in the aftermath of the appointment of the new CEO in June 2016 and in particular with the expansion of the Board of Directors, and the 2017 EY report and the strengthening of the Oversight Committee.

F The Concerns of the Indigenous Groups Regarding Methylmercury

58. Of the project oversight issues faced by the Ball Government since December 14, 2015, the re-assessment of the potential impact of methylmercury in the reservoir and downstream in Lake Melville has been the most challenging because of the combination of scientific, constitutional and legal issues engaged by the methylmercury issue combined with the legitimate concerns of those affected which has manifested itself in protests, hunger strikes and stress in the local communities.

59. The public calls for the re-assessment of the potential impact of methylmercury in the reservoir and downstream in Lake Melville commenced in October 2015 with the announcement of the Make Muskrat Right campaign. The campaign made four demands of the provincial government

including the establishment of an Independent Expert Advisory Committee (“IEAC”) to bring to bear independent scientific and Indigenous knowledge on the issue of methylmercury.

60. On October 26, 2016 Mr. Ball announced that his government had committed to establishing the IEAC, which is described in a press release recorded in Exhibit CIMFP P-04156, as follows:

“The IEAC will be mandated to see an independent, evidence-based approach that will determine and recommend options for mitigating human health concerns relating to methylmercury throughout the reservoir as well as in the Lake Melville ecosystem. Mitigation measures will be realized through utilizing best available science that incorporates Indigenous Traditional Knowledge. The full mandate of the IEAC continues to be refined.”

61. In their evidence before the Inquiry the representatives of the Nunatsiavut Government confirmed that the wording of the press release describing the specific commitment made by Mr. Ball on behalf of the Ball Government had been reviewed by the Indigenous groups, and the wording was jointly agreed upon, prior to its release.

62. The evidence before the Inquiry further demonstrates that prior to making that commitment significant work had been done by the Ball Government in 2016 to address the legitimate concerns raised by the Indigenous leadership and the local communities by better understanding the issue of possible methylmercury impacts in Goose Bay and Lake Melville. That work included holding scientific workshops in the spring and summer of 2016 and establishing a water quality monitoring program in September 2016 prior to the initial phase of flooding of the reservoir.

63. Recognizing the complexity of the issue, and the constitutional rights of the Innu Nation in the project area, the IEAC commitment made on October 26, 2016 was an attempt to develop a consensus-based approach to addressing the concerns through an independent information-gathering and advisory body that would provide recommendations to government which would inform its decision-making process.

64. The IEAC finalized its Terms of Reference in or around March 2017 and a Chair was selected by the voting members on August 4, 2017 and at that point the IEAC work began. There were three recommendations received from the IEAC in September 2017, which the Ball Government immediately accepted, the completion of a feasibility study for physical mitigation measures, the recommended changes to the methylmercury monitoring program established in the prior year, and the finalization of the Nalcor methylmercury modelling study by February 2018.

65. On April 10, 2018 four further recommendations received from the IEAC. Three of the four recommendations were made on a unanimous basis, and the Department of Municipal Affairs and Environment developed a position in response to these recommendations. The fourth recommendation regarding physical mitigation within the reservoir area was supported by a majority of voting members only, and was opposed by the Innu Nation the Indigenous group holding aboriginal rights in the reservoir. On April 24, 2018 the Ball Government received a letter from the Innu Nation, Exhibit CIMFP P-04172, which opposed any clearing of soil and vegetation in the reservoir, citing an absence of scientific data to support the recommendation and concerns that serious environmental impacts could result.

66. The evidence of Mr. Ball regarding the establishment of the IEAC, the work of the IEAC, and the position of the Innu Nation on the physical mitigation measures recommended by the IEAC is found commencing on page 18 of the transcript of July 5, 2019:

Q: Ms. Brown: So, yesterday you spoke about how, in 2015, a report called the Calder report was released. And you would agree that that report predicted the methylmercury levels caused by flooding the Muskrat Falls reservoir were going to be much higher than had been previously been anticipated. Is that correct?

A: Mr. Ball: Yes.

Q: Ms. Brown: And you're aware, of course, that the report caused serious concern, especially for people who eat country food and could be affected by these higher levels of methylmercury.

A: Mr. Ball: I am.

