

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

**Commissioner: Honourable Justice Richard LeBlanc**

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**FINAL SUBMISSION**

**On Behalf of the Former Nalcor Board of Directors (2004-2016)**

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## Introduction

1. On April 20, 2016, the Board of Directors of Nalcor resigned enmasse from their position as board members. On November 20, 2017, the Government of Newfoundland and Labrador established a Commission of Inquiry respecting the Muskrat Falls Project pursuant to section 3 of the Public Inquiries Act, 2006, S.N.L. 2006 c. P38.1. (the “Commission” and/or the “Inquiry”). Ken Marshall, Tom Clift, Gerry Shortall, Terry Styles and Leo Abbass, applied for, and were granted, limited standing at the Commission and were designated by the Commission as the Former Nalcor Board of Directors, 2004-2016 (the “Nalcor Board” and/or the “Board”). Standing was limited to evidence which specifically related to one or all of the Board members and their reputations. On October 15 & 16, 2018 each of Ken Marshall, Tom Clift, Gerry Shortall and Terry Styles appeared as a panel and provided evidence to the Commission (the “Panel”). On June 10, 2019, Ken Marshall was again called to testify at the Commission. Leo Abbass was not called as a witness to the Commission.

## The Board and Good Corporate Governance

### ***Ken Marshall***

2. Ken Marshall obtained a B.Comm., Honours from Memorial University of Newfoundland in 1984, followed by a M.B.A. (Finance) from Dalhousie University in 1985. He also completed the Executive Management Program (Telecommunications Industry) at Harvard University in 2009.

3. Mr. Marshall has over 25 years of experience in the telecommunications and information technology industries. He began his lengthy business career with the Institute of Canadian Bankers in Montreal, Quebec from 1987-1990. In this role, Mr. Marshall was responsible for directing and leading the development and execution of university level programs for financial institutions within Canada and internationally.
4. During the remainder of his working career he was employed by Cable Atlantic, later Rogers Communications. From 1990-2001, he was employed as Senior Vice President of Finance and Business Development for Cable Atlantic and was responsible for all operational aspects of that company including marketing, customer service and technical operations. From 2001-2016, he was engaged as Regional President (Atlantic Region) as well as Vice President of the Enterprise Business Unit for Rogers Communications. Upon the acquisition of Cable Atlantic by Rogers Communications, Mr. Marshall was the lead of integration and direction for Rogers in Atlantic Canada. Following a brief two-year retirement from 2016-2018, he returned to Rogers as Senior Vice President for National Residential Marketing in Toronto, Ontario.
5. From 2004 to 2016 Mr. Marshall was a board member and latterly Chair of the board of Nalcor and its subsidiaries. He has also served as a board member, Chair and past Chair of Special Olympics Newfoundland and Labrador; a board member with the JUNO Awards; Memorial University of Newfoundland & Faculty of Business Administration; and the Atlantic Provinces Economics Council.

6. Mr. Marshall was first appointed to the Newfoundland and Labrador Hydro Board by the Lieutenant Governor in Council in August of 2004 and was then appointed to the board of Nalcor Energy in October of 2007. In order to implement the work of Nalcor, several other subsidiaries were formed that required board members. As a result, Mr. Marshall also served on the board of Nalcor Energy Marketing Corporation, Labrador-Island Link General Partnership Corporation, Muskrat Falls Corporation, Churchill Falls (Labrador) Corporation, Nalcor Energy Oil and Gas, and Nalcor Energy Bull Arm Fabrication Inc.
7. When asked by Commission Council to describe the workload while serving on these Boards, Mr. Marshall stated that he put in approximately 100 hours per month as a board member.

**MS. O'BRIEN:** Mr. Marshall, I'll go to you next because on top of the work of a regular board member, you were chair or acting chair of the majority of the boards. And that would be in the 2014-on period, which we'll get to.

**MR. K. MARSHALL:** Correct.

**MS. O'BRIEN:** So trying to get a sense of when you had those additional roles, what would've been your workload?

**MR. K. MARSHALL:** Well, I can certainly echo. I never did want to tally it up because, you know, the numbers – the hours were astronomical, quite frankly. And trying to – with a family as well as full-time work besides, it became – it was rather onerous but we did it, we all did it. And I don't think the word "fiduciary" has been mentioned yet, but we did it with a complete respect to the fiduciary duty of the organization and a love of the province and a desire to see this organization, and the projects therein, succeed for the long-term benefit of the people of the province. So we put in, as Gerry indicated, perhaps, a hundred hours per month last going off and last going off would've been more, quite frankly, as the – as over the 12 years of my period of being on the board, going from being just on the board of Newfoundland and Labrador Hydro, ultimately to eight organizations as well besides, the level of activity ramped up considerably as the issues got more complex and more public and more, I guess, contentious. So it was a considerable amount of time,



considerable amount of activity and your – you know, you were working every night and weekend, your spare hour with respect to Nalcor and associated entities' activities.

**MS. O'BRIEN:** So you're talking about, you know, a hundred hours or more every month. I mean, that's – you know, most people work a, you know, 40-hour workweek.

**MR. K. MARSHALL:** Yup.

**MS. O'BRIEN:** So that is, you know, more than a part-time job. You – I know Mr. Shortall was retired at the time. You were working full-time.

**MR. K. MARSHALL:** Yeah.

**MS. O'BRIEN:** A very significant position –

**MR. K. MARSHALL:** Yeah.

[Transcript -Phase 1, October 15, 2018, Volume 17, pp. 15-16]

### ***Tom Clift***

8. Tom Clift obtained a B. Comm from Memorial University followed by a M.B.A. (Marketing Strategy) from Dalhousie University. In 2003 he received a Ph. D in Marketing and New Product Development from the University of Western Ontario. Mr. Clift also completed the Institute of Corporate Directors of Canada program and earned the professional designation of ICD.D from the University of Toronto in 2015. ICD.D is a group of professionals who are qualified to sit as board members on any board in Canada, primarily with a focus in the private sector.
9. Mr. Clift has been employed with the Faculty of Business Administration at Memorial University for the past 35 years, retiring in 2019. From 1983-2000 he was an Assistant Professor of Marketing Strategy and Marketing Communications. Mr. Clift then became an

Associate Professor of Marketing Strategy and New Product Development. During his time as an Associate Professor, Mr. Clift also served two terms as Associate Dean (Academic), Faculty of Business Administration.

10. In addition to serving on the boards of Nalcor and subsidiaries, Mr. Clift has been a member of the boards of the St. John's IceCaps; the Boys and Girls Club of Canada (vice chair of board and chair of the Governance Committee); the St. John's Sports & Entertainment; the Inaugural Board of the Johnson Geo Centre; the Newfoundland Chapter of the Canadian Special Olympics; the St. John's YM-YWCA; and the Fishing Industry (MOU)Steering Committee – a group tasked by the government of Newfoundland & Labrador (past chair).
11. Mr. Clift was also initially appointed to the Newfoundland and Labrador Hydro Board in 2005 and appointed to the board of Nalcor Energy in October of 2007. Additionally, he sat on the boards of Nalcor Energy Marketing Corporation, Labrador-Island Link Holding Corporation, Lower Churchill Management Corporation, Labrador Transmission Corporation, and the Muskrat Falls Corporation.
12. When questioned on his workload as a member of the Nalcor Board, Mr. Clift explained that he was typically engaged in matters of the Board for approximately 80 hours per month.:

**MS. O'BRIEN:** Okay. Mr. Clift, I'll go to you. Was your workload similar or do you – did you have a different experience?

**MR. CLIFT:** I would say my workload was similar. It would not have been quite of the magnitude of Mr. Shortall because those who are experienced with boards would know that the Audit Committee,

in particular, requires significant attention to detail, and Mr. Shortall had mentioned his review of financial statements and oversight of the accounting processes within the various entities... But if Mr. Shortall said a hundred hours, I would probably say 80 hours –

**MS. O'BRIEN:** A month.

**MR. CLIFT:** – in the same period of time, yes....

**MR. CLIFT:** And we did that, I would note, with the unqualified support of our families....

**MR. CLIFT:** Because when we were working – you know, if we were here for an all-day meeting on Friday, I personally was at my desk on Sunday to make sure I was ready to do the things I was supposed to do at the university on Monday, which meant time away from family. And they, like us, believed in the intent of the project and supported us.

