

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

FINAL SUBMISSION

Former Provincial Government Officials (2003-2015)

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SECTION 1: INTRODUCTION

1. On November 20, 2017, the Government of Newfoundland and Labrador (“GNL”) established a Commission of Inquiry respecting the Muskrat Falls Project (O.C. 2017 - 339) pursuant to Section 3 of the Public Inquiries Act, 2006. S.N.L 2006 c. P-38.1. The Honourable Justice Richard D. LeBlanc (the “Commissioner”) was appointed to act as Commissioner for purpose of conducting the proceedings and was provided with a deadline for filing his Report some two years later by December, 2019.¹
2. While discussion of the development of the Muskrat Falls Project (the “Project”) had been on the minds of Newfoundlander’s and Labradorean’s for decades, with the announcement and subsequent sanctioning of the Project in December of 2012, the Muskrat Falls Project became a focal point and topic of debate for people of the Province for years to come. The Muskrat Falls Project received widespread majority support province-wide in several polls², and indeed, proceeding was clearly a critical component of the electoral mandate received by Premier Danny Williams and his Government. This support was in part a result of the strategic, long-term energy vision clearly outlined by the Government of the day.
3. The Muskrat Falls Project (the “Project”) is a hydroelectric megaproject located in Labrador, approximately 25 kilometres west of Happy Valley-Goose Bay. Construction on the 824 megawatt generating facility commenced in 2013 and is intended to include a hydroelectric generating facility that would consist of a spillway, two dams and a powerhouse. It would be the second largest hydroelectric facility in the province with a scheduled start-up date of 2017.
4. In addition to the hydro-generating component, the Project also includes the Labrador-Island Transmission Link (LIL) an 1,100 km HVdc transmission line between Muskrat Falls and Soldiers Pond, including over 1,200 towers throughout the Province and a 35 km subsea link across the Strait of Belle Isle between Forteau Point, Labrador and Shoal Cove on the

¹ “Premier Ball Announces Muskrat Falls Public Inquiry”, Executive Council, November 20, 2017.

² Corporate Research Associates Media Release, “Majority of NL Residents Support the Muskrat Falls Project”, April 2, 2013, <https://cra.ca/wp-content/uploads/2013/04/13-1-NL-Media-Release-Muskrat-Falls.pdf>.

island portion of the Province. The Project also includes the Labrador Transmission Assets (LTA), which consists of two 250 km transmission lines between Muskrat Falls and Churchill Falls. Finally, the Project includes the Maritime Link, 170 km of subsea HVdc transmission cables under the Cabot Strait, connecting the island portion of the Province of Newfoundland and Labrador and the Province of Nova Scotia. The Maritime Link portion of the Project was to be governed by way of a number of agreements as between Emera Inc., a publicly-traded utility company operating in Nova Scotia, Nalcor Energy, a Newfoundland and Labrador Crown Corporation established to oversee power generation projects and other energy projects in the Province, and GNL.

5. While there was much public debate in regards to the various elements of the Project ranging from environmental issues, project cost, schedule overruns and rate related issues, matters appeared to come to a focal point in late 2017 when Premier Dwight Ball called a Commission of Inquiry stating that it would provide greater understanding of the following:
 - ***Whether all options were considered at the time of sanctioning of the project.***
 - ***Why there are significant differences between the actual cost of the project and the estimated cost at the time of sanction; and***
 - ***Whether it was justified and reasonable for the project to be excluded from the oversight by the Public Utilities Board.***³
6. On April 6, 2018 the Commissioner heard Applications for Standing and Funding from a number of interested parties requesting to participate in the Inquiry process. An Application was filed on behalf of a number of former elected politicians, being former provincial Premiers Danny Williams, Tom Marshall and Paul Davis, as well Ministers of Natural Resources, Shawn Skinner, Jerome Kennedy, Tom Marshall and Derrick Dalley. Mr. Marshall had served in both roles for a period over a two year span. It is worthy of note that the Application made on behalf of this client group cited as Former Provincial Government Officials 2003-2015 (the “**Group 2003-2015**”) took heed of the concerns expressed for efficiency and cost effectiveness by the Commissioner. While all individuals had their own

³ “Premier Ball Announces Muskrat Falls Public Inquiry”, Executive Council, November 20, 2017.

individual interests and reputations at stake, they combined efforts and made a single application requesting only one counsel represent all six individuals.

7. On April 6, 2018 the Commissioner released his decision regarding the matters of Standing and Funding and the Former Provincial Government Officials 2003-2015 was granted full Standing and Funding for participation in all aspects of the Inquiry process. There was Standing and Funding granted to numerous other parties to varying degrees as outlined in Commissioners decision.⁴
8. As is abundantly clear from the approximately 139 hearing days including evidence from approximately 134 different witnesses, over 4500 entered exhibits and nearly 6 million documents that have been submitted to the Commission for consideration, the scope of particulars and detail required to be reviewed in an attempt to canvas all aspects of the Terms of Reference was extensive, and not all matters are of relevance to all parties. Accordingly the objective of the within submission is not to canvas and opine on all matters that came before the Inquiry, but to address those issues, topics and evidence which may be relevant to the members of Former Provincial Government Officials 2003-2015 and which we respectfully submit should be considered by the Commissioner when rendering his final report.

⁴ Decision on Standing Applications for Former Provincial Government Officials 2003-2015, April 6, 2018.

SECTION 2: TERMS OF REFERENCE

9. At the time of the announcement of the Muskrat Falls Inquiry, the Government of Newfoundland and Labrador provided a wide ranging scope of review which was reflected by the Terms of Reference and outlined in Section 4 of the Order in Council establishing the Inquiry. The Terms of Reference are as outlined below:

4. The commission of inquiry shall inquire into:

- (a) the consideration by Nalcor of options to address the electricity needs of Newfoundland and Labrador's Island interconnected system customers that informed Nalcor's decision to recommend that the government sanction the Muskrat Falls Project, including whether:**
 - (i) the assumptions or forecasts on which the analysis of options was based were reasonable,**
 - (ii) Nalcor considered and reasonably dismissed options other than the Muskrat Falls Project and the Isolated Island Option, and**
 - (iii) Nalcor's determination that the Muskrat Falls Project was the least-cost option for the supply of power to Newfoundland and Labrador Island interconnected system over the period 2011-2067 was reasonable with the knowledge available at that time;**
- (b) why there are significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction and the costs by Nalcor during project execution, to the time of this inquiry together with reliable estimates of the costs to the conclusion of the project including whether**

- (i) Nalcor's conduct in retaining and subsequently dealing with contractors and suppliers of every kind was in accordance with best practice, and, if not, whether Nalcor's supervisory oversight and conduct contributed to project cost increases and project delays,
- (ii) the terms of the contractual arrangements between Nalcor and the various contractors retained in relation to the Muskrat Falls Project contributed to delays and cost overruns, and whether or not these terms provided sufficient risk transfer from Nalcor to the contractors,
- (iii) the overall project management structure Nalcor developed and followed was in accordance with best practice, and whether it contributed to cost increases and project delays,
- (iv) the overall procurement strategy developed by Nalcor for the project to subdivide the Muskrat Falls Project into multiple construction packages followed industry best practices, and whether or not there was fair and competent consideration of risk transfer and retention in this strategy relative to other procurement models,
- (v) any risk assessments, financial or otherwise, were conducted in respect of the Muskrat Falls Project, including any assessments prepared externally and whether:

 - (A) the assessments were conducted in accordance with best practice,

- (B) Nalcor took possession of the reports, including the method by which Nalcor took possession,
- (C) Nalcor took appropriate measures to mitigate the risks identified, and
- (D) Nalcor made the government aware of the reports and assessments, and
- (vi) the commercial arrangements Nalcor negotiated were reasonable and competently negotiated;
- (c) whether the determination that the Muskrat Falls Project should be exempt from oversight by the Board of Commissioners of Public Utilities was justified and reasonable and what was the effect of this exemption, if any, on the development, costs and operation of the Muskrat Falls Project; and
- (d) whether the government was fully informed and was made aware of any risks or problems anticipated with the Muskrat Falls Project, so that the government had sufficient and accurate information upon which to appropriately decide to sanction the project and whether the government employed appropriate measures to oversee the project particularly as it relates to the matters set out in paragraphs (a) to (c), focusing on governance arrangements and decision-making processes associated with the project.⁵

10. As is clearly evident from the Terms of Reference, the thrust of this investigation was to examine the role, consideration and actions of Nalcor Energy as it related to their recommendations to the Government of Newfoundland and Labrador in regard to such issues, including but not limited to, matters pertaining to the sanctioning of the Muskrat Falls

⁵ *Commission of Inquiry Respecting the Muskrat Falls Project Order*, at Section 4.

Project as well as ongoing cost estimates and scheduling. The Terms of the review were structured so as to cover a wide ranging scope of topics from Nalcor's consideration of assumptions and forecasts in regard to various options to be considered by GNL, to their ultimate recommendation and determination that Muskrat Falls was to be the lowest cost option to meet the hydro generation needs of the Province at that point in time.

11. In addition to these issues there was also to be consideration of commercial and contractual arrangements as between Nalcor and its contractors and suppliers, as well, whether or not GNL was fully informed as to the risks or other concerns anticipated with the Project. While the bulk of the Terms of Reference deal directly with Nalcor's decision making processes and the considerations that went into reaching these results, the Commissioner is also tasked with the responsibility to determine whether GNL employed appropriate measures to oversee the Project as it pertains to the actions and execution of Nalcor's responsibilities.
12. The Commissioner was also tasked with consideration of the participation of Indigenous peoples in the Inquiry process and, finally, was asked whether the determination that the Project should be exempt from oversight by the Board of Commissioners of Public Utilities was justified and reasonable. While the above is a capsule summary of some of the issues put before the Inquiry, it is not intended to be exhaustive, but it is demonstrative of the wide scope of this review.
13. The depth of the review was further delineated in a March 14th, 2018 written decision released by Commissioner LeBlanc pertaining to his Interpretation of the Terms of Reference for the Inquiry. While it is not necessary to review in detail all aspects of the Commissioner's decision, it is of importance to highlight the themes for which the Commissioner saw as primary considerations in conducting his review and which will in all likelihood will be reflected in his final report.
14. To this end the Commissioner has outlined at paragraph 14 of his decision the following six Guiding Principles as a guide as to how the Inquiry would be conducted and the primary considerations that would be reflected in his deliberations. While all principles have merit in and of themselves, it is respectfully submitted that three of these principles have more value

and importance to the Group 2003-2015 as a whole than others. Given the timing at which this Inquiry has been called and the interest that political partisanship play no role in the process, the Group 2003-2015 do not have any concerns that such factors will have any impact on the conclusions and recommendations arising from this review. The six principles identified are as follows:

1. **Independence** - That the Inquiry be an independent one with no pre-conceived or pre-formed bias towards any specific outcome.
2. **Cooperation** - That the Inquiry proceed on the basis of encouraging a cooperative approach as between all parties so as to promote the full canvassing of all relevant issues in the least adversarial manner as well as efficient use of time, effort and cost.
3. **Thoroughness** - That the Inquiry examine all relevant issues within its mandate proportionate to their level of importance or significance to the ultimate findings and recommendations to be made. Thoroughness does not mean the investigation must be totally exhaustive in all respects. To be borne in mind here is the amount of evidence surrounding the whole of the Project to be reviewed and considered as well as the amount of time available to conclude this Inquiry.
4. **Expeditious**: That the Inquiry be completed in the time mandated by the Government and that it be cost efficient but effective.
5. **Openness to the Public**: That the Inquiry be conducted in a transparent and an open manner subject to the need to respect any applicable legal privilege claims as well as to ensure that commercially sensitive material not be made public where such could negatively impact the overall construction and costs of the Project.

- 6. Fairness: That the Inquiry balance the interests of the public in learning what happened with the rights of those involved who are to be treated fairly. In an investigative Inquiry, it is important to be reminded that implicit in being fair is the need to guard against inappropriate reliance on hindsight. Any evaluation of past conduct must be done in the context of the knowledge that was available at the time, not what we know today.⁶**

15. The three principles which the Group 2003-2015 would respectfully submit should be given the most emphasis are Independence, Thoroughness and Fairness. The rationale in highlighting these three principles is that given the history and political overtones surrounding the history of the Project, which are extrinsically intertwined in the review, sanctioning and construction of the Project over the last 15 years, they must be considered so as to ensure adequate consideration of the same.

- a. Independence: The Independence of the review process in this instance is essential given the prolonged public and often emotional debate that surrounds all aspects of this Project and continue to do so up to current date. The importance of eliminating any pre-conceived bias towards any party is essential so as to ensure that any and all findings are based upon a fair and independent review of the evidence as a whole, taking into consideration all of the evidence and apportioning the appropriate weight to relevant evidence as required.
- b. Thoroughness: The thoroughness of the review is central to the Inquiry process in this instance given the length of time that the project process has been ongoing, but additionally, given that there are numerous individuals and groups involved to differing degrees and at various points in time. The varying role and responsibilities for each participant is an essential consideration in making any final determination in respect to the contribution and responsibility of such individuals or groups in the project process and execution.

⁶ Interpretation of the Terms of Reference for the Muskrat Falls Inquiry, March 14, 2018, at page 8.

There are numerous participants who played varying critical roles in the development of the Muskrat Falls Project, all of whom have differing levels of responsibility and influence pertaining to the outcome and decisions that were ultimately reached at various stages in the project development. In light of the fact that many parties and witnesses have found themselves in conflicting roles and that the evidence adduced throughout the Inquiry process has pitted individuals against each other, whether they are employed within any one organization or whether it be different organizations, it emphasizes the importance that all the evidence be considered as a whole.

Thoroughness hence is of utmost importance given the volume of evidence before the Commissioner and accordingly the influences of hindsight and contextual interpretation need to be in the forefront of any deliberations prior to reaching conclusions regarding the same.

- c. Fairness: The issue of fairness is undoubtedly one of the most fundamental principles governing not only the hearing process, but the evaluation of the evidence and ultimately, the completion of the Commissioner's Final Report. Given that all parties and individuals have vested reputational interests in the conclusions and recommendations that may be reached, a full and complete assessment of all relevant evidence and the apportioning of weight to be attributed to the same, lies in the hands of the Commissioner. As noted by Professor Ratushny, there is a heightened level of fairness required where a witnesses' reputation may be at stake: **"where adverse findings potentially affect professional reputations, the standard of proof in a civil case should be applied. This is the standard of proof on a balance of probabilities. The evidence must be clear, convincing, and cogent and must be scrutinized with care, taking into account the seriousness of the potential findings."**⁷

While an independent and objective assessment of the evidence is an overriding goal of any investigative Inquiry, as stated by the Commissioner in his decision

⁷ Ed Ratushny, "The Conduct of Public Inquiries: Law, Policy and Practice," (Toronto: Irwin Law Inc., 2009), at 383.

pertaining to the Interpretation of the Terms of Reference, he quite correctly stated, ***“it is important to be reminded that implicit in being fair is the need to guard against inappropriate reliance on hindsight. Any evaluation of past conduct must be done in the context of the knowledge that was available at the time, not what we know today.”***⁸ For purposes of clarity hindsight is defined as the perception of the nature of an event after it has happened.

16. It is the respectful submission of the Group 2003-2015 that the application of this fairness principle is not only essential, but is critical given that decisions were being made at varying points in time, such as pre and post sanction. Accordingly, any review of such decisions requires an assessment based upon all evidence available at the time, not what has been learned since. Professor Ed Ratushny notes that ***“inappropriate reliance on hindsight may also drive findings out of perspective and may be unfair when assessing individual conduct.”***⁹ The danger of considering evidence adduced at a Commission of Inquiry with the benefit of hindsight was aptly described by Justice Archie Campbell who stresses that “of all a commissioner’s temptations the most insidious is hindsight.”¹⁰
17. The Commissioner has the onerous task of reviewing all such decisions and in reaching any conclusions must ensure that such determinations are considered in the pretense as to whether they were reasonable given all the circumstances known at the time. As this Inquiry has unfolded, a concern has developed within the Group 2003-2015 of an over reliance on hindsight; and it is our respectful submission that the Commissioner guard against this as he reaches his conclusions. As will be discussed later in this submission, while it has become evident through the Inquiry process that additional relevant information may have existed at various periods in time during the project, not all parties, including members of the Group 2003-2015, may have been aware of the same at any given point in time. The principles of fairness therefore needs to be adopted when considering that some

⁸ Interpretation of the Terms of Reference for the Muskrat Falls Inquiry, March 14, 2018, at page 8.