Q: Ms. Brown: And you're also aware that Innu Nation members specifically, as the Indigenous rights holders in the Muskrat Falls area and as the Indigenous people in closest proximity to the reservoir, were very concerned about the report and these possibly higher levels of methylmercury. Is that fair to say?

A: Mr. Ball: It is fair to say, to the point they wrote a letter to me, as I mentioned yesterday, just a couple weeks after the recommendations were released.

...

Q: Ms. Brown: And you've spoken about the steps that your government took to address the concerns that were raised by the Calder report. You've spoken about the workshops and then later striking the Independent Expert Advisory Committee. Is that correct?

A: Mr. Ball: It is.

Q: Ms. Brown: And I don't expect you to be familiar with the inner workings of that committee, but we've been hearing evidence, the Commissioner has been hearing evidence on this. And we've heard that the IEAC's expert committee considered the Calder report, as well as other research, and it did its own analysis to look at mitigation possibilities. Is that your understanding?

A: Mr. Ball: That's my understanding.

Q: Ms. Brown: Okay. And we've also heard that the expert committee made unanimous recommendations on monitoring, management of human health, but not on mitigation. And that's something that you, of course, are aware of.

A: Mr. Ball: I am.

Q: Ms. Brown: You stated yesterday that it was your understanding that four of the six western scientists on the expert committee did not support and were not in favour of soil and vegetation removal. Is that correct?

A: Mr. Ball: It is.

Q: Ms. Brown: Is it your understanding that there were concerns raised but those scientists about possible unintended impacts that soil removal suggestion? So, potentially more methylmercury being released by that option?

A: Mr. Ball: Yes.

Q: Ms. Brown: And you are, of course, familiar with the position that Innu Nation took on the mitigation option. Is that correct?

And is it your understanding that Innu Nation opposed soil removal because of the risks associated with it – so this potential for greater methylmercury release into the water?

A: Mr. Ball: That's my understanding.

Q: Ms. Brown: Okay. The Commission has been hearing evidence that the Calder report's model predictions have not been borne out by the recent monitoring results. Is that your understanding as well?

A: Mr. Ball: It is. And those – that's – this data is publicly available.

67. The question has been raised whether Mr. Ball and the Ball Government intentionally delayed responding to the IEAC recommendations of April 10, 2018 in order to make it impossible to carry out physical mitigation measures in the reservoir. Witnesses have also questioned whether

the commitments made by Mr. Ball on behalf of the Ball Government were made honestly and sincerely at the time on October 26, 2016.

68. With the greatest respect, Mr. Ball and Ms. Coady completely reject the suggestions that Mr. Ball was party to any plan or scheme to delay responding to the IEAC recommendations, or that Mr. Ball was insincere in making the commitments to the Indigenous groups on October 26, 2016.

69. Mr. Ball's evidence regarding the question of whether there was intentional delay on the part of the Ball Government commences at page 5 and page 6 of the transcript of July 4, 2019:

Pages 5-6

Q: Mr. Learmonth: Do you agree that on January 14, 2019 government was advised by Nalcor that it was no longer feasible to carry out the wetland capping remediation work. At that point it was just too late and that was subsequently – the fact it was too late was subsequently confirmed by SNC-Lavalin. Do you agree with that generally?

A: Mr. Ball: In Mid-January the confirmation there would have been about pre-impoundment and that would have been the first that we would have heard-that I would have heard about the window had closed around pre-impoundment. Up to that point, we were committed to do this, along with the work that would have been done with the fish habitat conservation plan. And that was, you know, our thoughts through all of this and it was very frustrating for me to find out that that window had been closed around pre-impoundment. So, I immediately engaged officials to look for what a new approach would be and other opportunities.

...

A: Mr. Ball: ...when you look at the capping and the impact that it would have on methylmercury, the overall impact would have been intangible when you look at somewhere between 1 and 2 per cent. I've been keenly watching and closely watching all the data on methylmercury with the new monitoring plan that we would have in place. So we've been watching that, and certainly the plan – even though the benefits would've been intangible and very minimal, we were still prepared and wanted to – and I know Nalcor wanted to, I wanted to and I know the minister's comments the other – a few days ago, properly reflects the view of government, that we wanted to do wetland capping, even though the impact wouldn't been intangible. There was still a lot of anxiety and stress that had been created by people who had been watching this closely and that was a commitment that I made and one that I wanted to follow through on.