[Transcript - Phase 1, October 15, 2018, Volume 17, p. 16]

### ***Gerry Shortall***

13. Gerry Shortall commenced his career in the public accounting profession in 1967 and obtained a C.A. designation in 1972. Mr. Shortall worked his entire career with Ernst & Young LLP and its predecessor firms. In 1977, Mr. Shortall transferred to Toronto as a Senior Audit Manager and in 1979 he was admitted to partnership, returning to this Province as an audit partner. In 1986, Mr. Shortall transferred to the firm's national office in Toronto as a partner in the National Audit Standards Department, assuming national responsibility with Ernst & Young LLP as Director of Audit Quality Control and Director of Audit Automation for the Canadian firm. Additional responsibilities included the development and instruction of courses for the continuing education of partners and senior managers of Ernst & Young, LLP. During this period, he also acted as technical advisor to the Ernst & Young International Technology Committee. From 1991-2004 Mr. Shortall returned to practice in Toronto and assumed responsibility for a variety of clients in various industries including

many publicly traded corporations, while specializing mainly in technology and the telecommunications industry.

14. From 1982-2002, Mr. Shortall was retained as a consultant and advisor to a succession of Auditors' General of Newfoundland and Labrador. His primary services included "Challenge Reviews" of all Auditor General reports prior to their presentation to the Legislature. Mr. Shortall was responsible for dealing with complex accounting and auditing issues presented to him in the context of government departments, crown corporations and agencies. He retired from public practice in 2004.
15. In addition to his service on the boards of Nalcor and its subsidiaries, Mr. Shortall was appointed to the board of a publicly traded Canadian company, Aastra Technologies Limited in 2005 with his mandate being to improve corporate governance practices. As a Director of Aastra Technologies Limited he was Chair of the Audit Committee, a member of the Corporate Governance and Nominating Committee and a member of the Compensation Committee. In addition to his service on the Aastra, Mr. Shortall was elected as President of the Board of Directors of St. Andrew on the Green (Toronto Standard Condominium Corporation 1839) and is currently the Vice-Chair of the Financial Council of Our Lady of Sorrows RC Parish, Etobicoke.
16. Mr. Shortall was initially appointed to the Newfoundland and Labrador Hydro Board in 2005, and like Mr. Marshall and Mr. Clift, was subsequently appointed to the Board of Directors for Nalcor Energy in October 2007. He also served on the boards of Nalcor Energy Marketing Corporation, Labrador-Island Link General Partnership Corporation,

Labrador-Island Link Operating Corporation, Muskrat Falls Corporation, Churchill Falls (Labrador) Corporation, Nalcor Energy Oil and Gas, and Nalcor Energy Bull Arm Fabrication Inc.

17. When asked about the workload involved in serving on these Nalcor related boards, Mr. Shortall explained that his commitment to the 9 boards and 3 committees required him to fly to Newfoundland from Toronto on a regular basis for meetings and was required to spend approximately 100 hours per month on board related matters:

**MS. O'BRIEN:** Okay. So, now, I'm going to stay with you, Mr. Shortall, and I'm going to ask you to address, just, you know, your workload in doing all this work. So we've described you're on a number of boards, you're chair of a couple of them. You're chairing the Audit Committee, which is, I know, a very important committee for both, you said, CF(L)Co and for Nalcor. I understand there would be board meetings that you had to go to, annual general meetings. There would be preparation for those meetings. Can you please give the Commissioner some sense of how much time were you spending on these activities? How – what did it take?

**MR. SHORTALL:** Yes. So nine boards and three committees: hundreds of meetings over the years. I was thinking about it yesterday. I think I came up with probably a hundred hours a month in preparation and attendance time. And then, of course, I'd have travel time because I'd be coming down from Toronto for meetings.

**MS. O'BRIEN:** So were you flying down typically for meetings?

**MR. SHORTALL:** Yes, so quite a bit of time. And, you know, for a four-hour meeting, you'd probably spend at least four hours in preparation time. And we'd get big binders like these for pretty much every board meeting and committee meeting.

**MS. O'BRIEN:** Okay.

**MR. SHORTALL:** And then, of course, there were – you know, as chair of Audit, I had to meet with the external auditors, the internal auditor. They have meetings that are not part of board meetings or committee meetings that took up extra time as well.

***Terry Styles***

18. Terry Styles obtained a B.Ed. (Physical Education) from Memorial University. In 1991 he commenced work with Labatt Breweries Canada, and he remained there for 8 years holding several sales and sales management positions across Newfoundland and Labrador, Nova Scotia and Alberta. Mr. Styles subsequently returned to Newfoundland and Labrador and founded a distribution and transportation company, Appalachia Distributing Limited. Currently, he is acting President and General Manager of this company. Mr. Styles established another company in 2009, Nakyska Holdings Inc., which specializes in residential land development.
19. Mr. Styles' has sat on the boards of the College of the North Atlantic (chair, past chair and member of all standing committees); and the Joint Oversight Board, College of the North Atlantic, Qatar.
20. Mr. Styles was appointed to the Board of Directors for Nalcor Energy in 2012 and also served on the boards of the Labrador-Island Link General Partnership Corporation, Muskrat Falls Corporation, Churchill Falls (Labrador) Corporation, Nalcor Energy Oil and Gas, Nalcor Energy Bull Arm Fabrication Inc.
21. When testifying about how much time he was required to devote to these boards, Mr. Styles indicated that he spent approximately 20 hours per week – or 80 hours per month – reviewing documents and attending board meetings. He was also required to travel to and from Stephenville to attend meetings, most of which took place in St. John's.

***Leo Abbass***

22. Leo Abbass obtained a B.A. (Political Science) in 1975 and his B.Ed. in 1976, both from Saint Mary's University in Halifax. Mr. Abbass worked as a teacher in Labrador throughout his career. From 1976-1978 he taught in Davis Inlet, and from 1978 until his retirement in June of 2005 he taught in Happy Valley-Goose Bay. Mr. Abbass was appointed to the Board of Directors for Nalcor Energy in the summer of 2012.
  
23. In addition to sitting on the boards of Nalcor and its subsidiaries, Mr. Abbass has served as a municipal councilor and Deputy-Mayor in Happy Valley-Goose Bay from 1998-2003 when he began a 10-year term as its Mayor. During his tenure as Mayor, Mr. Abbass sat as the Council's representative on the Combined Councils of Labrador, represented Happy Valley-Goose Bay on the Urban Municipalities Committee, and was the Central Labrador representative with Destination Labrador. From 1990-1993 Mr. Abbass served on his local branch of the Newfoundland and Labrador Teachers' Association, first as branch Vice President and then as branch President for 2 years. Mr. Abbass also served on the boards of Goose Bay Citizens Coalition (past chair), Goose Bay Airport Commission, Municipalities Newfoundland and Labrador (past chair of Transportation Committee), and Labrador Winter Games. Mr. Abbass is a very active member of his community, having been involved in Minor Hockey, Minor Soccer, Knights of Columbus, Amaruk Gold Club, and Childhood Development Association, among other organizations.

24. It is clear from the evidence that although the Board was small and did not have specific expertise in engineering and hydroelectric megaprojects, the Board members took their responsibilities very seriously and they were devoted to Nalcor. Mr. Marshall testified, quite modestly, that members would “lean in over and above”:

**MR. K. MARSHALL:** So every board member, again, as thin as we were from a numbers perspective, really had an obligation under – whether it be Comp Committee to make sure that those elements were brought up to speed to be able to attract individuals and to retain individuals, working with the human resource department – to governance, to audit – everybody was asked to really lean in over and above what was typically their responsibilities of reviewing, you know, the activities of the corporation and its ongoing activity.

[Transcript -- Phase 2, June 10, 2019, Volume 50, pp. 148-149])

25. Given that the immense workload and the number of members of the Board were so diametrically opposed, the numerous achievements and developments that Mr. Marshall, Mr. Clift, Mr. Shortall, Mr. Styles and Mr. Abbass contributed to is highly commendable.