⁹ Ed Ratushny, *supra*, at page 362.

¹⁰ Justice Archie Campbell, “The Bernardo Investigation Review”, in Commission of Inquiry: Praise or Reappraise eds. Allan Manson and David Mullen, Irwin Law, 2003 in Chapter 13, pp. 395-397.

parties were required to make critical decisions in isolation, without the benefit of all pertinent information.

SECTION 3: PHASE I – PRE-SANCTION CONSIDERATIONS

3(a) Early History of the Churchill River

18. The Public Hearings for the Commission of Inquiry commenced on September 17th, 2018 in Happy Valley - Goose Bay, Labrador, which is the closest residential community in proximity to the Muskrat Falls Project site. Inquiry counsel called, as their first witness, Dr. Jason Churchill, a recognised historian and expert in the field of energy politics, particularly pertaining to negotiations to develop the hydroelectric resources of the Churchill River in Labrador.¹¹ Dr. Churchill was retained by the Commission to prepare a detailed paper that addressed the history of the Churchill River and to speak to some of the storied history associated with various attempts to develop hydroelectric projects over the last 50 years.¹²
19. While it is not necessary to duplicate the particulars of all historic matters pertaining to former attempts at development, it is essential that certain issues be considered as their historic importance plays an integral part in what led to the ultimate decision to proceed with the development of the Muskrat Falls Project in the manner which was ultimately proposed and approved.
20. Some would suggest that the earlier Upper Churchill Falls Development which was completed in partnership with Province of Quebec in 1969, through its provincial Crown Corporation Hydro Quebec, should not play any consideration in assessing the merits of proceeding with the Muskrat Falls Project. It is the respectful submission of the Group 2003-2015 that the history of proposals regarding the development of the Churchill River, stemming back to 1969 up to current date, is essential in respect to any analysis of the evaluation of current proposals to develop Muskrat Falls. To ignore this reality would be foolhardy and would seriously undermine any true and fair analysis of hydroelectric developments or policy in Newfoundland and Labrador.

¹¹ Exhibit P-00007, at page 1.

¹² Exhibit P-00009, at page 5.

21. It is argued that the difficulties which have been encountered over the years, and which continue with Hydro Quebec in respect to issues arising from the Upper Churchill contract, in addition to other ongoing hydro matters, is a very real and legitimate consideration when evaluating potential development options for the Lower Churchill Project. Had GNL been able to obtain the cooperation of Quebec with respect to wheeling power over their border, then this would have clearly opened numerous alternatives and allowed for consideration of development of the Gull Island project and / or various other potential partnerships for hydroelectric development. Given that for all intents and purposes, Hydro Quebec was resisting attempts to facilitate Newfoundland and Labrador's ongoing concerns pertaining to access to the international grid through Quebec, then this plays a role in the decision to proceed. The continued isolation of Newfoundland from a hydro transmission perspective resulted in substantial restriction in the Provinces' options for growth from both an economic and investment perspective.
22. Furthermore, a review of the factual history of Newfoundland and Labrador / Quebec negotiations surrounding this issue substantiates GNL's position that possible collaboration with Hydro Quebec was going to be highly unlikely and negates the suggestion that GNL failed to adequately consider such options. The evidence of Dr. Churchill, when considered in concert with that of former Premiers Williams and Dunderdale, and Nalcor CEO Ed Martin, substantiates that there exists an objective and historical factual basis for the notion that an agreement with Quebec on elements of the Project was not likely achievable. The matters considered by Dr. Churchill that provide support to this proposition are outlined in further detail below.
23. Dr. Churchill took the time to address the early history of the Churchill River Watershed in his report including stressing the importance of the 1927 Judicial Committee of the Privy Council Labrador Border Decision which culminated in Premier Joseph Smallwood executing the 1969 Brinco deal. Former Premier Smallwood had been pursuing efforts since 1952 to develop the Churchill River Basin with no success. Ultimately Premier Smallwood travelled to Great Britain, meeting Prime Minister Winston Churchill and the Rothschild banking family, which lead to the establishment of Brinco in 1955 and the creation of the Churchill Falls Company (CFL Co.). It was at this stage that Hydro-Quebec

entered the picture having initially acquired a 17 per cent share in CFL Co., later expanding to 34%. It was as a result of this pass through its territory that they would then set the terms of access. As stated by Dr. Churchill, this set the course in history for the development of the Churchill River given that there were only three possible alternatives as listed below:

- i. develop Churchill Falls according to Quebec terms,**
- ii. change the constitutional powers under the BNA Act**
- iii. find alternate route not traversing Quebec.¹³**

24. Given the politics of Option 2 and the geographic location for potential developments and the Quebec border, obviously the attractiveness of the latter two options was limited at that point in time. It was at this juncture that then Quebec's Minister of Natural Resources, Rene Levesque, was trying to pressure Newfoundland to nationalise Brinco, which would have resulted in significant savings for the Province of Quebec.

25. While the Anglo-Saxon Route was considered and dismissed by the Province of Newfoundland as not being economically viable at that point in time, the National Power Grid concept was still being considered by the Federal Government. It was in 1962 that the notion of a national electrical system was introduced to the House of Commons by Prime Minister John Diefenbaker. As quoted by Dr. Churchill:

“Diefenbaker, and other supporters of the idea, portrayed the national transmission system as a great patriotic endeavour akin to the construction of the transcontinental railways, or the Trans-Canada Highway, which were critical components to the development of the national economy. The government of Quebec opposed the talks. The position of the Quebec government was that electrical transmission was within the realm of the provinces and the federal government did not have any part to play. Quebec Premier Jean Lesage had remained consistent in his views on transmission of Labrador power from his days as a Minister in Prime Minister Louis St. Laurent's cabinet. As early as 1956, Lesage stated

¹³ Exhibit P-00008, at pages 5-6.

that the development and transmission of power from Labrador to any other province...[was] purely a provincial responsibility."¹⁴

26. The attempts at nation building by the Prime Minister was consistently rejected and the obstructionist approach invoked by the Province of Quebec was maintained over the next 5 years as the work of the subsequently established Federal Committee on Long Distance Transmission (CLDT) was stymied as a result of the lack of cooperation from the Province of Quebec. Such historic milestones cannot be merely disregarded, as they are essential in placing into context subsequent provincial governments' decisions to reach an agreement with the Province of Quebec, particularly when considering the actions over the next 40 years.
27. Perhaps one of the most important contracts of historic significance to the Province of Newfoundland and Labraodr, which couched in part how the Province would proceed on a go forward basis, was the 1969 Churchill Falls Contract. As duly noted by Dr. Churchill, the controversy surrounding the negotiating power of the Province of Newfoundland and Labrador at this point in time was vulnerable to say the least, given the critical financial position of CFL Co. and its parent Company Brinco. **"By the time the 1969 Contract was ready to sign, the bargaining capacity of CFL Co. visa vie Hydro- Quebec was virtually non-existent."**¹⁵
28. While there should be no judgment passed upon the decision makers at that point in time given the exposed position that they were in, suffice it to say it proved to be a very lucrative commercial transaction for the Province of Quebec over the next 50 years. While it is not necessary to review all the provisions of the contract for the purposes of this submission, it is worthy to note the attractiveness of the contractual terms which provided the Province of Quebec with guaranteed low and stable priced power over an extended period of time without any provision to re-open the contract or a price escalation clause. As duly noted by Dr. Churchill:

¹⁴ Exhibit P-00008, at page 7.

¹⁵ Exhibit P-00008, at page 11.

“The 1969 Contract would also have a significant impact on subsequent negotiations to develop the Gull Island and Muskrat Fall sites. In the end, the 1969 contract became a noose around the necks of Newfoundland in dealing Quebec negotiators and compounded market access disagreements which have remained unresolved.”¹⁶

29. The ills of the 1969 contract have regrettably restricted Newfoundland and Labrador Premiers for successive years as there has always been sense that there is a need to “*right the wrongs*” of the 1969 contract, whether it be through a re-opening of the contract to address the escalation issue,¹⁷ or some alternative form of redress remedy. To the present date, some 50 years later, the same has remained unachievable despite numerous attempts and a most recent refusal by the S.C.C. to reopen the contract in November of 2018.¹⁸
30. As time evolved Newfoundland and Labrador’s attempts to develop its own resources were stifled by Quebec as was evident from the efforts of the Moore’s Administration to develop the Gull Island Project with the financial support of the Federal Government. As project costs increased, the development of the project was contingent upon sale of Gull Island electricity westward and hence wheeling electricity through Quebec. An agreement could not be achieved with Hyrdro Quebec and the Gull Island project ended.¹⁹
31. With the collapse of this option the Province then attempted to arrive at a recall option which was basically countered with a stated position by the Province of Quebec, “*yes but at the same replacement cost*”, which was significantly higher than what they were acquiring it for from CFL Co. In addition to this response, it was expressed by then Quebec Minister of Natural Resources Jean Cournoyer, who suggested that in exchange for making available the additional power, there should be a change in the Labrador boundary or alternatively GNL could sell seven to ten thousand square miles of Territory so as to give them control

¹⁶ Exhibit P-00008, at page 13.

¹⁷ Exhibit P-00008, at page 17.

¹⁸ 2018 SCC 46.

¹⁹ Exhibit P-00008, at page 12.

over the headwaters of the Churchill River. Clearly such an impertinent suggestion was flatly rejected given the long term consequences of the same.²⁰

32. The next decade of the 80's was marked by further pursuit by the Province of Newfoundland to utilize legislative and judicial mechanisms to overcome existing obstacles and seek development of the Churchill River. Efforts were made to try and achieve further progress of Wheeling Rights through the Province of Quebec, but the same was not achieved through amendments to the Federal National Energy Board Act and subsequent changes did not facilitate progress in this regard. A subsequent review by the Supreme Court of Canada (a decision reached in May of 1984) of the newly proposed Water Reversion Act by the Province of Newfoundland and Labrador, which was drafted to reclaim the water rights given to CFL Co. in the 1961 lease, determined that the purpose of the Water Rights Reversion Act was outside the actual legislation and that it was intended to interfere with the 1969 contract.²¹

33. It is also of particular interest that on June 25, 1980, Victor Young, in his capacity as Chair of the Lower Churchill Development Corporation, wrote to the Honourable Leo Barry, Q.C., Minister of Mines and Energy for GNL, to recommend the development of the Gull Island and Muskrat Falls sites "at the earliest opportunity." Ultimately as outlined by Dr. Churchill, they were unsuccessful in executing the various requirements for development at that time, but it does demonstrate that the development of Muskrat Falls was considered decades before the 2012 sanction decision. In particular, we note that Mr. Young references that his recommendation reflected **"both considered judgement and the findings of an impressive series of technical, marketing, economic, financial and environmental analysis."**²²

34. The following decade saw continued efforts by GNL in relation to the Churchill River. The period of 1989 - 1996 was led by former Premier Clyde Wells who was also driven to achieve additional benefits for the Province from its hydroelectric resources. Given internal problems the Province of Quebec was having with hydro reliability, in an unusual move

²⁰ Exhibit P-00008, at pages 12-13.

²¹ Exhibit P-00008, at page 16.

²² Exhibit P-00138.

Hydro-Quebec opened discussions with the Province regarding possible redress of the 1969 contract in combination with other possible development opportunities on the Churchill River. While the parties were optimistic of a deal being achieved, final terms were never agreed upon as the Province was not able to get agreement on an escalation clause, which was the Achilles Heel of the previous 1969 contract.²³

35. The Premier then turned his mind to two possible alternatives. The first was privatizing Newfoundland and Labrador Hydro and this proposition was met with substantial public opposition and did not get off the ground. The second option was the creation of the *Electrical Power Control Act* (EPCA). The objective of this legislation was to enable government to use increased regulatory control and access provisions granted in Section 92A of the 1982 Canadian constitutional amendment. The provisions of the EPCA were structured such that the Public Utilities Board (PUB) was to have broad powers to allocate all power produced within the Province. Regrettably these legislative developments did not result in any further progress on hydroelectricity development in Labrador.²⁴
36. The next two administrations of Premiers Tobin and Grimes also attempted to move the file forward, but again without success. The Tobin administration had set out a comprehensive set of objectives to be achieved in any new agreement with Quebec, but it was also contingent upon there being a connection to the island portion of the province as it was critical to stabilize electricity rates. Agreement as between the Province and the Federal Government was never achieved and hence the Gull Island Development did not move forward. While this objective failed, the Tobin administration was able to acquire better benefits from the Upper Churchill than previous administrations were able to obtain.²⁵
37. The subsequent Grimes administration had a shorter period of time to arrive at a deal having only been in power from 2001-2003 at a time when there were significant changes in the American energy markets regarding greenhouse gas emissions, as well as the impacts of the Kyoto Accord which was a United Nations Convention on Climate Change pursuing

²³ Exhibit P-00008, at page 17.

²⁴ Exhibit P-00008, at page 18.

²⁵ Exhibit P-00008, at pages 18-19.

the lowering of carbon emissions by 2012. With these influences in the background, the Grimes Government once again entered into negotiations with then Quebec Premier Bernard Landry regarding potential development of Gull Island. Upon disclosure of specifics pertaining to draft agreement, there was substantial public opposition within the Province and on the NL Hydro Board itself regarding such insufficient recall allocations; as well as the elimination of the Muskrat Falls Project and the absence of the inter-island connection, all of which resulted in the collapse of this effort once again.²⁶

38. It is at this juncture in the Churchill River timeline that the development of the Energy Plan: Focusing our Energy became a reality. Given the significance of this policy directive it will be addressed in the forthcoming section of this submission.

39. Dr. Churchill saw the merit on commenting on the creation and thoroughness of the Provinces Energy Plan which was released in 2007. Dr. Churchill's direct testimony in this regard was most insightful as he acknowledged the value and completeness of the report. When questioned in this regard, Dr. Churchill stated as follows:

“MR. T. WILLIAMS: In conclusion, in your review of this time period of some 50-plus years, and your comments in relation to the 2007 Energy Plan, had you seen the amount of work that was put into the Energy Plan had been exercised by any other of the previous administrations before moving forward with any strategy and development of the Lower Churchill?

DR. CHURCHILL: It depends on what you're referring to. Like, if you look at the amount of money – the millions on top of millions of dollars that Newfoundland has invested in Gull Island sites when it came to, you know, the environmental – the engineering studies. And at one point when they were negotiating one of the agreements, they wanted that recognized. There has been significant effort but it's different, right? If you have – when you get Frank Moores and Peckford, in particular, there was a lot of judicial

²⁶ Exhibit P-00008, at pages 20-21.

effort put in, you know, and developing legislation. That's where their efforts tended to be concentrated.

The thing that was, I think, possibly different – because I haven't examined to the same level any of those previous governments – but what appears to be slightly different with the Williams approach was the comprehensive nature of it. Of first – and, again, this comes back to the criticism that he had of the Grimes Gull Island agreement where it was done within the context of this – of a development without the broader context of the, what's the broader energy picture, what are we trying to achieve.

And so it's the comprehensiveness that may – and I can't go beyond may 'cause I said I haven't studied the other premiers. But I think it's the comprehensiveness of approach that may be different in terms of the time leading up to the Focusing Our Energy report.

[...]

MR. T. WILLIAMS: Okay.

And I guess just to wrap things up, on page 24 of your report, your personal report, exhibit, I think it's 00008, you had mentioned: "Focusing Our Energy also provides evidence that the Williams' government had studied issues associated with" the "developments since [the] 1960s to develop the Lower Churchill River and incorporated lessons learned."

DR. CHURCHILL: Mm-hmm.

MR. T. WILLIAMS: Are you in a position, having done a historical review and spent much time on this, as to offer an opinion as to the satisfactory nature of that plan? Do you feel that it encumbered – you know, considered the issues of and the lessons learned over the previous 50-plus years?

DR. CHURCHILL: Well, I give a couple of specific examples – and I'm not saying that the Williams' government was unique in this, by the way.