Q: Mr. Learmonth: Now, Ms. Coady, if you're familiar with her evidence, said that government's delay in directing Nalcor to carry out wetland capping remediation measures was not intentional. That position that: was it potential, was put to her and she said no, that's simply not the case.

Do you agree with what Minister Coady said on that, that it was not intentional to delay the direction to Nalcor to provide wetland capping until it was too late to do so?

A: Mr. Ball: I absolutely agree with that. There was nothing intentional. No plan to delay capping – wetland capping.

A: Mr. Ball: Yeah, so I would've been through a number of presentations on methylmercury and the impacts of methylmercury in our plan. And at no point was I ever given any information to say that the window had been closed and that the fish habitat was moving forward.

Nalcor had asked for a permit back in July of 2018, and so if there was a gap to be found here or work that was not completed it would've been in Municipal Affairs and Environment.

Q: Mr. Learmonth: And were you taken by surprise when you found out that the time had passed?

A: Mr. Ball: Very much surprised.

Q: Mr. Learmonth: Okay. Because that interfered with the plan that you had decided to implement – you, as Premier, decided to implement, together with the support of Cabinet. Is that correct?

A: Mr. Ball: Well, the commitment that I had made to the Indigenous – regardless of the impact being tangible or intangible, it's a commitment that I wanted to see through and follow through on. And so, we've engaged the Indigenous groups right now in conversations that we best – we can actually look at what the next steps would be and how to deal with this.

70. Other key references in the evidence of Mr. Ball regarding this issue are found at page 77, page 78 and page 79 of the transcript of July 4, 2019:

Page 77

Q: Ms. Urquhart: We've also heard information that July – in July of 2018, Nalcor applied for a permit for wetland capping. Do you have any information as to why that wouldn't have been approved?

A: Mr. Ball: No, I don't. It was my intention, to actually do wetland capping. We could not do, you know, soil removal based on the fact that we had a number of the scientists at the time – four of the six who were making statements that if you had – if you did soil removal you could potentially increase the level of methylmercury in the reservoir and downstream.

So it was always my intention to do wetland capping and – to the point where there were a number of presentations that would've been given to me and – this was always going to be done concurrent with the Fish Habitat Conservation Plan. And, we (inaudible) to the point where we took this to

Cabinet in January the 9th of this year – and continued to proceed with wetland capping. A few days after that, I became aware that this was posing some problem and that the fish habitat, you know, program had been finished and that the – we’re now having to explore what other options that we would have available to us.

A: Mr. Ball:

Well first of all, my understanding is that this was an amendment to a permit that was already in place for the Fish Habitat Conservation Plan. And so what they wanted to do was amend that permit to allow for wetland capping and that was submitted to the Department of Municipal Affairs and Environment in July of that year. So why the approval wasn’t given, it was not something that I was aware of until just a few months ago.

The other issue was that the wetland capping, even though there was maybe not a tangible – you know, not a tangible – anything tangible to decrease methylmercury, there were intangible benefits, in my mind. There’s been a lot of anxiety, a lot of stress that have been – that this has caused on the people in this area. And even doing something intangible like wetland capping was something that I wanted to do, and I can assure you that, you know, Mr. Marshall wanted to do this as well.

pages 78-79

A: Mr. Ball:

It’s been increasingly frustrating for me when I find out that we could not do wetland capping simply because the permit was not approved, I had numerous discussions with – on the data around methylmercury levels in the reservoir and in Lake Melville, and the issue around having a permit never came up. I was – I always wanted to do wetland capping. There was nothing here to purposely delay wetland capping. It was not the intent at all. It was something that I’ve always wanted to do.

71. Ms. Coady’s key evidence regarding this issue commences on page 28 and page 29 of the transcript of her sworn evidence of June 27, 2019:

Page 28

Q: Mr. Learmonth: Can you bring us up to date as best you can on where this stands?