#### Implementation and Application of Protocols

26. The Corporate Governance Committee (the “CGC”), of which Mr. Marshall, Mr. Shortall and Mr. Clift were members during their tenure is integral to the success of any board. The Board established the CGC early in their tenure to ensure that in carrying out their mandates, responsibilities, policies and activities the members of the Board were fulfilling their fiduciary duty to Nalcor. When questioned by Commission counsel about their ability to carry out their fiduciary duties, Mr. Clift provided an overview:

**MS. O'BRIEN:** Okay. So, generally, when you are appointed to the board, you have a duty – as you said, a fiduciary duty, so that's a – you have a duty to manage the companies that you're on in good faith, to the best of your abilities –



**MR. CLIFT:** Yeah.

**MS. O'BRIEN:** – to do your due diligence –

**MR. CLIFT:** Mm-hmm.

**MS. O'BRIEN:** – and to manage them for the benefit of the – ultimately for the benefit of the shareholder.

**MR. CLIFT:** Right. And so we would also, as part of governance you would look at the mandates of the various committees and ask questions – fundamental questions like: Do we have the right committees? And are they properly staffed and what are the qualifications of the people that are on them? And what is the mandate and/or the charter? It was referred to as two different terms over time, and those would be two-to-three-page descriptions of the activities of the individual committees. So the Governance Committee would review those each year, individually, at our committee and co-operatively with – so if we were reviewing audit, we would review it with the Audit Committee and we would talk about things like changes in audit standards and practices and ensure that we had the right language in place to make sure that we were current in our oversight.

[Transcript - Phase 1, October 15, 2018, Volume 17, p. 17]

27. In order to provide initial guidance for proper corporate governance to board members, in 2006 members of the CGC, who were then members of the board of Newfoundland and Labrador Hydro, first introduced the Corporate Governance Committee Charter which is still used today. It states that the Board is to

- i. Annually develop, and update long-term plan for the composition of the Board of Directors that takes into consideration the current strengths, skills and experience of the Board, retirement dates and the strategic direction of the Company;
- ii. Review, monitor, and make recommendations regarding new Director orientation and the ongoing development of existing directors;
- iii. Recommend, for Board approval, a Code of Business Conduct and Ethics, applicable to directors, officers, and employees of the corporation constituting written standards that are reasonably designed to deter wrongdoing, and monitor compliance with the Code;

- iv. Recommend to the Board an appropriate evaluation process for the Board as a whole, its committees and directors individually;
- v. Recommend to the Board the remuneration and benefits to be provided or paid to Directors;
- vi. Function as a forum for concerns of individual directors about matters that are not discussed readily or easily discussed at full Board meetings;
- vii. Review and approve any public disclosures included in the annual report or other public documents regarding the corporate governance of the Corporation;
- viii. Recommend to the Board the members and/or Chairs to serve on the various committees;
- ix. Review the terms of reference for the Board of Directors, the committees of the Board and the Chairman and CEO;
- x. Annually, be responsible for overseeing the implementation of the assessment process approved by the Board, and report to the Board with the results of its assessment of Board and Committee performance;
- xi. Review the directors and officer's liability insurance coverage; and
- xii. Monitor current developments in corporate governance and make recommendations to the Board with respect to independence criteria for Board members.

[Exhibit P-00385]

28. Members of the CGC also developed practices to carry out and fulfill these mandates which are still utilized today. Perhaps most significant to the Commission with respect to governance is the implementation of the Director Independence Policy and the Director Selection Process – including the Board Competency Matrix. It is on the basis of these matrices that the Board of Directors wrote directly to Mr. Robert Thompson, Clerk of the Executive Council, on September 2, 2008, requesting that individuals be appointed to the Nalcor Board who had experience in large scale construction, engineering and power

generation. This request was followed up on numerous occasions by the Board and the correspondence of September 02, 2008 was specifically attached to an email to Mr. Thompson dated September 26, 2012. Despite this and numerous other requests by the Board to Government, on those occasions when individuals were appointed to the Board of Directors of Nalcor, they lacked the skill sets requested.

[Exhibit P-00401]

29. Although the Commission could not find a final draft of the Independence Policy, when asked if the Board followed the policies outlined in the draft, Mr. Marshall confirmed: “very much so. Yes” [Transcript - Phase 1, October 15, 2018, Volume 17, p. 23]. The policy states:

The Corporation’s Independence Policy consists of the following:

- i. A majority of the Board of Directors, including the Board Chair and all Committee Chairs shall be independent in accordance with the criteria established by the Corporation.
- ii. All of the members of the Audit Committee, Compensation Committee, Corporate Governance Committee, and Environment Committee shall be independent Directors.
- iii. Annually, the Directors will be required to provide a formal declaration indicating that they satisfy the Corporation’s Independence Criteria.
- iv. Directors have a responsibility to discuss any potential conflicts that might impact the Director’s independence with the Board Chair or the Chair of the Corporate Governance Committee. If, based on these discussions, it is determined that the independence of the Director has been impacted, the Board should be advised.
- v. If Directors do not satisfy the Independence Criteria, they should not participate in any discussion or voting relating to matters that contribute to the Independence issue.

[Exhibit P-00388]

30. When asked by Commission Counsel if the Board members completed the annual Declaration requirement stated above, Mr. Marshall confirmed that they did and added that this was not a pre-existing requirement, but one that the Board introduced:

**MS. O'BRIEN:** Okay. So that's – you're referring there, I believe, to point three, that there was "Annually, the Directors will be required to provide a formal declaration indicating they satisfy the Corporation's Independence Criteria." So that was done?

**MR. CLIFT:** And that would –

**MR. K. MARSHALL:** Yes. That came on during our tenure because we put that in place. It was not pre-existing; we brought that in as part of the governance proceedings.

[Transcript Phase 1, October 15, 2018, Volume 17, p. 24]

31. During the Panel's testimony, Commission Counsel pointed out that Mr. Edmund Martin, CEO of Nalcor, a member of its executive and senior management, would have been the only non-independent member sitting on the Board. When asked how the Board operated their meetings considering this potential for conflict, Mr. Clift explained that the meetings were split into two (2) phases: one with Mr. Martin present, and one without Mr. Martin.

**MR. CLIFT:** Yes, so at the end of each meeting, we would go through two phases. We would have a session where Mr. Martin was there. Everyone else would've been recused from the meeting, and then we would have a discussion with Mr. Martin there where we might have identified challenges or questions that we might have had around internal performance, occasionally commentary on how someone performed those kinds of things. And then Mr. Martin would leave the room, and we would have our own in camera session. And those lasted as long as they needed to. Sometimes they would be relatively short, and sometimes they would be longer.

[Transcript - Phase 1, October 15, 2018, Volume 17, p. 80]

32. In addition to the Independence Policy, the Board also introduced a Director Selection

Process which required the CGC to undertake the following:

- i. Corporate Strategic Objectives  
The Committee will review the company's current strategic objectives to determine the implications of such objectives for the composition of the Board of Directors.
- ii. Current Skill, Experience and Board Dynamics Analysis  
The Committee will review the background, experience and skills of each director along with the current Board dynamics to determine current Board strengths and needs. For this purpose, the Committee will develop a matrix of existing directors' skills, knowledge and experience.
- iii. Skills and Experience Gap  
The Committee will review the information it has assembled about existing skills and dynamics in light of the company's strategic objectives. This information will be used to assess whether the current Board represents a mix of skills, experience and individual characteristics required for collective effectiveness.
- iv. Development of Criteria  
Bearing in mind the skills and experience gap, the Committee will develop the criteria for the selection of new directors to ensure it complements the current Board composition and fills any gaps. Using the results of the gap analysis, the Committee will develop a profile of skills, knowledge and experience required of potential candidates, that is consistent with the general selection criteria outlined below and that reflects Hydro's values. The Committee will report to the Board with its findings. The Board Chair, upon the direction of the Board, will advise the Shareholder of the Corporation's need for new directors, including a recommendation with regard to the specific skills and experience desired. The final decision on the appointment of directors is made by the Shareholder.

[Exhibit P-00388]

33. Mr. Clift explained to Commission Counsel that when it came to the Board Competency Matrix, "...essentially, we were working through the lines of business, looking at what we felt would be required in the way of expertise, and then cross-referencing that with the functional area expertise that individual board members had in an attempt to identify areas

where we were strong and areas where there were gaps” [Transcript- Phase 1, October 15, 2018, Volume 17, p. 27]. He further described it as “an internal document that we were using as a self-check” [Transcript -Phase 1, October 15, 2018, Volume 17, p. 32]. The Board would then make suggestions and/or requests to government based on their research and findings; however, the decision to appoint new board members and the selection of these individuals was ultimately that of the Government.