If you look at when they changed the Electrical Power Control Act, when you read about that section in the energy report, immediately afterwards they add in the fact that none of these changes that we're making to the Electrical Power Control Act will have any impact on existing contracts. And they use the phrase: including the 1969 Upper Churchill contract. So they're cognizant of that. And so – 'cause they learned from what happened with the Wells' administration.

And, actually, when Premier Wells was in government he had learned from what happened with the Water Rights revision act. One of the reasons why the Water Rights revision act that the Supreme Court of Canada gave for rejecting it, for Newfoundland losing that case, was the comments that were made by Premier Peckford and others talking about that: now, finally we'll get control of the water lease back.

It was key to the 1969 – that was used as evidence against Newfoundland's case that, no, this is – it's within Newfoundland's jurisdiction and so we have the right to do this. What Supreme Court of Canada said is that it's *ultra vires*, it's outside the intent – you're a lawyer, you should know better than I do. But the – it's outside the intent of the legislation, and that's why they ultimately concluded, based on some of these external things, that the purpose of the Water Rights reversion act was indeed to find the means of getting at the 1969 contract.

So Clyde Wells, one of the things that he was doing when he came in with his two-pronged approach of privatizing Hydro and bringing in the Electrical Power Control Act, one of the things that he attempted to do was to minimize the amount anybody said on it in terms of public comments and all the rest of the stuff. Now, it didn't turn out 'cause of public outcry

against the privatization idea, but that lesson was learned by him. And you can see that, again, they – by the time you get to 2007 – 2005, 2007 – I think it became – it's pretty obvious that there are certain avenues that will no longer work.

Now, if you go back to – look at the court cases that the Province of Newfoundland and Labrador were not successful with, right? You know, the 800 megawatts recall, the Water Rights reversion act. Now, these things that went to court meant that – by 2007, it was clear that those established methods had been tried, right? Those means have been tried and they're found wanting, if you're looking at it from a results perspective. And, so that's – I think that lessons were learned, and that's part of the reason why they said: okay, what now?

I think that the 2003 Royal Commission report, I think their conclusion, that I mentioned – the (inaudible) presentation and in the paper – where they say, you know, that: we haven't had success, and none of the approaches or strategies that have been used from Confederation to 2002, 2003 had ultimately enabled the province to fully capitalize on the hydroelectric resources of the Churchill River.

And so, the question is: if all this had been tried for decades and decades, if you're – you know, when Premier Williams came into power, the questions is: What now? And if you're starting with a question of what now, it makes sense that you would try to do this to get a comprehensive understanding of what the lay of the land was.

MR. T. WILLIAMS: Can I read into your response that that 2003 to 2007 period provided an opportune time to revisit this project and possible proposals, having learned from the lessons of the past?

DR. CHURCHILL: Well, that's – well, there's two things with that, right? That's part of the reason why they released, in 2005, the request for proposals, to find out what's possible, what's out there, what's the interest level, what's involved.

And you also have the public discussions, right? They released the discussion paper before they released the final energy policy, and so that provided the opportunity for citizens and different groups to also be involved in development of that policy. So it was an opportune time, and they attempted to cast their net broadly.”²⁷

40. Accordingly Dr. Churchill's detailed analysis of the Churchill River Project is quite astute in assessing, not only the whether there was any probable likelihood of obtaining a satisfactory arrangement with Hydro Quebec, but in addition, that the benefits that the Maritime Link would provide in freeing the Province from the strangle hold that it found itself resulting from its geographic isolation.
41. It is respectfully submitted that the history of the Churchill River is not only a real and live issue that is worthy of consideration, but in fact it serves as a very critical piece when assessing the viability of various options and opinions expressed in respect to issues as they pertain to the Province of Quebec. It is the position of the Group 2003 -2015 that the turmoil, interference and obstruction that has been repeatedly demonstrated by the Province of Quebec over the years through their provincial energy corporation, is a real and legitimate concern for the Province of Newfoundland and Labrador as it pertains to the development of the Muskrat Falls Project.
42. The Commission of Inquiry also thought it worthy to have commissioned a paper by Dr. Bent Flyvbjerg, who was called as an expert in relation to Mega Project management. He was retained by the Commission to prepare a report relating to the development of megaprojects internationally, particularly cost and schedule overruns on hydroelectric dam projects. ^{28 29}

²⁷ Hearing Transcript, September 19, 2018, at pages 33-34.

²⁸ Exhibit P-00003, at page 1.

43. Dr. Flyvbjerg indicates that in a review of 274 hydro-electric dam projects both in Canada and Internationally, such projects are high-risk and typically subject to cost and schedule overruns by their very nature. Given the limited scope of the authors review, it is not clear as to the distinguishing factors that could have contributed to cost and schedule overruns in the various projects reviewed.
44. The tenure of Dr. Flyvbjerg's evidence was to outline a number of philosophical propositions that he has considered and advanced as they relate to the development of mega projects internationally, two of which are the doctrines of Optimism and Political Bias. The premise of Optimism Bias as quoted by Dr. Flyvbjerg is that it is a cognitive predisposition found with most people to judge future events in a more positive light than is warranted by actual experience. This supposition is grounded on the assertion that human judgment is generally optimistic due to overconfidence and insufficient regard to distributional information about outcomes. Consequently, it is argued that people will underestimate the costs, completion times, and risks of planned actions, whereas they will overestimate the benefits of the same actions.³⁰
45. Such considerations are grounded in behavioural science and as such are subject to contrary opinion. Based upon the same we would suggest that the Commissioner must be cautious as to the reliance he places on such perspectives. While such opposing opinions were not canvassed at the Inquiry, there exists a school of thought critiquing these viewpoints. There exists a body of research from King's College London, UCL and Birkbeck, University of London which casts doubt over claims that people are inherently overly-optimistic or "Optimistic or biased." In a May 25, 2016 study entitled "A pessimistic view of optimistic belief updating", Dr. Punit Shah and Dr. Adam J.L. Harris et al. provide a counter opinion to optimism bias.³¹ Dr. Adam Harris from UCL has stated the following as it relates to their findings:

"Previous studies, which have used flawed methodologies to claim that people are optimistic across all situations and that this bias is 'normal' ,

²⁹ Exhibit P-00010, at page 5.

³⁰ Exhibit P-00004, at page 16.

³¹ Shah, Dr. Punit et al., "A pessimistic view of optimistic belief updating," (2016) Cognitive Psychology. 71-127.

are now in serious doubt...This assumption that people are optimistically biased is being used to guide large infrastructure projects, with the aim of managing expectations around how much projects will cost and how long they will take to complete. Our research supports a re-examination of optimism bias before allowing it to guide clinical research and policy.”³²

46. The premise of Political Bias as quoted by Dr. Flyvbjerg suggests that when forecasting the outcomes of projects, forecasters and planners deliberately and strategically overestimate benefits and underestimate cost and schedule in order to increase the likelihood that it is their projects, and not the competition's, that gain approval and funding. In concluding Dr. Flyvbjerg stated **“Optimism bias and political bias are both deception, but where the latter is deliberate, the former is not. Optimism bias is self-deception.”³³**
47. A primary issue at hand is that Dr. Flyvbjerg's evidence and perspective was presented in isolation and no contrary or alternative opinions were canvassed by Commission Counsel. While this is merely an observation, it is grounded in the view that there does exist a body of study that challenges the legitimacy of these theoretical propositions. As the Commission has asserted the principle of “fairness” as a key mandate of this Inquiry, we respectfully suggest that Dr. Flyvbjerg's evidence in the absence of contrary opinions may raise a concern to this extent.
48. In addition, it is submitted that it is of material consequence that while Dr. Flyvbjerg was given access to person(s) of interest in completion of his paper, he confirmed that he did not speak with any elected Government Officials in the completion of his paper and it is a reasonable assumption that he did not deem it necessary to do so. This was acknowledged during his hearing testimony:

“MR. T. WILLIAMS: Okay.

³²Science Daily, “Study casts doubt on claim that people are over-optimistic” (August 16, 2016), online: Science Daily, < <https://www.sciencedaily.com/releases/2016/08/160816182618.htm>>

³³ Exhibit P-00004, at page 18.

So in instances where you've been able to specifically find that there is either deliberate or innocent bias present, you would have specific examples of that by members of the project team or leadership member – someone of that nature, I trust.

DR. FLYVBJERG: Yes.

MR. T. WILLIAMS: And so, in keeping with that theme, I trust you can confirm that in preparing your report you have not spoken with, met with, or interviewed any political leaders, any political participants, any project team managers, any CEOs in relation to this specific project.

DR. FLYVBJERG: So the Muskrat Falls Project?

MR. T. WILLIAMS: Muskrat Falls.

DR. FLYVBJERG: I have not.

MR. T. WILLIAMS: And so you are not able to reach any conclusions with respect to the presence of any of these influences in regards to this project 'cause you weren't asked to do so. Is that correct?

DR. FLYVBJERG: That is correct.”³⁴

49. Accordingly while Dr. Flyvbjerg's testimony and the content of his paper were of interest, it is submitted that there is no evidentiary basis for which the Commissioner can apply, with any degree of certainty, that these proposed principles can be applied to the development of the Project, as there exists no evidentiary link to establish the same. It is respectfully submitted that to draw any such inferences would be without merit.

The fact that at the time of Decision Gate 2 (DG2), when a decision was made to proceed with the Muskrat Falls Project, the Province was in a uniquely positive financial position and

³⁴ Hearing Transcript, September 17, 2018, at page 71.

that the governing administration was experiencing exceptionally high poll ratings, is not in and of itself, sufficient evidence to draw any conclusions pertaining to the applicability of such theories without independent analysis. Accordingly we would suggest that Dr. Flyvbjerg's evidence to this extent is for information purposes only.

50. It is noted that Dr. Flyvbjerg did supply the Inquiry with independent, objective evidence in regard to the past experience of various mega projects as they relate to both cost and scheduling overruns. It is evident that from the statistical evidence provided in the International context, that with the exception of nuclear development projects, hydro electrical projects are the most likely to exceed budget estimates and incur schedule overruns. On average, hydroelectric megaprojects experience cost overruns of 96% and schedule overruns of 42%.³⁵

3(b) Recent History of The Churchill River (2003-2015):

51. As stated by Dr. Churchill in the introduction of his paper, the creation of the Energy Plan by the Williams Government was a key consideration in shaping the Province's energy policy for the next decade and beyond:

“In September 2007, the government of Danny Williams released its much anticipated *Focusing Our Energy: An Energy Plan for Newfoundland and Labrador*. The plan expressed great optimism for the future and argued that the province was at a watershed; it had faced challenges in the past that had taught some hard lessons, but the lessons had been learned and the province was now potentially on the cusp of sustained prosperity. It was clear that the province's future prosperity was to be anchored on natural resource development that included exploiting a wide range of non-renewable and renewable energy sources including existing and new hydroelectric developments in Labrador. The key to achieving that prosperity was to have a flexible strategy with contingencies in place to mitigate, as far as possible, the vagaries of resource development,

³⁵ Exhibit P-00004, at page 6.

jurisdictional politics, and emerging opportunities resulting from global struggles to combat climate change.

Focusing Our Energy also illustrated the persistence of a key fact that had frustrated successive provincial governments from the time of Confederation with Canada to Premier Williams. The vast hydroelectric resources in Labrador were isolated from the lucrative North American energy markets. That basic fact was exacerbated by the additional fact that the province had perpetually struggled to overcome various obstacles – technical, economic and political – and had never been able to find a permanent solution to facilitate the full development of the hydroelectric resources available on the Churchill River.”³⁶

52. At the time of the development of the Energy Plan, the Province was operating in a significant climate change environment, with International Government sensitivities in respect of carbon footprints and with an emphasis on proceeding with “green” renewable energy projects. As noted by Dr. Churchill, and contrary to the view of some critics, GNL did not immediately attempt to proceed with negotiations or development of the hydroelectric resources in Labrador; as “...**first they would study the current circumstances using all the expertise required and survey the realms of possibilities before developing negotiating strategies.**”³⁷

53. As was evident from the evidence of Inquiry witnesses Danny Williams, Shawn Skinner, Thomas Marshall, Robert Thompson, Jerome Kennedy, Charles Bown, Edmund Martin and Kathy Dunderdale, the development of the Energy Plan was a comprehensive and collaborative effort of a number of Senior Government Officials, including the Executive Branch, as well as Senior Nalcor Management Executives and knowledgeable community participants. Drawing upon the extensive expertise and experience of this group, a comprehensive and researched policy document that laid out a clear vision for the Provinces energy sector was drafted and released in September 2007.

³⁶ Exhibit P-00008, at page 3.

³⁷ Exhibit P-00008, at page 24.

54. When one examines the policy document itself, Dr. Churchill notes that:

“‘Focusing Our Energy’ provides evidence that the Williams’ administration had studied all relevant issues associated with previous attempts at development since the 1960’s to develop the Lower Churchill River and incorporated lessons learned. For example, in granting the “energy corporation” water rights, it was noted that this would not interfere with existing contracts. That statement acknowledges the Supreme Court Decision in the previously mentioned Water Rights Revision Act. The Supreme Court had decided against Newfoundland and Labrador, in part, on the belief that the intent of the Act was to interfere with the 1969 Contract. Similarly, Premier Clyde Wells’ enactment of the Electrical Power Control Act (EPCA) had an analogous aim, but it did not lead to any advances on the Churchill Falls front. The Williams’ government amended the EPCA in 2007 to allow the PUB to directly regulate the coordination of power production and water management arrangements. When mentioned in Focusing Our Energy, it was immediately followed by the explanation that: ‘The amendment provides that all relevant delivery commitments under existing power contracts can be honoured, including the 1969 power contract for the Upper Churchill.’

While of utmost importance, as it had been in previous decades, developing the Lower Churchill was presented as an ultimate goal, but not one that would be achieved at any costs. The electricity chapter in Focusing Our Energy reflected caution towards future developments when it stated that if plans to develop the Lower Churchill did not proceed as planned then the province had a backup plan to fill expected demand using a combination of thermal, wind and small hydroelectric developments.” ³⁸

55. In concluding his historical overview of the Williams Administration’s approach to energy development as outlined in *Focusing Our Energy*, Dr. Churchill stated that:

³⁸ Exhibit P-00008, at pages 24-25.

“It was hoped that by understanding the full energy picture, the province would be in the best possible position to benefit from its vast hydroelectric resources in Labrador. The inclusion of a transmission line linking Labrador to the island, through the Maritimes and to the US markets beyond ensured that future discussions would be fundamentally different than in previous decades. While not necessarily ensuring a level negotiating table, having a viable alternate route to the markets significantly strengthened the provinces’ relative negotiating position when discussing Labrador’s vast hydroelectric resources.

The Williams’ government saw Focusing Our Energy as a foundational piece that would create the conditions in which the province could achieve sustainable prosperity for its citizens through the intelligent, coordinated and fact-based development of its natural resources. Critical to that vision was the exploitation of the Churchill River’s hydroelectric resources to the benefit of the people of the province. It was the continuation of a dream in the province that extended back to the years before Newfoundland and Canada joined in 1949.”³⁹

56. Once GNL had established a strong framework for moving forward with its Energy Plan, they undertook the process of evaluating various options with respect to development of the Churchill River, including the potential of both the Gull Island and Muskrat Falls electrical generating projects. It is worthy of note that at this point Nalcor was also exploring the potential of other developments projects such as aluminum smelters and additional mining opportunities in Labrador. This was discussed by Nalcor CFO Derrick Sturge:

“MR. STURGE: ...So the process through 2006, '07, '08, and '09 was really around exploring different market opportunities. So Ed had come to me, I think, at around early 2007 and said: One of the opportunities we want to bottom out is whether the opportunity to have aluminum smelting in the province is feasible. And the province had been down this road - I think,

³⁹ Exhibit P-00008, at page 27.

2001, 2002-and, you know, concluded that it just probably wasn't a good fit. But we wanted to bottom out again, and largely because the aluminum market had changed. And a couple of things had changed. One is that the pricing - the prices for aluminum had rapidly increased. And the second thing is the whole China factor and the more global demand for aluminum - aluminum smelters that came.