A: Ms. Coady: Certainly, happy to do so. This is a very important and complex conversation and discussion, and one which government in general takes extremely seriously and respects and recognizes the concerns. So I can tell you that most recently – so I’ll start with what’s happening most recently and we can go backwards. But, most recently, the Premier, as minister with responsibility for Indigenous Affairs, has met with the groups, the Indigenous Affairs leadership, to discuss what I’m going to say the overview and the requirements coming out of the IEAC, and ensuring that a committee is struck to ensure that they are implemented, and that I understand that all three groups now have responded to the terms of reference for that – for the new committee. I can tell you that the recommendations coming in the IEAC,

around monitoring and around human health and around the food security, have – you know, have had tremendous amount of work done on them. And I could tell you that there is a respect for ensuring that everything that can be done should be done, is done. You’ll appreciate that as Minister of Natural Resources responsible for Nalcor, that I have an interest and a role, but I am not the regulator of the environment – and ensure that I am not overly influencing that decision-making process. I respect the parameters around such, but I do follow it with interest and I can tell you, with sincerity, there is a genuine respect for the concerns and making sure that everything that is done can be done.

Page 29

Q: Mr. Learmonth: ...And although there was no commitment to be – that the government would be bound by the findings of the IEAC, there was certainly an implied obligation to treat any recommendations in good faith. Do you agree?

A: Ms. Coady: Yes. I – and I would say that there was – this has been a – methylmercury has been dealt with sincerity and concern since that time.

Q: Mr. Learmonth: Okay.

72. The next references in the evidence of Ms. Coady regarding this issue are found at page 30 and page 31 of the transcript of June 27, 2019, referencing CIMFP Exhibit P-04242:

Page 30

Q: Mr. Learmonth: ...And it lists government’s response, one of which, on page 3, says: “Based on lack of consensus, uncertainty in the theoretical modelling approach, possible adverse environmental effects of soil removal, Innu land claims and the fact that nowhere has soil removal for reservoir preparation to reduce MeHg ever been carried out, soil removal recommendation will not be accepted.” So, that’s the end of that, I guess. But then it says: “Recognizing that wetland capping has very little theoretical benefit, it does give some long term benefit and does not present any environmental risks. It will be combined with fish habitat compensation. Wetland capping is therefore accepted.” So based on what this document clearly states, as of January 10, 2019, do you agree that the recommendation for wetland capping was accepted by government?

A: Ms. Coady: That’s what I understand.

Page 31

Q: Mr. Learmonth: In other words, why did it take government – why did government not get on this issue after the recommendation had been accepted and tell Nalcor, don't do anything to interfere with our plan to do wetland capping until we get back to you – how did this left hand not knowing, what the right hand was doing occur? It's difficult to understand. Do you agree?

A: Ms. Coady: I can only say that, again, you're asking for the involvement of what occurred in Municipal Affairs and Environment and with Nalcor. I can say that Nalcor and SNC-Lavalin in particular had indicated the timelines and requirements. I can't tell you what occurred in another department, but I can tell you that it was – that SNC-Lavalin had prepared reports for the IEAC indicating timelines and indicating what needed to occur.

Q: Mr. Learmonth: But you agree there's a disconnect here?

A: Ms. Coady: There's a timing – there's definitely a timing issue here. I agree with that, that where one indication is, you know, we have a timing sensitivity on getting wetlands capping done prior to -...

73. The next reference in the evidence of Ms. Coady regarding this issue is found at page 34 of the transcript of June 27, 2019:

page 34

Q: Mr. Learmonth: Yeah. But government either didn't know this, or knew it and decided to sit on its hands, I suggest. It's only one of – it's got to be one of the two.

A: Ms. Coady: I don't see any attempt – and again, I'm not the regulatory authority on this – but I don't see any attempt, to be quite frank with you, within government to not address this issue.

Q: Mr. Learmonth: Okay.

A: Ms. Coady: Whether the timing is of concern, whether there was – you know, whether there was a time lag, I can't comment. But I can tell you, with sincerity and honesty, that I don't see a deliberate attempt within government not to address this (inaudible) –

Q: Mr. Learmonth: You're not aware of any deliberate attempt?

A: Ms. Coady: I am not- absolutely not – aware of any deliberate attempt. I see sincerity in trying to address –

Q: Mr. Learmonth: Okay.

A: Ms. Coady: -the concerns.

Q: Mr. Learmonth: Oh, okay.

A: Ms. Coady: Even though the methylmercury levels are still low, I see a sincere attempt by all involved to try and address it.