34. Mr. Shortall testified that the Board Competency Matrix results centered round the need for megaproject experience: “when we did the matrix at the Governance Committee and we highlighted areas where we thought the board could be strengthened, most of those areas were in the megaproject field; in other words, large project experience, large financing experience, electrical engineering experience.” [Transcript – Phase 1, Volume 17, p. 84] When asked by Commission Counsel if the Board received a response from Government with respect to their repeated suggestions of needed skill sets for directors and requests for additional Board members based on the criteria identified as lacking, Mr. Clift confirmed that it did not:

**MS. O'BRIEN:** Ultimately – and so I'll come back to this in just one moment. I'm actually going to go back to P-00395 for just a moment, and that was the email that you'd written to Robert Thompson, because I neglected to go over his response. So you wrote him; he acknowledged receipt.

**MR. CLIFT:** Yes.

**MS. O'BRIEN:** And you wrote him again then on – your initial write to him was in January 2012. You wrote to him again a few days later, and here's where you forwarded him, I believe, the letter of September 2, 2008 –

**MR. CLIFT:** Yes.

**MS. O'BRIEN:** – that we looked at earlier. Did you ever get a substantive response from Mr. Thompson or anyone at government?

**MR. CLIFT:** Not that I recall.

**MS. O'BRIEN:** Okay. And so we know that Knightsbridge Robertson Surette was continuing on that work in 2015. And then you talked then again about further work that you were done – you were doing in 2016. But did this ever come to a resolution? Did you ever get to the point while you were on the board of directors where you were getting appointments that fit the criteria that you were looking for?

**MR. CLIFT:** No.

**MS. O'BRIEN:** Okay. Do you know why not? Did you get any response back from government or from –?

**MR. CLIFT:** No.

**MS. O'BRIEN:** Okay.

**MR. CLIFT:** We were told at various junctures that they were dealing with this or taking this under consideration. And I recall the CEO, Mr. Martin, saying we're gonna take one more run at this and gather everything we had and go in and do a more formal presentation on this. So what we presented – subsequently, what was presented on behalf of the board was a fuller, richer, more detailed accounting of what the board felt as individuals and collectively and what Knightsbridge Robertson Surette came up with as well in conjunction with us.

[Transcript - Phase 1, October 15, 2018, Volume 17, p.32]

35. Mr. Marshall added to this, emphasizing the Board's "dogged determination" to follow through with the Director Selection Process that it had developed despite the Board not having the authority to appoint members:

**MR. K. MARSHALL:** Yes. I mean, as a board member through part of this process – which – you’ve gone through these exhibits from 2008 and 2012 and one that Tom alluded to from 2016 – a couple of things were happening. Number one is I think it shows that the board did not shirk its responsibilities in trying to add to the board as was felt to be necessary to make the board more effective. I think that we were diligent, we were forceful and we were acting in a fiduciary manner at all periods of times to try to make sure that this issue was brought to the fore. I think that you’ll get soon to the issue of compensation. We’ll come back, and we’ll address that. But over that period of time, I think that there’s an important backdrop here that is evident. One is that we wouldn’t drop the bone. We wanted to continue to bring this home, and we were probably – with incredible dogged determination – to try to make sure that this saw the light of day. We did not have the authority, as you indicated, to appoint board members. We could only recommend and recommend the process, and it’s up to Cabinet, as you indicated earlier, to be the ones to recommend, much like in a public company where the shareholders of a public company elect and appoint the board of directors at their pleasure and at their vote.

[Transcript -Phase 1, October 15, 2018, Volume 17, p. 33]

36. Another concept introduced by the Board, which Mr. Clift testified has transitioned generally from audit committees to governance committees across Canada, is the “risk register”. Mr. Marshall explained that the Board “would be recognizing the relative risks that were established or were present in various areas of financial or environmental or business or global, etc., and also hiring a chief risk officer” [Transcript - Phase 2, June 10, 2019, Volume 50, p. 148]. On cross-examination, the Panel was asked that given this information, was the Board solely responsible for risk management. Mr. Clift clarified that the Board merely acted on the information provided to it:

**MR. SMITH:** – the issue that comes to mind is whether or not the board was solely responsible for risk management.

**MR. CLIFT:** We would be acting on the information that was presented to us and we would be considering that in the context of



whether or not we thought it was complete. Whether or not there were things that also needed to be identified that may not have been identified at that time. And advocating for more detail as we moved forward.

**MR. SMITH:** And in part of risk management, would that include the retention of experts to isolate and develop –

**MR. CLIFT:** Yes.

**MR. SMITH:** – strategies?

**MR. CLIFT:** Yes.

[Transcript - Phase 1, October 16, 2018, Volume 18, p. 44]

37. As to how the Board meetings were run in a general sense and how a distinction was drawn between the roles of the Board, the Chair and the CEO, Mr. Clift testified that agenda setting, agenda prioritization and discussion protocol were done with the specific approval of the Chair and in accordance with good governance:

**MR. CLIFT:** And also from a board governance perspective, as I'm listening to Mr. Marshall talk here I'm thinking about the role of the chair versus the role of the CEO. And it was fair to say that over time we made sure that, according good governance, things like agenda setting and the prioritization of items at individual meetings were done in conjunction with the chair. There were occasions when we disagreed as to what should be brought forward, when it should be brought forward, what the agenda might look like, but in the end there was always a strong alignment and an understanding that the agenda for each individual meeting and the protocol for the discussion of that meeting was done with the distinct approval of the chair of the board, which is –

**MS. O'BRIEN:** Okay so that would have been at sanction, Mr. Styles? And –

**MR. CLIFT:** Whomever at the –

**MS. O'BRIEN:** Yeah and then Mr. –

**MR. CLIFT:** – the various juncture –

**MS. O'BRIEN:** And then, Mr. Marshall –

**MR. CLIFT:** That was all part of – as we became more knowledgeable in the governance area and we built up our backgrounds and our knowledge and understanding, and that would be part of a series of checklists that we would have had to ensure that everybody knew who was driving the bus at the board meeting.

[Transcript Phase 1, October 15, 2018, Volume 17, pp. 82-83]

38. Additional actions that were undertaken by the Board include, amongst other things, introducing and subsequently changing the timing of the Annual General Meeting (AGM), initiating the Board self-evaluation process (as indicated in Dr. Holburn's report), implementing the Environmental Responsibility Report, and developing whistle-blower protocol, which they were informed could not proceed until the government had enacted legislation.

#### Reliance on Experts and Information Given

39. A board of directors must ensure that it has sufficient information upon which to monitor and assess the corporation's performance. A problem can arise if a Board does not have the requisite expertise to gather necessary information or to assess information that has been provided to it.
40. Dr. Guy Holburn is a professor of business, economics and public policy in the Ivey Business School, at the University of Western Ontario and was requested by the Commission to prepare reports both in Phase 1 and Phase 2 of the Commission. He was certified on October 23, 2018 as an expert before the Commission to provide evidence with

respect to the regulation and governance of the energy sector. On February 25, 2019 he was further qualified to provide expert evidence on the governance of Crown corporations. In Phase 2, Dr. Holburn presented a paper he authored on corporate governance in Crown corporations entitled *Best Practice Principles of Corporate Governance for Crown Corporations*.

41. On February 25, 2019, Dr. Holburn testified with respect to the information being provided to a board, their reliance on that information and the retention of experts:

... the board is reliant on management to provide that information and this is normal given that management have control over the information and they also have the expertise. However, if the board is not satisfied that the information may be complete, the board also has the authority to retain external advice and external experts to provide an independent opinion or to provide information on a specialized type of topic.

[Transcript Phase 2 Volume 7, p. 52]

42. Dr. Holburn further testified that boards often retain auditors to assess the health of a corporation and the financial status, but they also retain experts for subject matters such as law consultations. [Transcript Phase 2, February 25, 2019, Volume. 7, p. 52] One reason a board may choose to hire external experts or consultants is that the board may be specialized in nature, which could result in difficulty finding ideal members to serve on that board. An external expert could assist in filling the gaps in expertise [Transcript Phase 2, February 25, 2019, Volume. 7, p. 70].