So, you know, I think it was deemed that it was worthwhile to have another revisit of the aluminum file to see if it made sense. And aluminum only made sense with Gull, because aluminum's numbers were anywhere from 600, but as - you know, they were closer to a 1,000 megawatts, probably. So they were big, big users. And that would only fit with a Gull scenario.

So Ed asked me would I take that file, which I did. You know, probably wasn't, you know, core to what my role would've been, but I took it. And so basically, through 2007, 2008 and probably into 2009, we were exploring whether an aluminum smelter was feasible. And we're doing that with four aluminum companies, so essentially the four leading aluminum companies outside of, probably, the Russian aluminum companies, so sort of the Western world four leading aluminum companies.

And we were in negotiations with them. I wouldn't call it negotiations, but probably more discussions. And trying to really - we were all trying to determine whether this was feasible. And that went on for quite some time, we put a lot of work into that. And, you know, it was sort of around the middle of 2009 it became clear that that probably wasn't gonna work.”⁴⁰

57. In considering all potential opportunities, GNL established an Expression of Interest (EOI) process whereby they solicited interest from any and all parties interested in submitting to GNL for review and consideration.⁴¹ This process resulted in a significant number of

⁴⁰ Derrick Sturge Interview Transcript, August 30, 2018, at pages 3-4.

⁴¹ Exhibit P-00025, at page 1.

responses that were ultimately reduced to a short list of three potential proponents for further evaluation including Hydro Quebec. Having conducted a full review and due diligence assessment of the possible alternatives in concert with Nalcor, GNL made the determination that the Province of Newfoundland and Labrador would look to assess the viability and opportunity to proceed with development of the Churchill River utilizing its own means and drawing upon the strengths and expertise that existed within the Province. In partnership with Nalcor Energy and drawing upon external expertise where required, GNL, together with its energy Crown Corporation embarked on furthering this objective.

58. It is to be stated emphatically, that the decision at this stage was not a finite determination that the Muskrat Falls Project was proceeding at all costs, but that the Province was then to engage in a more complex review and assessment process which would continue over the next number of years to determine as to whether or not all required and necessary elements to proceed with the development of the Project could ultimately be achieved.

59. As indicated in the evidence of former Premier Williams, there remained a significant number of required obstacles that would need to be achieved in advance of any decision to proceed with the project. In summary fashion these include but are not limited to:

1. An acceptable land claims agreement with all necessary aboriginal groups
2. A satisfactory Environmental Assessment
3. Confirmation that the project was the lowest cost option
4. Confirmation of a Federal Loan Guarantee (FLG)
5. An acceptable agreement with Emera Energy for a Maritime Link.⁴²

60. The above analysis should dispel any suggestion that an acceptable agreement with Hydro Quebec was unilaterally rejected by the Williams Administration. Despite former Premier Williams' personal acknowledgement of his sense of suspicion and mistrust of Hydro Quebec, based upon on the historical dealings with the Province over years, it cannot be said that this is what resulted in the failure to reach a deal with Hydro Quebec. The evidence of Mr. Williams, as well as former Premier Kathy Dunderdale and Mr. Ed Martin,

⁴² Hearing Transcript, October 1, 2018, at page 32.

former CEO of Nalcor Energy, confirm that there were in fact attempts to reach out to either Quebec Government officials or representatives of Hydro Quebec to assess the feasibility of reaching an amicable agreement between the two, but such was not achievable. Mr. Danny Williams' evidence on this issue was as follows:

“MR. LEARMONTH: ...Mr. Williams, while you were premier, did your government ever consider or enter into discussions with Hydro-Quebec on the feasibility of importing electricity from Hydro-Quebec? Because, as I said before, the documentation that I've referred to certainly establishes that Quebec was in the business of seeking customers to sell electricity to.

I mean this would, of course, require the construction of a transmission line from Churchill Falls to the Island, I realize that. But was any initiative taken by your government, while you were premier, to explore the possibility of, you know, instead of building Muskrat Falls or developing Lower Churchill, instead building a transmission line from Churchill Falls to the Island and then entering into a power purchase contract with Hydro-Quebec? Was any consideration ever given to that possibility?

MR. D. WILLIAMS: Well, the – first of all, as you've stated, the – you'd need a line in from Quebec and or Churchill Falls, wherever it came from, in order to get the power to the province. That cost now, I think, is about \$3.7 billion is the cost that – the original estimates were 2.1 but that cost is about 3.7. So that's a significant expense.

I started exploring that with Quebec when I was actually Leader of the Opposition. Premier Charest at the time asked me to come in and meet with me...But he came in and we had a lengthy chat, and I knew him. And so we talked generally about Newfoundland and Labrador and Quebec relations. We talked about the whole possibility of, you know, doing something jointly with Quebec.

We talked about, actually, a link as well. I was, you know, interested at the time in a transportation link as well as a power link, but I quickly realized in the discussions that the Quebec North Shore Highway – and I can't remember the route number; I used to remember it – was not built properly. It was just a dirt road or it was a rough road, for want of a better term. So we couldn't do that transportation loop which would've involved a link to the province. That would've also, of course, obviously facilitated a hydro loop as well.

So we initially just generally talked about – so that would be the first, I think, formal – formal, informal – discussion that took place, but I was the Leader of the Opposition at the time. But then, you know, as we progressed – and there's a long litany of, you know, what Quebec did in order to thwart us and foil us and block us and everything else, that it became quite apparent that, you know, something – an arrangement like that wasn't going to happen.”⁴³

61. Similarly, Mr. Williams' successor Kathy Dunderdale provided evidence that an agreement with Quebec was not practically or politically feasible:

“MR. LEARMONTH: Well, did your government or in the Williams government – do you have any recollection of ever approaching Hydro-Quebec to see whether a power purchase agreement could be a possibility?

MS. DUNDERDALE: I don't think there was ever a discussion around a power purchase agreement. But Premier Charest and I were good friends and we had lots of conversations, Commissioner, about power.

But I have to tell you that – and I'm speaking to you now as a political person – that I would have a great deal of difficulty, even if they had the

⁴³ Hearing Transcript, October 1, 2018 at page 10.

power – which I was told that they didn't have the power and shown the documents to support that. And I also know that they had released their Plan Nord, which spoke to developing new generation in La Romaine. So they're talking about developing rivers in La Romaine at a much higher cost than Muskrat Falls; that they certainly had some kind of an issue around energy supply.

However, putting that to one side, I would have the greatest difficulty as a premier making the responsible – making the province reliant on Hydro-Québec for their power supply. And that's based on my experience in watching what happened with them in terms of New Brunswick. It was in all of our actions that we tried to find a transmission route through – for Gull and Muskrat through Quebec. And how they went and talked to Emera, I understood, to try and derail the Maritime Link. They tried to become involved in the environmental review – Joint Review process.”⁴⁴

62. Furthermore, Nalcor had analyzed the issue of the potential import of power from Hydro-Quebec and had determined it was not feasible, as outlined by Ed Martin:

“MR. E. MARTIN: The primary reason here, that we had demonstrated in several documents that were published, was security of supply. If you talk in getting it from Quebec, they were talking about getting it from Churchill Falls.

But in any event, what we said that we would do is that we knew that Quebec didn't have the capacity and didn't have a plan to have the capacity to sell us that electricity. That was referenced several times. At the time it was in Quebec's energy plan that was published. I believe Mr. Smith filed that with the Commission.

⁴⁴ Hearing Transcript, December 18, 2018, at pages 69-70.

But, in any event, it was clear there that Hydro-Quebec was short of capacity. So, we needed capacity. So from that perspective they weren't going to be of any help to us in terms of getting that. And then what we did, we said, well, let's – you know, let's stretch it and check the numbers at the end of the day.

And we said for certain Hydro-Quebec – or anybody for that matter – wouldn't sell us electricity for any less than they would be paying for it, or getting for it. And that's where they came up with the market references, my understanding, to run that for – to come up with some idea of what it would be. But that was a – more of a secondary check, in my mind. It was a security of supply –

MS. O'BRIEN: Okay.

MR. E. MARTIN: - and the ability to meet our capacity needs drove it more."

[...]

MS. O'BRIEN: ...But I just – the question right now is whether there was a – you know, was there – was the – your – the reluctance, or the decision not to approach Quebec directly, did that have anything to do with the prevailing sentiments between this province and Quebec, particularly on the energy front?

MR. E. MARTIN: No.

I mean, Commissioner, capacity was the overriding issue, you know, to the extent that, you know, that was the issue, you know, any leverage discussion and things would be secondary to that. If they didn't have a – if they had excess capacity, it was available, we would have been talking to them to see.

I had, you know, several meetings with Thierry Vandal, the CEO of Hydro-Quebec, on various topics over time. At one point, based upon discussions between Premier Charest and Premier Dunderdale and Premier Dalton McGuinty – you know, we were asked to get together with Hydro-Quebec, Hydro One and Nalcor to see if we could do a Gull deal, which we did. And we had a couple page document drawn up to try to effect that. And for various reasons – and I don’t want to talk politics that much – I think in Quebec, you know, I think Premier Charest – things were happening there from a, you know, election event and such, but it never went through.

But it’s an example that, you know, I, the premier, we’re not avoiding talking to Hydro-Quebec. I want to make that point.”⁴⁵

63. Based upon these prerequisites, it can be stated categorically, that there was no pre-determination that the Project would proceed with certainty until such time as the above requirements were met. Given the evidence adduced through the Inquiry process, it was not until the Decision Gate 3 process was complete and that the FLG and Emera Agreements were achieved in 2013, that the project could be said to be proceeding without abatement. While official sanctioning of the Project occurred on December 17, 2012 it should be noted that Government still had the authority to curtail the Project had it seen fit at such time until the finalization of the FLG. This established fact is contrary to the assertions made by detractors and was confirmed by Commission Counsel during the course of the Inquiry that the “point of no return” was not until the execution of the FLG on November 29th, 2013.

3(c) Grant Thornton Forensic Audit (Phase I)

64. Grant Thornton was retained by the Commission of Inquiry to complete a Forensic Audit of the Muskrat Falls Project. This audit was divided into two (2) parts, with the first relating to the Sanctioning Phase (DG2 in November 16, 2010 to DG3 Sanction on December 17,

⁴⁵ Hearing Transcript, December 10, 2018, at pages 57-58 and 63.

2012). As outlined in Grant Thornton's July 16, 2018 Sanctioning Phase Report, their engagement included the following:

- d. The options that were considered by Nalcor to address the electricity needs of Newfoundland and Labrador's Island Interconnected customers;**
- e. The assumptions or forecasts on which Nalcor's analysis of the options was based; and**
- f. Nalcor's financial analysis of both the Interconnected Island Option and the Isolated Island Option and selection of the least-cost option for the supply of power to Newfoundland and Labrador's Island Interconnected system over the period 2011-2067.⁴⁶**

65. Grant Thornton made several significant findings that are relevant to the Terms of Reference of the Inquiry as related to the Group 2003-2015. In particular, we draw attention to the following sections of the Terms of Reference:

4. The commission of inquiry shall inquire into

[...]

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

[...]

- (V) any risk assessments, financial or otherwise, were conducted in respect of the Muskrat Falls Project, including any assessments prepared externally and whether:**

⁴⁶ Exhibit P-00014, at page 5.

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

[...]

- (d) whether the government was fully informed and was made aware of any risks or problems anticipated with the Muskrat Falls Project, so that the government had sufficient and accurate information upon which to appropriately decide to sanction the project and whether the government employed appropriate measures to oversee the project particularly as it relates to the matters set out in paragraphs (a) to (c), focusing on governance arrangements and decision-making processes associated with the project.⁴⁷

66. In relation to section 4(d) of the Terms of Reference, the relevant members of Group 2003-2015 submit that they were not fully informed and made aware of some of the risks anticipated with the Muskrat Falls Project to inform the sanction decision. Grant Thornton identified several items that were not disclosed prior to sanction. First, Nalcor selected a P50 contingency value for the tactical risk on the Project, resulting in a total tactical contingency of \$368 million or 7% of the estimate. Group 2003-2015 was never advised of the selection of this contingency rating, nor were they provided details as to how this number was arrived at. This was confirmed by the Ministers of Natural Resources and Finance during their hearing testimony:

⁴⁷ *Commission of Inquiry Respecting the Muskrat Falls Project Order*, at Section 4.

MR. LEARMONTH: ...Nevertheless, Nalcor settled on a P50, which increases the chance that the – the project will go over cost. Were you aware of this selection of the P50 at any time before sanction?

[...]

MR. LEARMONTH: So you never engaged in a discussion –

MR. KENNEDY: No.

MR. LEARMONTH: – with Nalcor about the – choosing a P50. In other words, a discussion like, Mr. Kennedy, our figures are based on a P50 factor which means there's a 50 per cent chance that the figures – the costs can go over or 50 per cent under. Are you satisfied with that?

MR. KENNEDY: Yes any –

[...]

MR. LEARMONTH: And you didn't know anything about P-factors at any time up to sanction. Is that correct?

MR. KENNEDY: That's correct, Sir. I mean, as you pointed out, Mr. Learmonth, this kind of – you know, this is very complicated stuff. There's experts and consultants we hire in every department in government and we expect these people to – you know, the experts and consultants to bring forward relevant factors.

And, no, I have no – I have no recollection of – there was – my notes do not indicate any discussion of P-factors, any of the explanations. Whether or not there could have been a reference, Commissioner, in one of the numerous presentations that Nalcor gave, I can't say, but I have – it was never discussed with me as to what factor was –

MR. LEARMONTH: Yeah.

MR. KENNEDY: – being used or how that factor was being determined.

MR. LEARMONTH: Well, in fairness to you, I mean, I'm not talking about some fleeting reference here or there that you may not have understood, I'm talking about a very simple discussion or explanation by Nalcor as to what a P50 is. It's not that complicated to understand, it may be difficult to apply, but –

MR. KENNEDY: Yeah.

MR. LEARMONTH: – it's not difficult to understand and you never had that information from Nalcor.

MR. KENNEDY: And if you look at my notes here you'll see that I write everything that's important; I write these things down, I elaborate on them and what people are telling me. No, there's no reference.

MR. LEARMONTH: So you were in the dark about that?

MR. KENNEDY: Absolutely Sir, I – and when I read this Grant Thornton report I – because when it first came out I'd seen the report – I didn't read the full thing but I'd seen it and there was reference to all of these P-numbers, Commissioner, and it meant nothing to me.”⁴⁸

[...]

MR. LEARMONTH: You would think so, yeah.

⁴⁸ Hearing Transcript, December 3, 2018, at pages 13-14.

Did you ever question the use of a P50 factor at – for the project cost estimates at the time of sanction?

MR. T. MARSHALL: No, I would not know what a – at that time, I wouldn't know what a P50 meant.

MR. LEARMONTH: Did you know that Westney had recommended a P75?

MR. T. MARSHALL: No, I did not.⁴⁹

67. Evidence at the Commission of Inquiry has confirmed that there does not appear to be a universally agreed industry best practice in terms of selecting a P-value for tactical risk. As stated by AACE, “management can decide how much risk they are willing to accept and therefore how much contingency will be required.”⁵⁰ As such, Nalcor's decision to use a P50 rating on the Muskrat Falls Project was not in and of itself an improper decision. The more significant concern was that GNL was not involved or made aware of the process in reaching this decision. As such, Nalcor was unilaterally deciding how much risk they were willing to take on, a decision which should have involved GNL.

68. The \$368 million contingency amounted to 7% of the project budget. Group 2003-2015 were not provided with the information to support this decision and were unable to have meaningful involvement in selecting the amount of risk they were willing to accept. This was despite certain members of Group 2003-2015 making best efforts to confirm the amount of risk through conversations with Nalcor, as discussed by Jerome Kennedy:

MR. KENNEDY: Yeah, whatever – all I – again, I just repeat, Mr. Learmonth, I was looking for all the information, and you'll see as we go through this, on October 18, I'm sitting down with Mr. Martin going through the cost of concrete, the cost of steel – like, why have costs increased between DG2 and DG3? How can you be confident in a 9 per cent contingency?

⁴⁹ Hearing Transcript, November 6, 2018, at page 29.

⁵⁰ Exhibit P-00014, at page 62.

MR. LEARMONTH: Yeah.