Q: Mr. Learmonth: And do you agree, though, that just because you believe that government was sincere in its attempt to deal with the issue, that it's possible – and that you were sincere, it's possible that others in government weren't sincere?
Do you recognize this possibility?

A: Ms. Coady: That would be – again, you know, that's a supposition. I can say that I have not observed –

Q: Mr. Learmonth: Right.

A: Ms. Coady: -that attitude within government.

Q: Mr. Learmonth: Yeah.

A: Ms. Coady: I have not observed in any of my dealings with other departments or with – or with any officials –

74. The next references in the evidence of Ms. Coady regarding this issue are found at page 36 of the transcript of June 27, 2019:

page 36

Q: Mr. Learmonth: I suggest to you that there's been a failure by government – I'm not talking about you, personally – but a failure by government to properly, responsibly and in good faith address the legitimate concerns of the Indigenous groups.
Can I have your comment on that, please. A failure.

A: Ms. Coady: If there is, I do not think it's deliberate. And I – I take your words sincerely and I understand how passionate people are about this very important issue and I'll again say I believe that government has been responsive to – trying to address the concerns that have been raised. I will also point out, scientifically, that there has – the levels of methylmercury have been not significantly risen-raised, and I will point out that wetland capping only would attribute to 1 to 2 per cent of the mitigation of methylmercury, should it be raised. Having said that, I understand the passion and I understand the concern that – and it would've been helpful if there had been a, you know, a different outcome here.

75. The next references in the evidence of Ms. Coady regarding this issue are found at page 37 of the transcript of June 27, 2019:

Page 37

- Q: Mr. Learmonth: And I'm going to say that after reviewing the documents that we've just gone through that a clear question emerges or arises as to whether government was serious or sincere about ever implementing their mediation work with respect to alleviating the methylmercury problem. And I think that's confirmed by the document I just referred to, P-04248. It was on the mind that someone anticipated questions. Anyway, so we do know that there is a body of public thought that – and perhaps in Indigenous communities in particular- that government was just stalling and scheming and extended the talk on capping the wetlands until such a time when the full impounding of the reservoir would make this work impossible. Now, what is your response to such a position?
- A: Ms. Coady: Why would government do that? Why would – how would that have been helpful? Wetland capping would've – would cost somewhere in the vicinity of \$20 million. And I think that's the number that I understand, somewhere in that vicinity. And if – I don't – I wouldn't understand why there would be that attitude within government, to be honest with you, and I'm being as sincere as I can be.
- Q: Mr. Learmonth: Right.
- A: Ms. Coady: Why would government take that approach? I'm –
- Q: Mr. Learmonth: Well, I can't answer that for you.
- A: Ms. Coady: Were there mistakes made – because you asked that question. If there were, I don't think they were deliberate.
- Q: Mr. Learmonth: Okay. That's an answer.
- A: Ms. Coady: And I'm being – like, it wouldn't – there would be no benefit to, I think you used the term, maliciously or –
- ...
- Q: Mr. Learmonth: -Scheming
- A: Ms. Coady: scheming, okay. That was the word I was trying to recall. I don't see that. I don't see why that would be the case, but there – you know, so I don't think that there were – that was the – that was being done.

76. The final reference in the evidence of Ms. Coady regarding this issue is found on page 92 of the transcript of June 27, 2019:

- Q: Ms. Urquhart: So I take it from that perspective, from the perspective of beyond monitoring - and I know that you've indicated a lot of work went into the – sort of first three recommendations, but on that fourth one, it appears that the government really took a wait-and-see approach.
- A: Ms. Coady: I don't believe they took a wait-and-see approach, that is not my understanding. My understanding is that they were reviewing the recommendations. So I cannot classify them as a wait-and-see. I can only classify them as they were analyzing the work that was done and seeking to ensure that it was the appropriate response. I cannot speak to the time delay.

77. With respect to the current status of the response to the issue, a reference in the evidence of Mr. Ball regarding this issue is found on page 23 of the transcript of July 5, 2019:

Page 23

Q: Mr. Cooke: So, based on that kind of document, we have not gotten a formal response from the Government of Newfoundland and Labrador to date, correct?