43. Experts may be hired, such as external auditors, that would report directly to a board as opposed to the CEO or senior management. If information provided to a board by the executive was inaccurate or insufficient, experts can be retained to investigate or review a

narrow issue and provide further information or clarity on the subject matter [Transcript Phase 2 -June 10, 2019 Volume. 8, p. 6].

44. In his paper *Best Practice Principles of Corporate Governance for Crown Corporations* [Exhibit P – 01770, p. 15 – Section 3.6.3], Dr. Holburn noted that the following was consistent with good governance:

Boards require accurate, timely, reliable, concise and complete information to discharge their duties. Information on operations, financial status, safety, environmental impacts and other salient dimensions facilitates monitoring of organizational performance and risk management, and allows the Board to ensure that the corporation's policies are implemented. Though management has responsibility for providing internal information, Boards must be satisfied that it is complete, reliable and tailored to their needs. Boards may also retain external professional advice on legal, financial and other matters where appropriate.

45. It is critical that board members can rely both on the information provided to them by the Corporation as well as any information provided to them by experts, whether retained by the Corporation or retained by the Board.
46. Professor Ratushny writes at p. 362 of his textbook *The Conduct of Public Inquiries: Law, Policy and Practice*, Irwin Law, 2009, "inappropriate reliance on hindsight may also drive findings out of perspective and may be unfair when assessing individual conduct". In other words, "hindsight is 20/20."
47. During the time that Messrs Marshall, Shortall, Clift, Styles and Abbass served on the board of Nalcor, they had access to a multitude of internal and external resources that they

believed were sufficient for them to properly assess and oversee the management of the operations of Nalcor. If the Board believed that they had insufficient information then they either retained, or had access to, expert information.

48. Ken Marshall testified on June 10, 2019 [Transcript-Phase 2 Volume 50, p. 76], when asked by Ms. Erin Best, counsel for Kathy Dunderdale, about the expertise of the Board, that:

**MS. E. BEST:** But I think what you wanted, wasn't it hydroelectric megaproject expertise –

**MR. K. MARSHALL:** Yeah.

**MS. E. BEST:** – specifically, right?

**MR. K. MARSHALL:** Yeah.

**MS. E. BEST:** Yeah.

**MR. K. MARSHALL:** But, yeah, in hindsight, you – we could've had our own consultant, but as I explained, we didn't necessarily – we always knew that we could hire, kind of, our own advisors and consultants, which we did, as I indicated when I contracted Mr. Waitzer from a governance perspective out of Toronto, and we contracted the Hay Group, and Mercers and Robertson Surette numerous times from a human resources perspective. But we felt that with the number of outside parties who were advising both the organization and the provincial government, and the number of affected stakeholders who were doing independent reviews of the analysis, that the board – and that's probably a – you know, something that if I was to go back, I would change. I would've had an independent advisor to the board with respect to some of these matters. But, yeah, again, there was already Westney, there was Navigant, there was Manitoba Hydro, there was the project Oversight Committee, there was independent audit, there was Internal Audit, external audit. There was a lot – there was TD Bank, Government of Canada, Province of Newfoundland: there was a lot of outside groups that were evaluating and determining with a lot of expertise, and the board was relying on some of this information.

**MS. E. BEST:** Okay. So just to summarize, you felt that the expertise that you had access to was adequate.

**MR. K. MARSHALL:** Yes.

49. In his testimony on June 10, 2019 [Transcript-Phase 2, Volume 50, p. 76] Mr. Marshall again acknowledged the Board's ability to retain outside experts:

We were always aware that we could hire outside counsel, expertise, where it felt necessary and we did in certain areas, as I said, in legal and in compensation, in other matters. Do I view it as a – would I liked to have had an outside opinion reviewing, as has been suggested by Grant Thornton and by others, in hindsight? Yes. But did I feel at the time or did the board feel at the time that we should have that given all of the outside, independent, involved stakeholders – including federal, provincial government, TD Bank, Oversight Committee, et cetera – that it was necessary? No, we didn't feel it was necessary at that point in time.

50. When the Board determined that it was lacking specific information that they considered to be relevant to their assessment, the Board retained two (2) law firms to assist them. McInnes Cooper and Stikeman Elliot were retained by the Board to provide guidance from a legal perspective on employment matters and contracts. The Board relied on the expertise of these lawyers to guide their decisions.
51. It was suggested in the Auditor General Report [Exhibit P – 04306] which reviewed the severance package provided to Mr. Edmund Martin upon termination of his employment with Nalcor, that the Board could have waited and allowed a new board to conclude a settlement agreement with Mr. Martin. Mr. Marshall testified that both their outside counsel, John Green of McInnes Cooper and Ed Waitzer of Stikeman Elliott, did not suggest that

waiting for the appointment of a new board was something that they should consider nor was it suggested that they disregard the terms of Mr. Martin's employment contract.. As the Board lacked the legal training and knowledge necessary to make these decisions, reliance on the advice and recommendations of their legal counsel was imperative to the Board in carrying out its fiduciary duties. They had a responsibility to oversee the management of Nalcor that included limiting any potential legal liability and they had a responsibility to manage and conclude the contract with the CEO, Mr. Martin, as the Board had done throughout his tenure with Nalcor. The Board believed that to defer this matter to an unknown group of individuals with no history, knowledge or relationship with the CEO, his activities and performance would have been an abdication of their responsibilities to Nalcor and may have caused further harm to Nalcor. The Shareholder, being the Government, was in possession of the CEO's contract and was aware of its terms and the obligations of Nalcor thereunder.

52. Similarly, the Board took ownership of the performance contract payouts that were due and owing to employees of Nalcor. They sought expert advice on the interpretation of these terms of the employment contracts upon being advised by Government that payments should not be made and advised Government of the method by which payments could be avoided. Given that Government did not choose to issue the Order-in-Council, the Board reviewed and amended the performance contract payouts to the extent of its ability under the terms of these contracts. Again, the Board did not wish to subject Nalcor to potential litigation that their expert suggested would be probable.

53. The Board retained the human resources firm Knightsbridge Robertson Surette to conduct a national search for a CEO for the Corporation. Knightsbridge Robertson Surette conducted initial screening of individuals and provided the Board with a recommendation of candidates. An interview process subsequently occurred with members of the Board being present, after which it was determined that Mr. Edmund Martin had the expertise and skill set the Board was looking for, and he was unanimously recommended by the Board to Government for appointment as the CEO [Testimony of Tom Clift, Ken Marshall, Mr. Terry Styles, and Mr. Gerry Shortall - Former Nalcor Board, on October 15, 2018 Transcript Phase 1 Volume 7, p. 90]. The subsequent appointment of the present CEO of Nalcor did not occur in this manner.

54. The board of directors of a Crown corporation being engaged in hiring the CEO is consistent with good governance according to Dr. Holburn. In his paper at Exhibit P-1770, Dr. Holburn stated at page 14 that:

When the government has ultimate appointment authority, it is recommended that the Board play a central role in identifying and nominating preferred candidates, who may then be formally appointed by the responsible Minister or Cabinet. This 'Board Search' model places the Board as a central party in hiring the CEO, and helps create a stronger accountability relationship between the Board and the CEO.

55. The Board again retained Knightsbridge Robertson Surette in December of 2014 to assist them in developing a board competency matrix that would enable the Board to assess its existing members and to establish a process to identify gaps in the composition of the Board that would assist with recruitment of new members [Exhibit P-00079 - Letter dated March 3, 2015 from Mark J. Surette to Edmund Martin re: summary of activities to date]. Board



member Mr. Tom Clift had familiarity with governance of corporations and had previously worked on a self-assessment competency matrix on behalf of the Board in 2006. The matrix was then used to identify competency gaps that existed on the Board and formed the basis of the request by the Board to Government that it appoint new members to the Board with specific skill sets.

56. One of the roles of the CEO of the Corporation, as well as the project management team in relation to their interaction with the Board, is to ensure that all pertinent information is provided to the Board so that they can make informed decisions. Whether enough information, or too much information, was provided to the Board is subjective.