MR. KENNEDY: I mean, so, anything that related to increased costs I would have wanted to be aware of.⁵²

69. Secondly, Grant Thornton found that Nalcor did not include an amount for strategic risk in their base estimate, despite this being recommend by Westney, Nalcor's risk consultant. Evidence at the Commission of Inquiry has established that GNL was not informed that Nalcor did not include a contingency allocation for strategic risk in their base estimate. As discussed by Jerome Kennedy during his testimony:

MR. KENNEDY: – later on. I questioned. I sat there specifically. I asked about contingencies. And there's one meeting in – I think it's October 18, 2012, where – Mr. Martin is breaking down for me the cost of steel, the cost of gates, why things have gone up, the cost of concrete. So I asked a lot of questions. It was not only that the information was being provided, Sir, I asked questions, also.

MR. LEARMONTH: Well, at that meeting or any other time, any other meeting, did you – or any form of communication – did you ever know about this strategic risk amount of \$497,000 dollars?

MR. KENNEDY: No, Sir, no, Commissioner, I'd never heard that amount.

MR. LEARMONTH: So Mr. Martin was giving you all this information – and you referred to an October meeting – he would have had that final report by then. He didn't discuss it or –?

MR. KENNEDY: There were a number of meetings, Mr. Learmonth. I think October – August 3, 2012 there's a DG3 alignment –

⁵² Hearing Transcript, December 3, 2018, at page 36.

MR. LEARMONTH: Yeah.

MR. KENNEDY: – meeting. I'm not sure if that's the – the numbers were available. Then we move into September 19, October 2, October 18 –

MR. LEARMONTH: Yeah.

MR. KENNEDY: – and October 30. And at no point was that – reference to that number, no.

MR. LEARMONTH: You never heard about it until I showed it to you at your interview on September 6 of this year?

MR. KENNEDY: Yeah. Now whether it was referred to – I would have seen the Grant Thornton report, Sir.

MR. LEARMONTH: Yeah.

MR. KENNEDY: Whether or not it was in that, I think –

MR. LEARMONTH: Okay.

MR. KENNEDY: – it was referred to in that. But the first time it really came out is when you showed it to me, Mr. Learmonth.⁵³

70. Finally, Grant Thornton found that Nalcor was advised by Westney Consulting prior to sanction that there was only 1 to 3 percent likelihood that the July 2017 first power date would be achieved. Despite this, GNL was not fully informed of the risk related to the estimated completion date for the Project. Several members of Group 2003-2015 testified during Phase I that they were advised prior to sanction that the July 15, 2017 completion date was a very realistic possibility:

⁵³ Hearing Transcript, December 3, 2018, at page 7.

“MR. LEARMONTH: ...The – next I would ask you to turn to page 64 of the Grant Thornton report, please. And you can see in the bottom that’s a – there’s a chart: “Risk Adjusted Schedule Suggests an 11 to 21 Month Delay for First Power.”

Now, you can look at that, and I’m gonna carry on page 65. But before I do so, do you have any recollection of Nalcor discussing with you the possibility or probability that the target date of July 2017 for first power would not be met?

MR. KENNEDY: Never, Sir.

MR. LEARMONTH: Never?

MR. KENNEDY: No, in fact –

MR. LEARMONTH: Until you read the Grant Thornton report?

MR. KENNEDY: Yeah. And, in fact, when we go to – it’s again, those notes that I made in October of 2012, when we’re looking at the DG3 numbers trying to figure out what’s going on, we’re still told that power – my note indicates – and I – it’s either October 2 or October 18 or September 22 – that first power in 2017. That’s what we’re still told back – as late as October 2012, we were told that the first power is in 2017.

MR. LEARMONTH: Well, I can tell you that the strategic risk report that expressed the – a different opinion was in the hands of Nalcor when you were told that.

MR. KENNEDY: Yeah.

MR. LEARMONTH: Does that give you concern?

MR. KENNEDY: It obviously concerns me, Sir. Because if there's delay in the project, Commissioner, then there's going to increased cost. And if there are increased cost, then the cost of Muskrat Falls is going up. So not only, Mr. Learmonth, as you pointed out, is there the CPW aspect of it, but there's also the issue of the cost of ratepayer.

MR. LEARMONTH: Okay. Thank you.

Now, but – was there ever any the use of the word – that, look, we are on an aggressive schedule or something like that? Do you ever – do you recall any such information from Nalcor?

MR. KENNEDY: No. In fact, Commissioner, that – and I know we're going to come to this later. But in reviewing my notes, one of the issues in relation to the PUB was that we had to get the matter done, because the timelines were tight for Nalcor to get in and get their work done. There was never any indication, Sir, that this – the schedule would go beyond –⁵⁴

[...]

“MR. T. MARSHALL: Yes. You asked if I was aware of this P1 number.

MR. LEARMONTH: Yeah.

MR. T. MARSHALL: And that it – that there was a 99 per cent chance that the schedule couldn't be met. And I was not aware of that.

MR. LEARMONTH: Did you have –

MR. T. MARSHALL: Well, I became aware of it, I think, when the government Oversight Committee – there was a report from the

⁵⁴ Hearing Transcript, December 3, 2018, at pages 14-15.

independent engineer. I think I was aware of it then. But not before sanction.

MR. LEARMONTH: Not before sanction.

MR. T. MARSHALL: No.

MR. LEARMONTH: Or at the time of sanction.

Now, is that the type – if that information was available at the time of sanction, is it a matter of concern for you that this information was not disclosed to you by Nalcor?

MR. T. MARSHALL: Yeah, I – Nalcor were constantly meeting with government and giving us information. They're pretty thorough in the information but I don't recall that, that there was a 99 per cent chance they wouldn't meet their schedule."⁵⁵

71. Furthermore, evidence at the Commission of Inquiry has established that as the Project progressed, GNL was continually advised that the estimated first power date could still be achieved. It was not until mid-2015 that Nalcor advised GNL that the 2017 first power date could no longer be met. The impact of Nalcor's failure to provide such crucial information to GNL cannot be overstated. As noted by Mr. Kennedy, any delay in the Project would undoubtedly result in significant cost overruns.

72. It should be noted that although there are several instances that were identified where certain information was not shared with GNL, this evidence must be also taken into context considering the testimony of Nalcor executives who offered some explanatory and contextual evidence in relation to these matters.

⁵⁵ Hearing Transcript, November 6, 2018, at page 5.

73. Grant Thornton's Forensic Audit also addresses section 4(a) of the Terms of Reference, which states as follows:

4. The commission of inquiry shall inquire into

- (a) the consideration by Nalcor of options to address the electricity needs of Newfoundland and Labrador's Island interconnected system customers that informed Nalcor's decision to recommend that the government sanction the Muskrat Falls Project, including whether:**
 - (i) the assumptions or forecasts on which the analysis of options was based were reasonable,**
 - (ii) Nalcor considered and reasonably dismissed options other than the Muskrat Falls Project and the Isolated Island Option, and**
 - (iii) Nalcor's determination that the Muskrat Falls Project was the least-cost option for the supply of power to Newfoundland and Labrador Island interconnected system over the period 2011-2067 was reasonable with the knowledge available at that time.⁵⁶**

74. Group 2003-2015 submit that all reasonable alternative power supply options other than the Interconnected Island Option were considered by Nalcor and GNL prior to sanctioning the Project. As such, they disagree with some of Grant Thornton's findings in relation to this issue. The consideration and review of power supply options has been a constant and ongoing endeavor for decades, and has included consultation and review from experts in these varying fields.

⁵⁶ *Commission of Inquiry Respecting the Muskrat Falls Project Order*, at Section 4.

75. The Williams Government's 2003 election platform entitled "*Our Blueprint for the Future*" included the "development of the Lower Churchill to encourage economic development within the Province of Newfoundland and Labrador" as a "Key Commitment" on which they were elected. Energy development was a key component of the Williams' platform, as outlined in "*Our Blueprint for the Future*", the PC Government committed to:

- **"Implement an energy plan to ensure that all energy sources are used first to provide a reliable, affordable supply of power for domestic use and for Province-wide economic development, and then to take advantage of business opportunities in export markets to sell energy that is excess to our needs on terms that secure maximum benefits for the Province.**
- **Retain Newfoundland and Labrador Hydro as a Crown Corporation with a mandate to support the Province's economy by providing reliable, clean energy at competitive prices, and making sure that its customers receive the best possible service for their money..."⁵⁷**

76. Furthermore, the Williams Administration was re-elected in 2007 with a mandate that involved establishing Newfoundland and Labrador as an energy warehouse, as stated in their 2007 platform document "*The Future is Ours*":

"Implement Newfoundland and Labrador's first-ever comprehensive Energy Plan under the direction of a new Energy Corporation, establishing our province as an energy warehouse in eastern North America and taking maximum advantage of all opportunities including those associated with Churchill power development, wind power development..."⁵⁸

77. As discussed above under Section 3(b), Recent History, GNL's release of the Provincial Energy Plan: "Focusing Our Energy", in September of 2007 was the culmination of years of

⁵⁷ *Our Blueprint For the Future*, at page 30.

⁵⁸ *The Future Is Ours*, at page 14.

research and development into potential power supply options in the Province. It is a comprehensive document that demonstrates GNL had completed extensive due diligence on power supply options many years prior to sanction.⁵⁹

78. The technical and feasibility studies in relation to the various power supply options were completed by Nalcor or their predecessor, on behalf of GNL. Nalcor completed these studies independently or with the assistance of third party consultants. Nalcor utilized a two phase approach to assessing power options. Phase One included benchmarking possible options against screening principles while Phase Two involved entering power supply alternatives into Strategist with key inputs such as load forecast and capital cost estimates. As outlined in Grant Thornton's Phase I Forensic Audit Report, the following alternative power supply options were explored by Nalcor:

- **Nuclear**
- **Coal**
- **Biomass**
- **Solar**
- **Wave and Tidal**
- **Island Hydroelectric**
- **Labrador Hydroelectric**
- **Electricity Imports**
- **Natural Gas**
- **Liquefied Natural Gas**
- **Wind**
- **Simple Cycle Combustion Turbine**
- **Combined Cycle Combustion Turbine**
- **Oil-Fired Generation (Holyrood)⁶⁰**

79. Grant Thornton found that the vast majority of alternative power supply options were reasonably considered and eliminated. Nalcor eventually narrowed the possible supply options down to five (5): the Isolated Island Option, Lower Churchill Project – Gull Island,

⁵⁹ Exhibit P-00029.

⁶⁰ Exhibit P-00014, at page 13.

Lower Churchill Project – Muskrat Falls, Imports from Hydro-Quebec or Imports from New England Independent System Operator. Grant Thornton found that all but two (2) of these options were reasonably eliminated.⁶¹

80. Grant Thornton found that GNL / Nalcor potentially unreasonably eliminated the options of importing power from Hydro Quebec and waiting until 2041. Group 2003-2015 submit that Grant Thornton's findings in relation to these options are not supported by the evidentiary record. First, in relation to the option of importing power from Hydro-Quebec, Grant Thornton's findings was simply based on a statement made during the Nova Scotia Utility and Review Board's (NSUARB) review of the Maritime Link Project, as acknowledged during their testimony:

“MR. SIMMONS: Okay.

So before looking at the Nova Scotia UARB report though, I – am I correct in assuming, from the questions you’ve answered already, that Grant Thornton did not do any kind of independent assessment of the question of whether there were uncertainties about the availability of market-priced power or power in 2041?

MR. MALAMED: That’s correct. We were not engaged to do an assessment.

MR. SIMMONS: Okay.

So really what you’ve done is you’ve flagged that Nova Scotia UARB made a statement. It looks on its face inconsistent with the decision to use that rationale as part of the reason for eliminating the 2041 option?

MR. MALAMED: That’s right. Based on the experts, this is what they’ve said.”⁶²

⁶¹ Exhibit P-00014, at pages 22-29.

⁶² Hearing Transcript, September 24, 2018, at page 12.

81. The possibility of importing power from Hydro-Quebec had been explored by several prior GNL administrations. Some of these efforts are outlined in Dr. Jason Churchill's paper submitted to this Commission of Inquiry and are outlined above. The long history of unsuccessful negotiations with Hydro-Quebec as it relates to energy transmission and the Churchill River specifically are clear throughout Dr. Churchill's paper and should not be overlooked in assessing the option of importing power from Quebec. Furthermore, several witnesses have provided evidence to suggest that GNL did explore the Quebec import option but determined it was not feasible at the time. This evidence is outlined in detail in paragraphs 60-62 herein.

82. It should also be noted that during its review of the Maritime Link Project, the NSUARB reviewed the potential option of importing power from Quebec as an alternative to the Maritime Link. This was a key component of Nova Scotia Power Maritime Link Inc. (NSPML)'s submission to the NSUARB:

"In its Opening Statement, NSPML stated that, despite its efforts, there is no long-term, fixed price energy available from Hydro-Quebec:

We have been asked about discussions with Hydro Quebec and why we didn't go through a competitive bidding process and bring forward a long term competitive contract as an alternative to the Maritime Link.

Emera and Nova Scotia Power have worked with Hydro Quebec for many decades. We met with them specifically to discuss and consider this alternative and simply put, there is no long-term, fixed price energy available from Hydro Quebec."⁶³

83. The NSUARB concluded that there was no reasonable prospect of a long-term contractual arrangement with Hydro-Quebec for the import of power:

⁶³ Exhibit P-00245, at page 44.

“The extent of required transmission upgrades was the topic of much evidence at the hearing. However, irrespective of which transmission upgrades may be required, the Board considers the lack of any reasonable prospect of a long-term contractual arrangement with Hydro Quebec proves fatal to this option.”⁶⁴

84. Based on the foregoing, it is clear that GNL gave reasonable consideration to the option of importing power from Hydro-Quebec as an alternative power supply option. Based on the evidence of Ed Martin and Nalcor, Hydro-Quebec did not have the capacity required for such an arrangement. Furthermore, Pelino Colaiacovo, an expert witness called by the Commission in Phase III, confirmed that any agreement offered by Hydro-Quebec would not have been appealing to Nalcor. Finally, decades of negotiation with Quebec as it relates to power had made entering into a contract with Hydro-Quebec politically untenable. Nonetheless, GNL completed their due diligence on this option and reasonably eliminated it.

85. Similarly, Group 2003-2015 submit that Grant Thornton was incorrect in concluding that GNL / Nalcor unreasonably eliminated the option of “deferring development of Lower Churchill Project until 2041 when power was available from the Upper Churchill.” Grant Thornton bases this possibility solely on the finding of the NSUARB during the Maritime Link review wherein they found that:

“While legitimate questions remain about the availability of market priced Energy from Nalcor over the first 24 years of the Maritime Link, the evidence clearly shows that there should be no shortage of Market-priced Energy when the Churchill Falls arrangement with Hydro Quebec comes to a conclusion in 2041.”⁶⁵

86. As outlined during their testimony, Grant Thornton based their finding in relation to the 2041 Option solely on a quote from the NSUARB Maritime Link decision, with no investigation into the veracity of that statement:

⁶⁴ Exhibit P-00245, at page 44.

⁶⁵ Exhibit P-00245, at page 65.

“MR. SIMMONS: Well, let’s go to paragraph 200 of the decision, please. Okay, this is the section dealing with Findings. I think, Mr. Shaffer, this is the quote you’re referring to.

MR. SHAFFER: Yes, that was the source of the quote in the report.

MR. SIMMONS: Right. “While legitimate questions remain about the availability of Market-priced Energy from Nalcor over the first 24 years ... the evidence clearly shows that there should be no shortage of Market-priced Energy when the Churchill Falls arrangement with Hydro Quebec comes to a conclusion in 2041.”

So my question is that what else is there in this decision that supports – that you identified that supports that finding, other than the one line that I referred to a moment ago? Are either of you aware of anything else that supports this?

MR. SHAFFER: This was the basis for the finding.

MR. SIMMONS: Pardon me?

MR. SHAFFER: This was the basis of what made the report.

MR. SIMMONS: Hmm.

MR. SHAFFER: There’s nothing else that I’m aware of in this report –

MR. SIMMONS: Okay.

MR. SHAFFER: – otherwise we would’ve listed it.”⁶⁶

⁶⁶ Hearing Transcript, September 24, 2018, at page 16.