A: Mr. Ball: The response would've been, you know, bringing the Indigenous leaders together – and I think it was around April 8 of 2019. There was a letter that I wrote to the Indigenous groups to actually put together a group to implement the recommendations of the IEAC, and so this would have been a very formal response. Matter of fact, it was a draft terms of reference that would've been provided for them to begin to work on and provide their input on those draft terms of reference. However, I would say that during this time we were collecting – or collecting significant data around methylmercury and this decision would have been very important before you could actually formally make a decision on what you would do in the area. And as I've said, you know, many times, I think there's some 1,300 samples that have been collected, publicly available and we're not seeing the level of increases in methylmercury that Calder were predicting. And it was unfortunate because the IEAC, in the great work they did, did not have access to this information when the final recommendations were had. So it was important before we do anything finally that we actually had this data to be shared with all members as well. And I know some of them were monitoring this closely, with the methylmercury levels within the reservoir and downstream.

78. It is submitted on behalf of Mr. Ball and Ms. Coady that the evidence demonstrates that throughout the summer and fall of 2018 the Ball Government, and Mr. Ball personally, continued to track the data from the reservoir and Lake Melville which did not support the predicted increase in methylmercury or the existence of a risk to human health. The consensus recommendation, the capping of wetlands, had been recommended to government by the IEAC and Mr. Ball fully supported the implementation of that measure. In November 2018 the Department of Municipal Affairs and Environment formally recommended in written presentations that government decide to accept that recommendation on the understanding that this wetland capping work could be carried out before impoundment. A Cabinet paper was prepared and the formal decision was made by

Cabinet on January 9, 2019 to direct Nalcor to carry out the capping prior to impoundment at the same time as it was conducting fish habitat restoration work ordered by DFO.

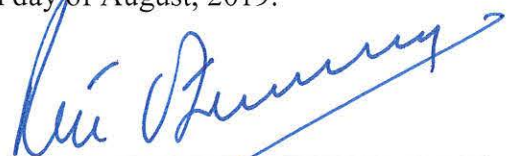
79. This response on the part of the Ball Government to the concerns raised regarding the potential environmental impacts of methylmercury in the reservoir and downstream in Lake Melville was reasonable and appropriate, and there is absolutely no evidence Mr. Ball failed to conduct himself in good faith in dealing with the issue.

80. There is no evidence that Mr. Ball, or the Ball Government, intentionally delayed responding to the IEAC recommendations of April 10, 2018 in order to make it impossible to carry out physical mitigation measures in the reservoir. The error resulted from a miscommunication and while it was unfortunate the evidence indicates that implementing the measure would have only had an intangible impact as there has been no evidence of increases in methylmercury from flooding the reservoir.

PART III - CONCLUSION

81. It is respectfully submitted that the evidence demonstrates that the responses of Mr. Ball and Ms. Coady to each of the project oversight issues reviewed herein were generally reasonable and appropriate, and that they have both conducted themselves in good faith in dealing with the issues.

ALL OF WHICH is respectfully submitted this 9th day of August, 2019.



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SCHEDULE A – EXHIBIT REFERENCE

Paragraph Reference	Exhibit Reference	Page Reference	Document Description
31	P-03452	All	Natural Resources Release – “Responsible Management of the Province’s Investment: Government Opens Books on Muskrat Falls Project” December 21, 2015
32	P-02676	Page 46	Transition Team Presentation – December 3, 2015
37	P-01984	All	EY Interim Report, April 8, 2016
38	P-03589	All	Nalcor Briefing Note – Implications of Cancelling or Significantly Delaying the Muskrat Falls Project, March 7, 2016
53	P-00408	All	Email from Ken Marshall to Dwight Ball and Siobhan Coady re: Nalcor dated April 20, 2016
55	P-03408	All	EY Report – Muskrat Falls Project Assessment of Implementation of EY Interim Report Recommendations, dated August 31, 2017
60	P-04156	All	Press Release re: Provincial Government and Indigenous Leaders Make Significant Progress on Muskrat Falls Issues, dated October 26, 2016.
65	P-04172	All	Letter from Innu Nation to Minister of Municipal Affairs and Environment dated April 24, 2018
72	P-04242	Page 3	Information Note – Department of Municipal Affairs and Environment – Government’s Response to the IEAC Recommendations on Methylmercury, dated January 10, 2019