57. For example, with respect to the Westney report [Exhibit P-00130 Nalcor Energy – Lower Churchill Project – Decision Gate 3 Project Cost and Schedule Risk Analysis Report dated October 1, 2012], Mr. Ken Marshall testified that he would not have expected that the Board would receive the entire report when questioned specifically by Andrew Fitzgerald, counsel for Julia Mullaley and Charles Bown, on whether Mr. Martin could have kept the Board fully informed of information and financials. Mr. Marshall stated at Transcript Phase 1, Volume 50, p. 84:

**MR. K. MARSHALL:** Again, I'm not sure. I think because Dr. Holburn also said that over provision of information to a board is as dangerous as under provision of information. So when we reviewed, for example, the November 30, 2014, board meeting this morning, you know, it was over 400 pages and that was very standard. The role of the CEO and the management team is to make sure that the information – for example, when I looked at that Westney report just before break, you know, it was in the 400-page variety. Would I have expected that that 400-page report would go to the board in its entirety? I don't think so.

If it's – there may be elements of it, there may be excerpts, there may be some summations of it, but it often becomes a judgment call as to

what is board relevant and what is not board relevant. And what is board pertinent, I guess –

58. The Board, when questioned by Commission counsel as to whether they felt that they had received enough information to make their decisions, confirmed that they felt they did have the information that they needed prior to making decisions on the management of Nalcor.

**MR. K. MARSHALL:** I can't say. I mean I felt that the board – we felt, generally – obviously, we approved it, that we had sufficient information to satisfy concerns. And we pressed to see was there any information that, you know, we need and we were assured, no. So did we feel that anything was being withheld from us? No. Did we feel that we had sufficient information? Yes. Did we feel that there was a fair analysis done and a detailed analysis, and that we had asked the questions and pushed and pressed and prodded to make sure that this thing was, you know, tested? Yes, absolutely. So we were still reliant on if there was anything that come to light, had we any reason to think that somebody withheld? No, we did not.

[Transcript-Phase 1, October 15, 2018, Volume 17, pp. 71-72]

59. In 2012, Nalcor Energy retained Hatch to complete an evaluation of how much additional wind generation could be added to Newfoundland and Labrador's system, from an economic and technical point of view, assuming no interconnection to neighboring power systems, also known as the Isolated Island Scenario [Exhibit P-00057 - Hatch Report for Wind Integration Study – Isolated Island dated August 7, 2012]. Mr. Ken Marshall and Mr. Tom Clift testified [Transcript Phase 1 Volume 7, p. 55] that the Board was provided with a presentation based on the Hatch report which allowed the Board to assess whether wind generation was an option for the Province.

**MR. CLIFT:** I can recall, for example, we would have had a presentation on wind, sort of an overarching presentation on the wind patterns, the nature of it, the sustainability of it, the incremental cost to add it to the grid relative to other options. And so, as other

alternatives were brought to us, there was invariably some kind of presentation package that would have been sufficiently detailed to allow us to understand the dynamics of whichever option might have been – the wind one, I recall, because there was a map –

**MR. K. MARSHALL:** It was vivid.

**MR. CLIFT:** – that – very vivid! – that showed wind conditions across North America, starting with the very light colour of pink and as you proceeded north and east across North America it got darker and darker and darker and it was dark purple by the time it got to Newfoundland. The problem was that the winds were not always sustained – sometimes they were too high, sometimes they were too low and wind power storage – there was other issues. And so we would have had a rather fulsome discussion at presentation around individual options and challenges for each one.

**MR. K. MARSHALL:** That would've been internal at Nalcor, as I recall, and as well the board followed with great interest and encouraged the development of a number of wind projects in Fermeuse and in St. Lawrence, even though they were costing a lot more than Holyrood at the time. But the board felt strongly that it was an environmental solution that could form a part of the overall power generation capacity. And when we went to external consultants and they said yes but if you're talking about firm base load power you require – not – you need something more than wind to do it. Wind should not form more than 10 per cent of your power. So –

60. As evidenced in this exchange between Commission Counsel Barry Learmonth and Ken Marshall found at Transcript Phase 2 Volume 50, p. 43, the information with respect to difficulties with the Astaldi contract came to the Board from the CEO of Nalcor:

**MR. LEARMONTH:** So who gave you all this information about Astaldi, Mr. Martin?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** All of it?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And you accepted it?

**MR. K. MARSHALL:** Mr. Martin, Mr. Harrington, Mr. Bennett, like they were the ones who were working with Astaldi on a daily basis.

61. At the time of termination of Mr. Martin's employment and the resignation of the Board, the most pressing issue outstanding from the perspective of the Board was resolving the contract dispute with Astaldi. It was evident to the Board that the Astaldi negotiations settled much higher than they were told to expect by Mr. Martin [Transcript - Phase 1 Volume 7, pp. 74-75].

**MR. SHORTALL:** The – other than that – I mean, on the day we resigned from the board, my understanding of the project – and this was not a public number at the time – but we were at \$8.2 billion. And we had only one significant outstanding issue to be resolved, and that was the Astaldi contract.

And Mr. Martin had been working hard on trying to negotiate that number with Astaldi. Although, he thought it – had some problem with the new government, kind of, not supporting him on the negotiations and so it kind of slowed down. But his estimate to us, as a board, was he thought he would – he could settle it in the \$300 million to \$500 million range, which would've brought us to 8.5 to 8.7, somewhere around there. Now it's apparently at 10.1. So I have no visibility into the difference between the 8.2 and the 10.1. It's \$2 billion. I can't believe we gave Astaldi \$2 billion. So I ...

**MR. K. MARSHALL:** – no, when we left, like for an example, in April of 2016, as I indicated, at Phase 1, the AFE and the FFC was sitting at 7.7. We understood quite clearly that there was going to be a figure between \$300 and \$500 million. And again, I was not in discussions with Astaldi. To this day I've never met anybody from Astaldi. So this was based on information that I was getting from Mr. Martin, Mr. Bennett and whoever else was in those discussions and negotiations with Astaldi.

So even at the top end of that range we were looking at 8.2, and that is if all went well from that point forward with Astaldi. Now, you know, could there be – was there still risks with respect to other

elements? Well, we still weren't at completion – that was in 2016 – and we still had another year or two to go. So that's when the reference became, yeah, if things go poorly or things go wrong or things happen, then there was still some element of risk. But, again, we were getting closer and closer, we felt strongly we owned, up to the 8.2, because we knew that that was what we felt was going to be required –

**MR. COFFEY:** Okay.

**MR. K. MARSHALL:** – to get Astaldi settled and to finish the project.

[Transcript - Phase 2 at Volume 50, p. 100]

#### Recommendations

62. The Board of Directors of Nalcor, as with the boards of any Crown corporation, is an integral part of effective corporate governance and is necessary to ensure that the Crown corporation can successfully carry out its' mandate and objectives. The composition of the Board and the implementation of corporate best practices determine whether a Board can effectively oversee and manage a corporation's strategic plan.
63. The Board submits that their ability to comply with all the best practices of corporate governance was hindered only by the inaction of Government in responding to its' many requests for additional Board members with specific skill sets. There ought to have been a timely and consultative process undertaken by Government and the Board for the appointment of new directors with the requisite skills and competencies. This failure is then intrinsically related to the Government's failure to consider, review and implement a remuneration scheme for the Board that would enable it to attract these new directors.

64. We have discussed the efforts of the Board to implement committees, to prepare director matrices and competencies for self and peer assessment, to name just a few of the steps taken by them to ensure good corporate governance. With this in mind, the Board believes that this Commission has a unique opportunity to make recommendations that can improve not only the operations of the Board of Directors of Nalcor, but also the boards of other Crown corporations.
65. Reflecting upon former Premier Dunderdale's evidence about the appointment process for members of the Board [Transcript Phase 1 – December 18, 2018, Volume 60, p 42] and recognizing that an Independent Appointments Commission (IAC) has been established by the Government that provides details of the time requirements, competencies and experience expected of directors, the Board submits that further efforts are required to ensure that the right people with the necessary skills are in place to provide appropriate oversight of the business operations of Nalcor.
66. Firstly, the Tier structure that has been established by the Government through the IAC fails to recognize the diverse nature of the boards and the qualifications necessary of their directors. If Government chooses to maintain the Tier structure, then subclasses are required to reflect this diversity. A critical analysis of competencies required of directors on each board needs to be undertaken by the Government or by an independent committee established by Government. These subclasses can then reflect such things as governmental expectations, commercial and policy objectives, budget, time commitments, educational and work experience and remuneration for directors. It is not enough to say that this cannot be done because "...if I'm going to compensate one board, I really have an obligation to

consider compensation for the vast majority of the boards.” [Testimony of former Premier Kathy Dunderale, Transcript Phase 1 – December 18, 2018, Volume. 60, p 44]. When you have a corporation that is responsible for one-third of the Provincial debt and generates, or has the potential to generate, the largest portion of the Provincial revenue you cannot rely solely upon the goodness of your citizens to provide the oversight that is necessary for the shareholder.