87. In their decision, the NSUARB provides limited reasoning for this statement and also notes that there should be no shortage of market-priced energy. The context in which the NSUARB was assessing this question is important. The NSUARB was concerned about the likelihood of Nalcor being able to provide a long-term supply of market-priced energy for Nova Scotians. Having potential energy available in 2041 was of no assistance in this regard. As such, it was assessed on a limited basis.

88. Unlike the NSUARB, the question of the availability of market-priced energy from Churchill Falls in 2041 has been studied extensively by GNL and Nalcor, particularly then Minister of Natural Resources Jerome Kennedy. Their findings recognize that this is a complex legal issue without a certain answer. Nalcor presented their findings in relation to this question to the Newfoundland and Labrador Public Utilities Board and found that the option was eliminated for several reasons including:

- 1) uncertainty around availability of supply from Churchill Falls in 2041 because of the difficulty in determining the environmental and policy frameworks that will be in place 30+ years out;**
- 2) significant risk associated with maintaining reliable supply through continued life extension measures for Holyrood generating station through to 2041;**
- 3) deferral of the LIL would result in significantly higher rates for island consumers between now and 2041. This would not provide rate stability to island consumers as rates would be tied to highly volatile fossil fuel prices for the first 30+ years of the study period;**
- 4) customers will remain dependent on fossil fuel generation for the first 30+ years of the study resulting in continued and increasing greenhouse gas emissions; and**

- 5) **the prospect of requiring additional investment to extend Holyrood's service beyond what was contemplated increases the probability that this option will be more expensive than projected.**⁶⁷

89. Furthermore, Jerome Kennedy explored this issue extensively during his time as Minister of Natural Resources, culminating in the release of a paper entitled "Upper Churchill: Can we wait until 2041?" Minister Kennedy was heavily involved in the drafting of this paper which outlines the complexity of this question and concludes that waiting until 2041 is not a viable solution for several reasons:

- **Maintaining the isolated Island system until that time, followed by the construction of a transmission link with Labrador, is more expensive than developing Muskrat Falls;**
- **There is also considerable risk and uncertainty regarding security of supply and reliability, the cost to ratepayers, and environmental compliance;**
- **Deferring the project also means deferring the province's ability to fully capitalize on the value of its tremendous energy resources; and**
- **Deferring the Muskrat Falls development represents a more costly approach to supplying power and adds a layer of cost and uncertainty as power for domestic customers will be tied to fossil fuel prices as well as the ability to extend the life of the Holyrood Generating Station to provide reliable power within potential future GHG regulatory guidelines.**⁶⁸

90. It is clear that the option of waiting until 2041 was explored extensively by GNL, in collaboration with the efforts of Nalcor and ultimately decided by Cabinet as a whole. As

⁶⁷ Exhibit P-00014, at page 28.

⁶⁸ Exhibit P-00014, at page 28.

such, Group 2003-2015 submit that Grant Thornton's finding that this option was incorrectly eliminated is not supported by the historical evidence in this regard.

91. Finally, in general as it relates to the Grant Thornton Phase I Report, Group 2003-2015 respectfully submit that Grant Thornton's conclusions as stated are actually quite inconclusive. In particular, as outlined on page 68 of Exhibit P-00014, they note that there was a "potential overstatement" of the CPW for the Isolated Island Option and a "potential understatement" of the CPW for the Interconnected Option. Furthermore, their conclusion arising from these findings is that this "potential misstatement may have resulted" in the Interconnected Option no longer being the least cost option at the time of sanction. Group 2003-2015 respectfully submit that such findings are at best equivocal conclusions arising from a forensic audit, and cannot be relied upon as evidence of the conclusions suggested.

3(d) Indigenous Consultation

92. Section 4(b)(v) of the Terms of Reference of this Commission of Inquiry states that the commission of inquiry shall inquire into whether "any risk assessments, financial or otherwise, were conducted in respect of the Muskrat Falls Project, including any assessment prepared externally." Section 5(a) of the Terms of Reference states that consideration be given to participation in the Inquiry "by the established leadership of Indigenous people, whose settled or asserted Aboriginal or treaty rights to areas in Labrador may have been adversely affected by the Muskrat Falls Project." In his Interpretation of the Terms of Reference, the Commissioner described the scope of this inquiry as follows:

"...it is obvious to me that the Lieutenant Governor-in-Council intended that the established leadership of the Indigenous people would have a part to play in this Inquiry. If that is so, the part that they should play would be in areas of concern or of interest to those Indigenous people. I note that paragraph 4(b)(v)(a) refers, as regards the issue of the cost escalation of the construction of the Project, to any risk assessments, financial or otherwise, conducted in respect to the Muskrat Falls Project. At present, while I do not have full information, I am aware that certain assessments

likely were conducted, specifically risk assessments concerning environmental issues prior to, as well as subsequent to, sanction. I have decided here that a contextual and purposive review of the Order in Council permits me to investigate into what consultation occurred between the established leadership of the Indigenous people and Nalcor as well as the Government prior to sanction, what risk assessments and reports were done as regards the concerns of the Indigenous people, whether these assessments were appropriately and reasonably considered by Nalcor and the Government and whether 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. In investigating these matters, I will not be determining any claims or treaty rights for any of the Indigenous people as this clearly does not fall within the Commission's mandate.”⁶⁹

93. Group 2003-2015 submit that the Government of Newfoundland and Labrador participated in extensive consultation with established leadership of Indigenous groups, gave full consideration of the concerns of these groups and took appropriate measures 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. Consultation occurred as it relates to both the Lower Churchill Project (LCP) and the Labrador Island Link (LIL).

94. During his hearing testimony, former Premier Danny Williams spoke to the some of the early efforts related indigenous consultation many years prior to the final decision to proceed with the Project:

MR. LEARMONTH: Right.

The next exhibit is P-00031, which is tab 38 in your book, Mr. Williams.

⁶⁹ Interpretation of the Terms of Reference for the Muskrat Falls Inquiry, March 14, 2018, at para. 47.

This is a news release – a joint news release from the Executive Council in Labrador and Aboriginal Affairs, dated September 26, 2008, dealing with the New Dawn Agreement. And the first paragraph – well, the heading says: Innu Nation and Province Reach Historic Agreement. “The Honourable Danny Williams, Premier of Newfoundland and Labrador, and Mark Nui, Grand Chief of Innu Nation, today announced the signing of a milestone agreement. The Tshash Petapen Agreement ... which translates as the New Dawn Agreement, marks a new beginning for the Innu of Labrador and their relationship with the province.” Et cetera.

Can you give me some information as to why the – your government at the time found it necessary or beneficial to all parties to enter into an agreement with the Innu Nation at this time?

MR. D. WILLIAMS: I’d be delighted to.

This is one, I think, one of the prouder moments that I had in my time in government. A lot of hard work here was done by, you know, not only the Members of Cabinet who were responsible for those various departments – Labrador Affairs, Aboriginal Affairs, Natural Resources and so on – but the team that was at that table basically – and I’m afraid I’m going to miss somebody, but anyway – Ed Martin was there, Mr. Justice Burrage was on that committee, I think Aubrey Gover was there, Sean Dutton and Labrador officials as well.

Like that was something that we took a lot of time with, we took a lot of care with, we paid a lot of attention to; we felt it was very, very important that an agreement be struck with the Innu Nation because – for want of a better term and I don’t want to complicate any Aboriginal issues here – but they were kind of the lead Aboriginal group in our opinion. The Inuit agreement had been reached, and I’d signed off on that a couple of years before; however, I don’t take credit for that because that was done by Mr.

Grimes. But this particular agreement also – we addressed redress here on the Upper Churchill, because we felt it was important that if we were seeking redress from Quebec, the least we could do is acknowledge redress to our own people in the province.

So it was a lot of work; a lot of negotiation. Personally, I was close to it and very much involved in it. But, you know, it was a key part because this project was in the Innu territory, and it was important that we get this resolved to their satisfaction.

MR. LEARMONTH: Yes. But – well, it was certainly an excellent initiative and there's no doubt about that.

But I wonder why – or I should ask the question: Were negotiations held with other Indigenous groups? I mean, the Innu Nation is one, there are other groups that would certainly assert that they are affected by the development of the Muskrat Falls Project. What, if any, attempts were made to negotiate similar type agreements? I know the subject matter – but agreements with the other Indigenous groups, to your knowledge.

MR. D. WILLIAMS: There were – the term I used was consultations, and that's the – 'cause that's what took place. The – as I said, the Inuit agreement had already been done.

MR. LEARMONTH: Mmm.

MR. D. WILLIAMS: That was finalized, I think, in 2006 – 2005, actually. And so then we tackled the Innu agreement in two thousand – finally got that done in 2008. But there were consultations. There were consultations with the – and I don't know if they were called the Métis Nation back in those days, there was a Métis Nation – and then subsequently I think they moved

to an Inuit heritage, for want of a better term. Forgive me if I'm using the wrong Aboriginal (inaudible) –

MR. LEARMONTH: No, you're right.

MR. D. WILLIAMS: – the last thing I'd wanna do, Commissioner, is offend anybody, but ... So they were a factor, but at that point they were not recognized, to the best of my knowledge, from a federal government perspective. I don't think any particular status had been granted and I'm – you know, I may be taken issue on the terminology I'm using here – but having said that there, there were consultations.

And interestingly enough too, even during the whole Energy Plan consultations, way back in 2004, 2005, there was outreach. And at some point, see, I think even with the Innu there was a point there where we were waiting on the Innu to get back to us; there was a meeting I think, which I can remember being held in Ottawa, with the federal minister and the Innu to discuss issues, but ...

And the other factor was Quebec, you know. And they were – they were obviously more removed, they were in another province; however, they did have migratory and hunting rights into Labrador. I can't speak to how far those rights would have moved into the heart of Labrador and into the Churchill area, but they were maintaining that they had some rights.

And the difficulty with the Quebec Innu was that they were – some of them were very passivist, for want of another – better term and some of them were very active. And we had Red Wine issues – Red Wine caribou issues with them as well. So we were treading very lightly in our dealings with them, because there was some question of caribou hunting going on in the province.

So it's all very complex, so we were basically trying to tiptoe through the tulips as best we could in order to deal with all the various interests.”⁷⁰

95. Aubrey Gover was the Assistant Deputy Minister for the Department of Indigenous Affairs with GNL between 2010 and 2013. This Department spearheaded the consultation process, with considerable involvement of other departments including the Department of Environment. As such, Mr. Gover was heavily involved in indigenous consultation during the pre-sanction period. Exhibit P-00268 outlines GNL's consultation efforts as it relates to the Lower Churchill Project. As noted therein, the duty to consult is engaged:

“whenever government contemplates making a decision which has the potential to adversely affect asserted or established Indigenous section 35 Constitutional rights when the government has actual or constructive knowledge of those asserted or settled rights as per the 2004 Supreme Court of Canada Haida/Taku decisions.”⁷¹

96. This exhibit also notes that “procedural aspects of the Duty may be delegated to proponents”, as occurred on the Lower Churchill Project through Nalcor Energy during the Environmental Impact Statement process. In Exhibit P-00268 and during his testimony on October 3, 2018, Mr. Gover outlined the manner in which GNL conducted their consultations with Indigenous groups. The contemplation of the development of the Lower Churchill gave rise to considerations as to the engagement of the duty to consult. As such, GNL solicited the views of Indigenous people to canvass how the project could impact their settled and asserted rights. It was determined that GNL would engage in consultations with 10 Indigenous governments and organizations, three in Labrador (Nunatsiavut Government, the Nunatukavut Community Counsel and the Innu Nation) and 7 in Quebec.⁷²

97. As noted by Mr. Gover, it is common for Indigenous consultation to be integrated into the environmental assessment process, as there is often an overlap between adverse environmental effects and adverse impacts on settled or asserted Indigenous rights.

⁷⁰ Hearing Testimony, October 1, 2018, at pages 34-35.

⁷¹ Exhibit P-00268, at page 1.

⁷² Exhibit P-00268, at page 1.

Extensive consultations were undertaken at the environmental assessment (EA) stage. The LCP was registered by GNL and the Government of Canada on December 1, 2006. On January 26, 2007, Nalcor was notified that an Environmental Impact Statement (EIS) was required for the Lower Churchill Project under the Newfoundland and Labrador *Environmental Protection Act* (EPA). The LCP was also subject to the *Canadian Environmental Assessment Act*, and on June 5, 2007 the federal Minister of Environment announced that the LCP would undergo a federal EA by an independent review panel. In 2007, harmonization of the provincial *Environment Protection Act* and the Canadian *Environmental Assessment Act* resulted in the two jurisdictions negotiating a joint review process, including a Joint Review Panel (JRP) process, for the LCP. As outlined by Mr. Gover, the JRP process had the following steps:

“EA registration, EIS Guidelines, EIS, IRP hearings, IRP report to governments, and final EA decisions by the governments, and publication of the governments’ EA decisions, and governments’ responses to the recommendations of the JRP.”⁷³

98. Indigenous consultation was integrated into the EA process, and was present during all of the above noted stages. The specific details of this consultation process are outlined by Mr. Gover in Exhibit P-00268. The final decision stage saw GNL take into account the comments of the Indigenous Governments and Organizations (IGOs) on the report of the JRP to the governments.

99. In May 2007, GNL entered into consultations with Innu Nation, NunatuKavut Community Council and the Nunatsiavut Government (NG). Both GNL and Canada met with the Quebec Innu First Nations (Council of the Innu of Pakua Shipu, Council of the Innu of Unamen Shipu, Nutashkuan First Nation, Council of the Innu of Ekuanitshit, Innu Takuaihan Uashat mak Mani-utenam Band Council, and Innu Nation of Matimekush–Lac John) in February 2008 in Quebec. These meetings consisted of discussion of the EA, as well as opportunities for consultation. A common consultation protocol for all IGOs (including the Innu Nation) was transmitted to each IGO. This provided consistent guidance for Indigenous consultation

⁷³ Exhibit P-00268, at page 4.

throughout the EA process and timelines for each step. The protocols also directed the Proponent to release all EA documents to IGOs in advance of public release.

100. IGOs were heavily involved in the JRP process, including consultation on the Terms of Reference. The JRP Terms of Reference provided as follows:

“The Panel will have the mandate to invite information from Aboriginal persons or groups related to the nature and scope of potential or established Aboriginal rights or title in the area of the Project, as well as information on the potential adverse impacts or potential infringement that the Project/Undertaking will have on asserted or established Aboriginal rights or title.

The Panel shall include in its Report:

- 1. Information provided by Aboriginal persons or groups related to traditional uses and strength of claim as it relates to the potential environmental effects of the project on recognized and asserted Aboriginal rights and title.**
- 2. Any concerns raised by Aboriginal persons or groups related to potential impacts on asserted or established Aboriginal rights or title.”⁷⁴**

101. IGOs participated in the JRP Public Hearings from March 3 to April 15, 2011 in St. John’s and several Labrador communities over 44 days. On August 25, 2011, the JRP Report was released with 83 recommendations. The JRP concluded that after mitigation measures “the impact of the LCP on land and resource use by the Labrador Innu, NunatuKavut Community Council and the 7 Quebec Innu organizations would be “Adverse but not significant.” IGOs had 45 days from the public release of the JRP report to submit their views. Nunatsiavut Government, Innu Nation, NunatuKavut, Uashat mak Mani-Utenam, Ekuanitshit First Nation, Naskapi Nation, and Matimekush Lac John took the opportunity to

⁷⁴ Exhibit P-00268, at pages 6-7.

submit their views. Before taking any decision to proceed with the LCP, GNL and Canada gave full and fair consideration to those views. On March 15, 2012 GNL and Canada published their responses to the JRP recommendations and released the LCP from EA.⁷⁵

102. It should also be noted that funding was provided to IGOs by GNL to aid in their participation in the process. During his hearing testimony on October 3, 2018, Mr. Gover also stated that he was only aware of limited ongoing concerns in relation to Muskrat Falls from the four major IGOs. First, as it relates to the Nunatsiavut Government, Mr. Gover noted that the only ongoing concern he was aware of was that of methylmercury. GNL was well aware of this concern and an independent expert advisory committee was struck to address the mitigation of methylmercury downstream from Muskrat Falls, which efforts are ongoing. Similarly, Mr. Gover testified that he was not aware of any outstanding issues from any other IGOs in Newfoundland and Labrador:

MR. GOVER: So, apart from minor concerns – apart from concerns that may have been expressed during the environmental assessment process which were discussed, these were the major concerns. All these concerns were resolved to the satisfaction of the Innu Nation.”