67. While remuneration for directors is a topic that has largely been avoided by the Government, it is apparent from the testimony presented at this Commission that government cannot continue to do so. Individuals recognize that compensation for serving as a director of a Crown corporation will not be comparable to that paid by corporations in the private sector. However, if you wish to attract people with a specific skill set then you are going to have to remunerate them accordingly. In this model, financial compensation for directors is intended to vary from board to board and to vary within the board itself depending on the role undertaken by the director and the number of committees that they are called upon to serve. In the case of Nalcor and other Crown Corporations, director remuneration is paid by the Corporation not by the Government and this distinction should be emphasized if there is validity to the belief that the public will perceive remuneration to Nalcor Directors negatively.

68. A Crown corporation is established to place some distance between the shareholder, being the Government, and the business of the corporation: “The broad purpose of the Crown corporation should be clearly stated in its enabling legislation...” [Transcript Phase 2 –

February 25, 2019, Volume 7, p. 46 and the *Energy Corporation Act*, S.N.L. 2007, c. E-11.01, s. 3].

69. With respect to the makeup of the Board, there is debate about whether a representative of government should sit on the Board even in an *ex officio* capacity. This is briefly addressed by Dr. Guy Holburn in Section 3.3.4 at page 10 of his paper entitled “*Best Practice Principles of Corporate Governance for Crown Corporations*” [Exhibit P-01770]. Specifically, he discusses the potential that the directors might be inhibited by the presence of a government official and the potential for the government representative to be placed in a position of conflict if there is a divergence in the interests of Nalcor versus the interests of the Province [Transcript Phase 2 – February 25, 2019, Volume. 7 p. 44].
70. Evidence from the Panel on October 15 and 16, 2019 [Transcript Phase 1 – Volumes 17 and 18] was that they felt that a government representative on the Board was deemed to give rise to a conflict and the Board terminated the position. But for the circumstances surrounding this Commission this matter might not have arisen. It is clear that, at least in the short term, Nalcor must restore the confidence of the Government and the people of this Province. Given that Government now has an oversight committee for Nalcor that meets regularly, has the power to request information from the corporation and issues reports to the public, some may feel that this is sufficient to address transparency concerns.
71. Alternatively, this Commission might consider having the chair of the oversight committee sit as an *ex officio* member of the Nalcor Board, without a vote and without participation in *in camera* discussions. This would not only address transparency concerns but also the issue of



the Board being required to detail its discussion of, for example, commercially sensitive materials, in its minutes which may then be subject to disclosure pursuant to the *Access to Information and Protection of Privacy Act* S.N.L. 2015, c. A-12 (“*ATIPPA*”).

72. It is apparent that concerns about the release of commercially sensitive information continue to exist despite the exemption provided by s. 5.4(1) of the *Energy Corporation Act*. Alternatively, the Board submits that Nalcor might consider preparing two (2) copies of its minutes, one that is accessible to the public and the second, which might detail commercially sensitive materials, but which is available only to the Executive Council. As another alternative perhaps the Government ought to consider that given the discussions that occur at the Board that its minutes in their entirety remain confidential and excluded from the application of ATTIPA.

73. Absent changes in the ATTIPA legislation, Crown corporations that are engaged in commercial activities are at a disadvantage, for example, when negotiating with contractors if all aspects of their business are subject to disclosure. Moreover, given the volume of requests that are received by Nalcor on an annual basis it is a poor use of a CEO’s time to have him or her vetting ATTIPA requests.

74. The Board submits that in addition to, or in place of, the Oversight Committee which is exclusive to the Muskrat Falls project, the Government should consider establishing a committee of the whole whose purpose is to conduct an annual review of all Crown corporations with the power to retain experts and to call witnesses as required. This Committee could also review the legislation that governs the Crown corporations and any

changes that may be required and to comment on this legislation in the House. This adds another layer of oversight intended to ensure that information does not fall between the cracks. [Transcript Phase 2 – February 26, 2019, Volume. 8, p. 5].

75. To further enhance the different roles and responsibilities of the directors, the corporation and the Government, the Board submits that it should be responsible for recruiting and hiring the CEO and if Government wishes to appoint the CEO, then it should do so only in consultation with, and with the support of, the Board. This emphasizes that the CEO is accountable to the Board for the “corporation’s performance and whether the corporation is meeting its objectives” [Transcript – Phase 2, February 25, 2019, Volume 7 p. 46]. Further, the Board can then develop clear performance expectations for the CEO that it can monitor and use as part of its assessment of the CEO’s performance in any given year as was done by this Board during its tenure.

76. It is submitted that the absence of written records of conversations and the “open door” relationship that developed between the CEO and the various Premiers since the Muskrat Falls project was conceived beginning with former Premier Williams and continuing through former Premiers Marshall, Dunderdale, Davis and Ball established a pattern in which the CEO was the principal conduit of information between Government and Nalcor. Regardless of the best intentions of each of these individuals to ensure that Nalcor and in particular the Muskrat Falls Project, were successful, their goals for the corporation were distinct. Indeed, it is likely that we will find evidence of ongoing “open door” policies through the tenure of each Premier and the chairs of each Crown corporation dating back to Premier Smallwood.

77. As Dr. Holburn stated the primary role of the Board is to provide “sober second thought” not to “rubber stamp” the information provided to it by the CEO and the management team. Ministers of the Crown are tasked with managing their specific departments while the Premier is tasked with running the Province with the assistance of his or Ministers and members of the public service.
78. The Board submits that conversations should take place not between the Premier and the Board Chair but rather between the Minister and the Board Chair with the Premier’s involvement being determined by the Premier and/or his or her Minister. Conversations could then could be more frank and open, with discussions not focused solely on finances but also on the performance of the corporation, its shortfalls and its successes in carrying out the Corporations’ strategic plan as developed by the Board and any management issues that are deemed substantial in nature by the Board or the Corporation.
79. In furtherance of this change in communications protocol between Nalcor and the Province the Board submits that there should be regularly scheduled meetings between the Minister and the Board Chair every quarter, recognizing that additional meetings may take place as required. The CEO and the Deputy Minister should then meet monthly to ensure that the Department and the Minister remain apprised of regular developments. Again, the Premier could be involved in these discussions at his or her discretion or on the advice of the Minister or Deputy Minister. The Oversight Committee, if it remains, should similarly meet with the Board Chair and the CEO on at least a quarterly basis. This ensures that there is an open and transparent line of formal communications and that each body is cognizant of its

obligation to meet and to share current information. [Transcript- Phase 2, February 26, 2019, Volume 8, pp 7 and 8].

80. It is not enough to state that the mandate of the Board is set out in its enabling legislation. As a project evolves or as government changes the purpose of the Crown corporation and the policy objectives of Government may also change. Regular, open and frank discussions between the shareholder and the board and the board and the executive and the executive and the management team provide an opportunity to discuss a wealth of information relating to the changing needs of the shareholder and the Crown corporation that can then form the basis of an annual mandate letter that can be presented to the Board and the public during the Annual General Meeting. This process serves to provide a more open and transparent view of where the shareholder sees the Crown corporation focusing its attention during the upcoming year. In addition to ensuring that the Crown corporation and the Government are operating in sync, the public has an opportunity to see and to discuss the operations of the Crown corporation.
81. What then should be the makeup of the Board of a Crown corporation? Naturally, this will vary depending on the purpose of the Crown corporation. In the case of Nalcor, it has become apparent during this Inquiry that the ability of the Board to retain experts may not be sufficient to ensure that the necessary information is being provided to the Board for consideration, especially if the Crown corporation continues to retain its own experts and to provide only select portions of the information obtained from these experts to a Board.