[...]

MR. LEARMONTH: Yeah.

So is it your – government’s position that the concerns expressed to – by NunatuKavut for the – for environmental or other issues were addressed?

MR. GOVER: It’d be the view that the – that, yes, the mitigation that was required by Nalcor and that was to be conducted by the province and the federal government was sufficient to address the concerns expressed by NunatuKavut

[...]

⁷⁵ Exhibit P-00268, at page 7.

MR. LEARMONTH: So are there any outstanding concerns that have been expressed to government by Ekuanitshit that were not addressed in the view of government?

MR. GOVER: No.⁷⁶

103. As construction on the Project has progressed, additional environmental concerns have arisen such as the stability of the North Spur and wetland capping. These issues were considered by previous governments, including members of Group 2003-2015. However, the final decision on these issues fell to the subsequent Administration and have been addressed in their testimony.

3(e) Evidence of Former Provincial Government Officials (2003-2015)

i. Danny Williams (Premier November 3, 2003 – December 3, 2010)

104. It should be noted as a preface that the role of former Premier Williams is somewhat unique in that Mr. Williams has been seen by some in the public as the driving force behind the inception of the Project by the Province of Newfoundland and Labrador. It is to be noted that Mr. Williams served in office from November 6, 2003 to December 3, 2010 at which time the Province made the decision, subject to certain conditions precedent, that it would proceed with the development and construction of the Project on its own initiative and not in partnership with any other entities or provinces, with the exception of the involvement of Emera in regard to the Maritime Link portion of the Project.

105. It should be further noted that although when questioned by Commission Counsel on matters pertaining to information provided to him by Nalcor, Premier Williams did acknowledge that there were certain matters as posed by Commission Counsel which he was not aware. However, Mr. Williams maintained that it was important that those at Nalcor

⁷⁶ Hearing Transcript, October 3, 2018, at pages 21-23.

be given the opportunity to explain and contextualize specific inferences by Commission Counsel. Further, Mr. Williams has always been a strong advocate and supporter of the Project, as well as Mr. Ed Martin and staff who worked with his government to diligently and thoroughly explore all potential energy supply options leading up to pre-sanction and prior to his leaving government in 2010.

106. The significance of this timing is of note given that, despite the views of some critics, former Premier Williams was not involved in either the ultimate sanctioning of the Project in December of 2012, nor the finalizing of the FLG in December of 2013. The suggestion that Mr. Williams continued to wheel influence following his leaving office also surfaced during questioning at the Inquiry, and this was emphatically denied by not only Mr. Williams, but by all other members of the Cabinet that remained in office for five (5) years following his resignation. This issue was repeatedly raised by Commission Counsel with members of the Group (2003-2015) and was consistently refuted by both Mr. Williams and all other political figures who remained in Government subsequent to his tenure. Mr. Williams' direct evidence addresses this issue quite decisively:

“MR. LEARMONTH: I’m saying this is a rumour or belief that we hear and I want to put it to you.

And what it is, is that after you resigned as premier, you nevertheless exerted some level of control over the Muskrat Falls Project by exerting your influence on the premier who succeeded you and on Members of her Cabinet. In other words, you were gone but this was Danny’s project and he hung in there and, you know, drove the project even after he resigned as premier. You were – you’re influential in the steps taken after December 3, 2010, to bring this to sanction. Can you comment on that suggestion, we’ll say?

MR. D. WILLIAMS: For those rumours, nothing is further from the truth. Absolutely not. The day I went out the door, I was done. And I – you know, I did offer in following governments to, you know, I’m around if you want

advice or you want me to be involved or you want me to, you know, stand up on the stage. I was prepared to do it to help out.

But, no, I was not involved, I did not exert any control over it whatsoever and I wasn't privy to the information. So, like, my knowledge base ends on December 3 and apart from what I've picked up and what I read and what everybody else in the room has access to. So, no, absolutely not. No control, no influence at all that way.

MR. LEARMONTH: So that's a false suggestion?

MR. D. WILLIAMS: Absolutely and, you know – yeah.”⁷⁷

[...]

“MS. DUNDERDALE: Mr. Williams and I, while he was premier or even in private life, have never had a disagreement about Muskrat Falls. Period.

MR. LEARMONTH: And after he left the premiership, did you have any communication to and from him on the Muskrat Falls Project?

MS. DUNDERDALE: No.

MR. LEARMONTH: No?

MS. DUNDERDALE: Never.”⁷⁸

[...]

MS. O'BRIEN: Okay.

⁷⁷ Hearing Transcript, October 1, 2018, at page 59.

⁷⁸ Interview Transcript, Kathy Dunderdale, August 20, 2018, at page 136.

Okay, the last-one of the areas that-you know, one of the -part of what we're doing here at the inquiry, there's lots of-as you've alluded to a few times today, there's lots of-everyone's got their opinions and thoughts and critiques that are circulating around through media, social media, and part of what we do is we -you know, when people have said things, we, you know, track that down. We're doing an investigation. We're trying to, you know, make sure that we do ask the questions.

So one of the thoughts that have been out there, that despite Mr. Danny Williams's, you know, resignation, when he left office, that somehow he was still, you know, behind the curtain, pulling the strings, very involved in this project. That is something that has certainly been said by some people.

So I want to put the question to you: After Premier Williams left office, did you have any interaction with him with respect to the Muskrat Falls file?

MR. KENNEDY: I can tell you unequivocally that after Danny Williams left office he had no involvement with Muskrat Falls. There was a breakdown in relationships, which led to him not talking to certain people. And, in fact, in Cabinet - myself and Danny had been friends for a long time, so we had conversations, but he had absolutely no input. No one asked him for his opinion on Muskrat Falls. He was basically on the outside looking in. ” ⁷⁹

107. While Mr. Williams was not an elected member of GNL subsequent to 2010, he remained a strong vocal proponent of the Project and remains so to current date. As is evident from his testimony as a whole, Mr. Williams remains fully committed to the benefits of the Project, despite many of the criticisms that have been levied during the Inquiry proceedings. His evidence before the Inquiry forms an essential element in establishing why the Project was undertaken at the point in time it was and puts into perspective as to why

⁷⁹ Interview Transcript, Jerome Kennedy, September 5, 2018, at page 148.

the Project was the right option at the right time, particularly given the historical obstacles that had existed which stood as a bar to proceeding with the Project on previous occasions.

108. Mr. Williams also confronted one of the paramount issues which continues to emanate, and did so during the course of Phase 1 of the Inquiry, which is whether the Quebec option was unjustifiably dismissed. One cannot fairly consider this issue without putting into context the Province's historical experience dealing with the Province of Quebec and its utility corporation, Hydro Quebec over the previous 60 years as it pertains to hydro development within the Province. Former Premier Williams addressed this issue at some length at various stages of his testimony, but in response to questioning from Commission Counsel Learmonth on whether consideration was given purchasing power from Quebec Mr. Williams stated:

“MR. LEARMONTH: ...Mr. Williams, while you were premier, did your government ever consider or enter into discussions with Hydro-Québec on the feasibility of importing electricity from Hydro-Québec? Because, as I said before, the documentation that I've referred to certainly establishes that Quebec was in the business of seeking customers to sell electricity to.

[...]

MR. D. WILLIAMS: Well, the – first of all, as you've stated, the – you'd need a line in from Quebec and or Churchill Falls, wherever it came from, in order to get the power to the province. That cost now, I think, is about \$3.7 billion is the cost that – the original estimates were 2.1 but that cost about 3.7. So that's a significant expense.

I started exploring that with Quebec when I was actually Leader of the Opposition. Premier Charest at the time asked to come in and meet with me. I remember he came to town with about a dozen security guards. I was kind of blown away at the security that was required for the premier of Quebec at the time.

But he came in and we had a lengthy chat, and I knew him. I knew him when he was a Conservative. And so we talked just generally about Newfoundland and Labrador and Quebec relations. We talked about the whole possibility of, you know, doing something jointly with Quebec.

We talked about, actually, a link as well. I was, you know, interested at the time in a transportation link as well as a power link, but I quickly realized in the discussions that the Quebec North Shore Highway – and I can't remember the route number; I used to remember it – was not built properly. It was just a dirt road or it was a rough road, for want of a better term. So we couldn't do that transportation loop which would've involved a link to the province. That would've also, of course, obviously facilitated a hydro loop as well.

So we initially just generally talked about – so that would be the first, I think, formal – formal, informal – discussion that took place, but I was the Leader of the Opposition at the time. But then, you know, as we progressed – and there's a long litany of, you know, what Quebec did in order to thwart us and foil us and block us and everything else, that it became quite apparent that, you know, something – an arrangement like that wasn't gonna happen.

I do think there was a point even where the head of Nalcor, Mr. Martin, actually I think, at least wrote Hydro-Québec and basically indicating if they were open to discussing any kind of an arrangement. I know back in the past, one of the Quebec ministers back in the '80s had even acknowledged that this was an unjust contract and it should be looked at. So there was an attempt to, you know, talk about – to try and deal with Quebec but, you know, it really – it became very obvious to me that it didn't happen.

So, you know, the Vermont exercise, the announcement on the Romaine rivers; I mean, once we started to step up our game and we indicated that

we were going to, you know, go it ourselves with, you know, in conjunction with partners like Emera eventually on the Lower Churchill, that's where Quebec really then – it did what they always do. You know, if they – they block you at the Labrador border, and then if you happen to get through the Quebec border, which you never could because they wouldn't allow you through, then they tie up the markets on the other end. So there was always a filibuster everywhere we turned.

There's an interesting statement from Jean Lesage in May of 1965. Liberal Quebec Premier Jean Lesage in 1965, regarding the Upper Churchill, quote: The first and absolute condition is that all electrical energy that enters Quebec becomes the property of Hydro-Québec, so that our Churchill Falls, our Churchill River, our Churchill power becomes the property of Quebec.

He goes on to say: We will never permit, under any condition, others to construct a transmission line on Quebec territory – that's proven to be true to this day, this was 1965 – or let others transport energy produced at Churchill Falls, whatever the destination of that energy, United States or the other provinces. So that's in 1965, Quebec was thinking that way.

Everything that I have seen while I was in government, and I have observed – and as we look through Mr. Churchill's presentations of this Inquiry – is that they'll do whatever they can to cut us out. And it's shocking. You know, the biggest – a big shock for me was that, here they are, like, you know, they've gotten their massive pound of flesh on the Upper Churchill, we're just trying to do this little Lower Churchill, Muskrat Falls, 800 megawatt project. Back off and just give us a break here; co-operate with us, work with us. We'll even go – we'll even transport some of this power through your province, and we'll pay you – we'll pay you the cost of carrying it. But: no, Sir, no way.

MR. LEARMONTH: So Jean Lesage's comments in 1965, from your point of view, carried through as the policy of the Province of Quebec, right to the end of your –

MR. D. WILLIAMS: That's the philosophy.

MR. LEARMONTH: – premiership?

MR. D. WILLIAMS: I mean – yeah, that is. And, you know, it's sad because, you know, all of us I think have been on national boards and, you know, Quebecers are good people. They're wonderful people. They're people like us. They're proud of their province. They're proud of their culture; but, the leadership has a different view. And, you know, they've dug in on us and they basically tried to cut us off every step of the way.

And, you know, I can go through a long litany for you of things, but, I mean – for example, the map, and perhaps at some point we can show the map of Quebec. On the Quebec website, right now, if you go there today, shows a fuzzy boundary for the Labrador boundary. It's a grey, broken boundary that basically says this boundary is not determined. That's the French translation.

I would go to meetings of the New England Governors in Maine or Vermont or Connecticut – where it happened to be – they would display a map of Newfoundland, the Island, and Quebec, including Labrador. So I would object to it, right out of the gate.

I know that Premier Wells, if I remember correctly, was asked to put a pin on that display, Labrador as part of Quebec, and refused to do it. Premier Peckford at one point refused to go into a room. This has been the

behaviour. You know, Quebec feels that they did not get Labrador in the Privy Council decision of 1927."⁸⁰

[...]

MR. LEARMONTH: Yeah.

The next document I want to have turned up is Exhibit P-00199, tab 42, and this deals with the proposed purchase by Hydro-Québec of the hydro generating assets in New Brunswick –

MR. D. WILLIAMS: Mm-hmm.

MR. LEARMONTH: – which is something that as the documents will show certainly got your attention. And in this article on page 42 you're quoted as saying – excuse me, it's – the tab number is – the Exhibit number is P-00199 – you're quoted as saying: "Premier Danny Williams is threatening to go to the Competition Bureau or take other legal action if Hydro-Québec completes a rumoured plan to take over the assets of NB Power." And later on you say: "Hydro Québec is saying, 'We've got the Upper Churchill, we're going to take that up to 2041.

And now we're going to' – bring them under – 'their knees on the Lower Churchill' Williams said."

"I gotta tell you that will be over my dead body."

And so on. Now, why was this proposed sale of assets by New Brunswick Power to Hydro-Québec a matter of concern to this province?

⁸⁰ Hearing Transcript, October 1, 2018, at pages 9-10.

MR. D. WILLIAMS: Well. Now we knew very clearly what Quebec's – Hydro-Québec's pattern was – as you know, it's to stop you at the border, stop you at their border, or stop the markets. And they want to make sure that at the end of the day whatever we did, we had nowhere to go – we couldn't package it in any way. We couldn't sell it to anybody. We'd be stuck with just selling power in the province and presumably they assumed that that would affect the liability of Gull, particularly, and/or Muskrat.

So then they moved into New Brunswick – now that was a separate exercise and I'm saying that's not the only reason they did it, but it certainly was a – you know, a very valid strategic reason. And I was – as soon as I saw it I was very, very concerned and some people would say, well, it's none of your business because it's in New Brunswick, well – it very much was.

And I wanted to make sure that the New Brunswick government was aware of our experiences and the big-picture thinking that this corporation does. And basically what they were going in there to do was to cream the lucrative assets, leave them with coal if they had it, but more important, nuclear was there, and you know, they would have basically had full control of the New Brunswick power situation.

So we saw that as a strategic piece to block either – if I'm correct in my geography – the route coming through Quebec or the route coming up through Nova Scotia. So we basically just sat down and kinda went through the problems with that proposal, which kinda reminded me back, of the Grimes proposal in 2002.

MR. LEARMONTH: Or in a nutshell wasn't – would the concern be properly expressed in this way – that, if Hydro-Québec gets control of the transmission lines in New Brunswick – which they would've got under this proposed deal – they could – Hydro-Québec would then be in a position to

set up roadblocks for Newfoundland's attempt to bring power through Nova Scotia to New England, and in the same way to bring power through Hydro-Québec if you ever got – say the 300 recall block, you couldn't bring it to Nova Scotia –

MR. D. WILLIAMS: Yeah.

MR. LEARMONTH: – because that'd be – they'd be able to block you on either side?

MR. D. WILLIAMS: And that's the reality. That's the reality of what they would do. The legal position of what they should do is that there should be open access –

MR. LEARMONTH: Yes.

MR. D. WILLIAMS: – and you should get through and they should play by the rules and you should–

MR. LEARMONTH: Yeah.

MR. D. WILLIAMS: – get through TransÉnergie and you should get though (inaudible) with FERC. But we have experienced in our own province where that wasn't happening, so it certainly wasn't going to happen in New Brunswick.

MR. LEARMONTH: Okay.

So that's why you were fired up about this?

MR. D. WILLIAMS: Absolutely.

MR. LEARMONTH: Yeah.