82. Firstly, as is the case with the Nalcor Board, the CEO should be an *ex officio* member of the Board and should be required to attend all Board meetings. The CEO should inform the Board of any new developments that may affect the strategic plan. The Board should also be permitted to request additional information from the CEO and from other members of the executive team, as required either through written communications or through their attendance at the Board meetings. It is part of the role of the CEO and the executive to make representations to the Board about information that they may lack and to recommend various experts to the Board who may provide the Board and the Crown corporation with this information. By transferring the responsibility of hiring experts to the Board either at their own direction or on the recommendation of the CEO and the senior management team, this will ensure that the Board receives a complete copy of the expert's report that they can review should they choose to do so and the report should also then be supplemented by an executive summary prepared by the Crown corporation that is intended not to replace the experts report but to assist the Board in understanding what the expert is saying and the implications for the Corporation.

83. While expert reports have a role in informing the Board, the Board cannot subrogate its role to that of various experts. A Board should contain individuals who have the knowledge, background and experience in analyzing information provided to it. It is imperative that Government appoint members of the Board who can exercise their stewardship in three (3) major ways:

- i. Establishing an organizational strategy that enables the corporation to successfully achieve its objectives. The Board determines the approach for assessing business opportunities and risks, and it sets the tolerance level for the corporation in accepting risks.
- ii. Monitoring performance of the corporation against financial and operations goals, and setting internal control and reporting systems.

- iii. Appointing the CEO and monitoring performance. Setting CEO compensation and establishing succession plans and processes.

[P-02121 – Improving Governance and Strategy in Ontario’s LCD Sector, p 2].

- 84. Both Dr. Holburn and Knightsbridge Robertson Surette [P-00379, p 2] recommend that the ideal number of Board members for a Crown corporation should be in the range of 10 to 12 individuals who after being assessed as having the necessary competencies to sit on the Board ought then to have the diversity of experience necessary to provide for the smooth operation of the Board while being small enough to ensure that the cost of maintaining the Board is reasonable to the Government or to the Crown corporation. [P-02113 – Wood MacKenzie – Government Corporation Governance Review – April 2014].
- 85. A Board of this size should then have sufficient skilled members to populate the various committees which should include governance, audit, human resources, compensation, nomination, health, safety and environment or some combination of these. While the goal of the Board is to provide oversight of the Crown corporation which necessarily requires skilled members, consideration ought to be given to regional representation, gender diversity, visible minority, cultural competence, public or consumer interests not to the exclusion of the necessary skill sets but to supplement them.
- 86. The Board submits that the structure of the Board of Directors contained in s. 6 of the *Energy Corporations Act* respecting its’ size has been shown to be inappropriate for the Board of Nalcor. Five (5) members of which a majority represents a quorum cannot staff the necessary committees or digest and critically examine the volume of materials provided to the Board for consideration. Board members who spend up to 100 hours per month of

volunteer time on the business of the Board are an exception to the norm. The onus is on the Government to ensure that additional skilled members are recruited for the Board in a timely manner if the Board is going to provide the oversight required of the corporation by Government.

87. The Board accepts that it is appropriate for the members to serve until they are replaced however it does not accept that the members should “hold office during the pleasure only.” To ensure consistency in the Board and to the extent possible, decrease the potential for political considerations shaping board decisions at the expense of commercial objectives and performance, the Board submits that members should be appointed for a fixed term of 2 to 3 years with the ability to be reappointed for up to 3 terms. The terms of Board members should be staggered so that the Board never finds itself in a position where knowledge of prior Boards can only be gleaned from the minutes of their meetings. The exception to these fixed terms being for that of the Chair who could then hold office from 3-5 years.
88. Given the differing roles and responsibilities of the Chair and the CEO in the corporate governance structure and given the need to establish continuity in its governance, the Board submits that consideration be given to the creation of a Vice-Chair position. The Vice-Chair could be responsible for the operations of the Board in the absence of the Chair and could also be the segway for a member to move from being an ordinary member to the Chair.
89. To further delineate the roles of the Board and the CEO and the executive committee consideration should be given to the appointment of a secretary to the Board who is independent of Nalcor and is engaged by the Board for the purpose of, amongst other

things, scheduling meetings, following up on requests from the Board to Nalcor, coordinating requests and information relating to experts retained by the Board, submitting information to support remuneration for Board members, recording and preparing Minutes. Legal counsel of Nalcor who now attend meetings of the Board and prepare its minutes report on a day to day basis to the CEO while the Secretary to the Board should report and be accountable to the Chair of the Board. These roles are distinct and raise the potential for conflict.

90. Finally, among its many developments the Board implemented an orientation process for new Board members that the Board submits can be enhanced. The necessity of this orientation process is brought home in Mr. Shortall's testimony wherein he advised "I mean it takes a while to get an understanding of the business. Like Tom said, it took 12 to 18 months. I agree with that. Before I was really comfortable with it, it took me 12 months at least." [Transcript – Phase 1, Volume 17, p. 85]
91. It is imperative that a formal orientation process be maintained and enhanced to assist new directors in understanding the operations of the Crown corporation as well as the Board and the Government's expectations of them. This orientation should be rigorous and multi-phased with regular follow up sessions for new board members monthly for a period of up to six (6) months so that an assessment of the new directors ability to understand the corporation can be made and where limitations may be present, they can be addressed. This will ensure that each director is on the same page or if not on the same page they have the information necessary for them to make appropriate inquiries. Informal orientation from



written precis, slide decks and word of mouth are insufficient to enable a member to become a fully immersed in the governance of the Crown corporation within a reasonable period.

### Conclusion

92. It is evident from the testimony of the Board before this Commission that they had extensive knowledge and understanding of their roles as directors and of their obligations to oversee the management of Nalcor. Although not always written down and despite the passage of time, the Board was generally aware of the issues facing the corporation as the Muskrat Falls Project unfolded. They were clear that the project itself was sanctioned because after extensive review of the various options and vigorous debate it was apparent that Nalcor had a 29-year risk that it had to manage and that waiting until 2041 was not a viable option as:

- A. The Province needed additional power generation;
- B. The Holyrood infrastructure was crumbling and because it burnt fossil fuels it was a significant source of pollution; and
- C. The Province needs revenue. When the power flows from Muskrat Falls Nalcor has a mandate to sell the power at market rates thereby generating income for the Province and providing benefits to the Province and its taxpayers.

93. The Board's commitment to the Corporation was unwavering. They retained experts when they felt it was needed, such as lawyers and human resource professionals. Further, they analyzed all information provided to them by external consultants, the CEO, the executive and the project management team. They made inquiries of the CEO and the project management team when they felt information was lacking or they had concerns regarding

the information provide to them. The Board exercised good governance practice in the areas that were under their control, developing and complying with many of the good governance policies and procedures discussed by Dr. Holburn. Each year they reviewed all aspects of governance. They considered their mandate, their charter and any potential conflicts and reported to Government on an annual basis without ever receiving an acknowledgement or response. They engaged in long term planning. They introduced financial practices that enabled an antiquated corporation to clean up its balance sheet and prepare its books so that it was in a favourable position when requesting financing. If there were areas in which they were unable to complete their mandate these were areas under the direct control of the Government who did not act and failed to recognize the importance of the requests being made to it by the Board.

94. For the Government to suggest that its failure to appoint individuals with the requested competencies to the Board of Nalcor is justified by its inability to pay competitive compensation or by the possibility that members of other Boards of the Crown might therefore seek additional compensation is simplistic and will never resolve the issues that the Board faced or that future Boards will face if Government does not change its process of for appointing members to its various boards.
95. Despite challenges, such as a shortage of board members, the need for specialized skill sets and the extensive commitment required from each Board member, the Board submits that they made appropriate and well considered decisions with the information that they were provided, and that their exploration of the various issues placed before them and their

questioning of the CEO, the executive team and the project management team, was extensive and robust.

All of which is Respectfully Submitted at the City of St. John's, in the Province of Newfoundland and Labrador this 9<sup>th</sup> day of August, 2019.



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**GLEND A C. BEST, Q.C.**

Counsel for the Former Nalcor Board of Directors  
(2004-2016)