MR. D. WILLIAMS: It's very important to us.⁸¹

109. Given that the historical context of the Project, was outlined in Sections 3(a) and 3(b) above it is not necessary to review again, but the significance of the same is to be noted as it is this historical framework from which the Williams administration began its consideration and evaluations of hydro developments on the Churchill River. As noted in the evidence, while Muskrat Falls was one of the options under review early in this Administration, it was not the only opportunity as consideration was also being given to the Isolated Island Option, Gull Island, Importing through Quebec and imports through NEISO (North East United States Energy Organization).⁸²

110. In addition to the review and consideration of possible hydro generating development options, the Province was also expending a tremendous amount of effort in developing a detailed and extensive Energy Plan that was intended to guide the Province's energy strategy for decades to come. In speaking to the guiding principles of what the Energy Plan was intended to achieve, Mr. Williams stated as follows:

"MR. D. WILLIAMS: ...And so what we did is we collectively drew on the best brains and best minds that we could pull together in order to get the best outcomes, and this was something that went right back to the blueprint, back in, you know, when we were preparing it in 2002 and 2003. And as I said before, in those days, not only were the current PC members involved in helping me do that, but, you know, there were knowledgeable people like Doug House and Lorne Wheeler and Bruce Peckford – Brian's brother – and others involved.

So we felt that it was really important that – in the blueprint for the province that we also had a very comprehensive plan. And, I mean – when I say comprehensive, I mean comprehensive. This was, you know, as – even

⁸¹ Hearing Transcript, October 1, 2018, at pages 38-39.

⁸² Exhibit P-00014, at page 23.

more detailed research, because we had the resources of government at that time to put it together.

And you know, there was the – when this was originally conceived, the purpose was, again, to frame out what – first of all, to find out, what have we got in the province – what is – what do we have in actual resources, what is our potential, how does it all fit together, and then how does it take it to 2041 and beyond? You know, how do we make all this work in sync so that we can maximize the benefits for the people of the province?

And that's why this was put together. My recollection this is a 90- to 100-page document. I was delighted when Mr. Churchill gave evidence before the Commission, and I think if – I don't wanna put words in his mouth, but I think he complimented the document, because it was a good piece of work, and it was trying to put together – look at the – you know, what happened in the past and the assets, and how we could go forward in the future. And with the view to kind of bringing this all together.”⁸³

111. The evidence is unequivocal that the decision to proceed with the Muskrat Falls Project, as opposed to other options, was not ultimately reached until December of 2010 when Government had achieved many of the necessary prerequisites such as Environmental, Aboriginal and Water Rights issues. Ultimate sanctioning was to be further contingent upon obtaining the FLG and assessment of financial viability.⁸⁴ This conclusion is irrefutable and is supported by all Group 2003-2015 members called to give evidence in this regard. While the entirety of this evidence will not be detailed herein, we refer to the following excerpts:

“MR. KENNEDY: – you know – I had no real emotional attachment to Muskrat Falls. I think the way I put it in one interview: if Muskrat Falls is not sanctioned, I'm not gonna lose any sleep.

⁸³ Hearing Transcript, October 1, 2018, at page 12.

⁸⁴ Hearing Transcript, October 1, 2018, at page 76.

MR. SIMMONS: Mm-hmm.

MR. KENNEDY: You know, we were not – and up until the end, I know it – because of the way speeches and the way politics works, everyone would assume we'd made up our minds. I can remember, Sir, and this is as clear as day, Commissioner. I remember this conversation – I was going to – and I apologize if I'm digressing, but it certainly – it speaks to this point, Mr. Simmons.

I was going to hockey on a Thursday night in November, Commissioner. It was 9 o'clock at Brother O'Hehir Arena at approximate 8:20, my phone rang in the car and I was hauling in to the parking lot. I was four or five parking spaces up the – on the right-hand side of the parking lot and it was the premier. And she said to me: It looks like the loan guarantee is gone. So Muskrat Falls is gone.

Now that's the kind of approach that we were taking. It mightn't have seemed like that to everyone, but that was the approach so –

MR. SIMMONS: Mm-hmm.

MR. KENNEDY: – when we went out looking for issues on natural gas, Sir, it was the same thing. Like, I wasn't looking for anyone to confirm anything.”⁸⁵

[...]

“**MR. SKINNER:** So my perspective – and I would suggest to you our perspective as a government – was that there had been a lot of work over many years, many administrations done, on the potential development of the Muskrat Falls and Gull Island project as well. And there had been numerous studies and numerous reports and a lot of time and energy

⁸⁵ Hearing Transcript, December 4, 2018, at page 30.

spent on evaluating other options that existed or could potentially exist. And the point that we were at, at that point in time, was that it was quite apparent to us that the two options that appeared to be the best options would have been either to go with the Muskrat Falls Project, as we had it scoped out, or to go with an Isolated Island Option.

And it was determined by our government that the other options that potentially could exist would not be able to meet what we required in terms of cost, economic generation, time, I guess, all those things. And so we referred the two that we felt were the two that people felt, based on questions from the Opposition and the sentiment in the public, were the two viable alternatives.”⁸⁶

112. The evidence provided by Mr. Williams demonstrates that the decision to proceed with the Project, and the other considerations that went into reaching this conclusion, was aligned with several of the recommendations outlined in the 2003 Royal Commission on Renewing and Strengthening Our Place in Canada entitled “Our Place in Canada,” which was chaired by Mr. Vic Young.⁸⁷ During his testimony, Mr. Williams made the following comments in relation to this Royal Commission:

“MR. D. WILLIAMS: No, I certainly considered this recommendation, 'cause I did review the report, and you know, ironically, you know, at the end of the day here, the Muskrat Falls Project does not deal with redress because it doesn't have to. Because Quebec aren't involved, and therefore, by eliminating the Quebec factor from the equation, then there was no opportunity or need to have redress considered.

So yeah, I took notice of it, yes, and the fact – but it's – you know, with all due respect to the author, it's very easy to make a statement that you, you

⁸⁶ Hearing Transcript, November 2, 2018, at page 14.

⁸⁷ Exhibit P-00243, at pages 27-30.

know – in future dealings with Quebec on the Lower Churchill, that you ignore redress.

But in the minds and hearts and souls of every Newfoundland and Labradorian in this province, they feel they were hard done by, and they feel that there was a serious injustice, and that injustice adds up to \$50 billion. So you know, I would find it very difficult to ignore redress.

I do take the point, you know, under notice, but by the same token that's in the craw of all of us, I think. And I, you know, I can't speak for everybody in the room but I think I speak for most Newfoundlander and Labradorians. And interestingly, you know, even the survey that was done on this project, there was 67 per cent, I think, that were against this particular project.

The interesting thing here I notice in the conclusions of this particular report – there were three conclusions. The first one: "The provincial government works constantly to ensure the greatest possible returns from resource development." and it mentions that we look at section 92A. That was an argument that was raised by solicitors in Labrador – the late Mr. Ed Hearn I think was – raised that, as well as being raised by others as a matter to try and – another way of trying to find some redress on the Churchill, and it involved recall of a significant block and it involved taxation – possible taxation by Newfoundland and Labrador. So, that was that first recommendation.

In conjunction with my Minister of Justice at the time, Jerome Kennedy, we basically retained the best legal advice that we could find and I think it would – Mr. Commissioner, it was Mr. Justice La Forest at the time, formerly of the Supreme Court. And my Minister of Justice, Minister Kennedy, in conjunction with Madame Justice Paquette, who was working with the Department of Justice at the time, and Mr. Justice Burrage, I think, who attended with Mr. Kennedy to meet with Mr. Justice La Forest, very

thoroughly investigated and reviewed section 92A to see if that was an alternative.

Because if we were successful on that, we wouldn't have to build the Lower Churchill; we would have got enough back, either through taxation or through significant recall on the Upper Churchill, that we wouldn't have. So that was one alternative that we explored and I think there's significant legal opinions that are in the Justice Department, that show how thoroughly we researched that and other issues.

Just quickly – and I won't hold you up any longer, but the second item – the second bullet: “The federal and provincial governments enter into immediate discussions to revise the Atlantic Accord to ensure that the spirit and intent of the Accord,” – we'd be the principle beneficiary; “That the province must capture significantly greater net benefits...”

Well, that was another exercise we went on; that can bring you back to the encounters with Prime Minister Martin. And Prime Minister Martin agreed to take care of that for us; there was a period where he hesitated, and then he finally came through and that's when we received \$2 billion for the province.

So, recommendation A was followed, recommendation B was followed and recommendation C as well. We ended up at the end of the day not dealing with redress on Quebec because Quebec weren't involved in the Muskrat Falls project as we structured it.”⁸⁸

113. The suggestion that the Muskrat Falls Project was a *fait accompli* from the outset of the Williams administration is simply put, a falsehood. The final decision to proceed with this project was only arrived at following extensive and thorough review and consideration of all pertinent options and alternatives as well as attaining of a number of significant

⁸⁸ Hearing Transcript, October 1, 2018, at page 8.

preconditions that had not been achievable by previous administrations. This was discussed by Mr. Williams during his hearing testimony:

“MR. LEARMONTH: ...So this sentiment or belief goes something like this that: at the time the Energy Plan was released to the public in September 2007, and perhaps even before then, Premier Williams had made a firm decision that the Lower Churchill would be developed in some form or another and that any opposition to this decision would be dismissed and disregarded. That Premier Williams wanted this as a legacy project to satisfy his own ego and it was going ahead no matter what.

MR. D. WILLIAMS: Who’s that from, Mr. Learmonth?

MR. LEARMONTH: Well those – we just hear this from different people as expressing –

**MR. D. WILLIAMS: I can – it’s like ‘em
(inaudible).**

MR. LEARMONTH: – this point. And I want to put it to you so you can comment on it because the opinion is out there, it’s in the community. I’m not saying it’s–

**MR. D. WILLIAMS: It’s a closely held opinion by a few critics but I
(inaudible) –**

MR. LEARMONTH: No but I – well okay, I can’t quantify the number of people that hold it, but isn’t it – it is something out there; we’ve heard it, and I want to put it to you in sort of, the extreme form that I have, to give you an opportunity to respond to it.

MR. D. WILLIAMS: No, I appreciate that. The – that comment was basically made as recently as this weekend at the symposium. People with opposed views to probably mine, for want of a better term. This weekend that Professor Feehan, I think, indicated that it was a damn-the-torpedoes, proceed-at-all-cost approach. Well, nothing is further from the truth. I can be quite honest with you. Not at all.

You know, this process, the EOI process, started in 2004 and it was completed with the sanction in 2012. So, you know, for he – he's the only one I can quote and kind of attribute that to at this stage – and others is reckless and irresponsible and shameful to make that statement because it's absolutely untrue. I've stated before that we turned over every stone; we explored every option, both legal and financial and partnership and otherwise, to bring us to the conclusion that we finally came to in 2010 with the sanction in 2012.

So, you know, it's very unfair. And it's, you know, that – you know, in my legacy – what about the legacy. I mean I – you know, I felt that from 2003 to 2010 I had a good run. You know, politics is not without its ups and downs and its highs and lows, and I was warned about that going in and I knew it coming out. But having said that – I mean, at one point we hit a 93 per cent approval rating. I mean, I didn't need a Churchill project to put my stamp on the province, sir. And nor did I care. I went in and did what I wanted to do to the best of my ability in conjunction with the best advice and the best team I could put together. And I did it in the best interest of the people of this province.”⁸⁹

[...]

⁸⁹ Hearing Transcript, October 1, 2018, at page 14.

“MR. SIMMONS: The approval at DG2 for the policy that Muskrat Falls would be the option that was being considered. Can you give me an idea of what the range of considerations were that were taken into account?

MR. D. WILLIAMS: Well I mean, you know, we started basically kind of just assessing the whole project, as I said, way back from the EOI process –

MR. SIMMONS: Mm-hmm.

MR. D. WILLIAMS: – just to see where we were and got into more detail as we moved along; as we got down two years later to the selection of the four, then there was a further analysis to drill down as well. You know, I remember one document that was presented to us that had 20, 30 risk factors, risk mitigation factors that were just listed as being tick-off items. I couldn’t try to remember half of them for you but –

MR. SIMMONS: Mm-hmm.

MR. D. WILLIAMS: – that, I remember that that was a document we had. So, you know, the big thing for me to – was to – we had to get over the big hurdles. So we had to deal with the environmental, we had to deal with the Aboriginal issues, we had to deal with the water rights, the guarantee on the financing side, the general financing viability was important, so that we had an assurance that this project was viable.

And that’s really it. I mean you can see from some of these – the cost to the ratepayers was, as I said before, under examination by Mr. Learmonth – the rates were an issue.”⁹⁰

114. While it has been recognized that there were a number of preconditions necessary prior to reaching the decision to proceed, perhaps the most important one for GNL at the time

⁹⁰ Hearing Transcript, October 1, 2018, at page 76.

was ensuring that an acceptable agreement was reached with the Innu Nation as they would be substantially affected. This was achieved in September of 2008, and Mr. Williams explained the significance of the Agreement during the announcement of same in a press release:

"We are so proud to announce that after years of negotiations the Government of Newfoundland and Labrador and the Innu Nation of Labrador have reached an agreement on the major issues that will facilitate the finalization of an Agreement in Principle on Innu Rights...The Innu Rights Agreement will bring tremendous new benefits and opportunities to the Innu people of Labrador, and signals a new era of partnership and cooperation between their people and our government. The Tshash Petapen Agreement also resolves key issues associated with the Lower Churchill development including an Impacts and Benefits Agreement and redress on the upper Churchill hydroelectric development. We are extremely pleased to have these details agreed upon, as this signals an extremely important and significant step on the road to development of the Lower Churchill project. Today, Newfoundland and Labrador is substantially closer to finally seeing this project developed and in the North American context this further positions us as a major player in the energy industry."⁹¹

115. Mr. Williams also spoke to the importance which this issue was given by Government during his hearing testimony:

MR. D. WILLIAMS: I'd be delighted to.

This is one, I think, one of the prouder moments that I had in my time in government. A lot of hard work here was done by, you know, not only the Members of Cabinet who were responsible for those various departments – Labrador Affairs, Aboriginal Affairs, Natural Resources and so on – but the

⁹¹ Exhibit P-00031, at page 1.

team that was at that table basically – and I’m afraid I’m going to miss somebody, but anyway – Ed Martin was there, Mr. Justice Burrage was on that committee, I think Aubrey Gover was there, Sean Dutton and Labrador officials as well.

Like that was something that we took a lot of time with, we took a lot of care with, we paid a lot of attention to; we felt it was very, very important that an agreement be struck with the Innu Nation because – for want of a better term and I don’t want to complicate any Aboriginal issues here – but they were kind of the lead Aboriginal group in our opinion. The Inuit agreement had been reached, and I’d signed off on that a couple of years before; however, I don’t take credit for that because that was done by Mr. Grimes. But this particular agreement also – we addressed redress here on the Upper Churchill, because we felt it was important that if we were seeking redress from Quebec, the least we could do is acknowledge redress to our own people in the province.

So it was a lot of work; a lot of negotiation. Personally, I was close to it and very much involved in it. But, you know, it was a key part because this project was in the Innu territory, and it was important that we get this resolved to their satisfaction.”⁹²

116. The expression of interest (EOI) process utilized to arrive at a viable proposal to proceed with the Project was both thorough and detailed, having been initiated in 2004 and resulting in over 25 different submissions that were submitted and assessed, ultimately being reduced to a short list of 4, including Hydro Quebec. It was not until 2006 some 24 months later and following significant review, that it was determined that the Province would lead the project on its own.⁹³

117. The review and assessment process for the Project did not cease at this juncture, but in fact was a continuous piece work that saw various efforts throughout the lifespan of the

⁹² Hearing Transcript, October 1, 2018, at page 35.

⁹³ Hearing Transcript, October 1, 2018, at pages 18-19.

Project up to December of 2015. GNL and Nalcor together undertook extensive analysis including no fewer than 78 reports and studies throughout this period. Group 2003-2015 draws attention to the following non-exhaustive list of studies/reports that were completed in relation to the Project which demonstrates the extensive due diligence process:

DATE	TITLE	PREPARED BY	PREPARED FOR
Dec 1980	Cost Effectiveness of Delivering Power from the Lower Churchill River in Labrador to the Island of Newfoundland	Shawmont Newfoundland	GNL
June 1998	Gull Island to Soldiers Pond HVDC Interconnection	Teshmont Consultants Inc.	NL Hydro
Jan 1999	Muskrat Falls Hydroelectric Development Final Feasibility Study	SNC-Agra	NL Hydro
Oct 2001	Technical Feasibility of Offshore Natural Gas and Gas Liquid Development Based on a Submarine Pipeline Transportation System	Pan Maritime Kenny – HIS Energy Alliance	Department of Mines & Energy, Petroleum Resource Development Division, GNL
Oct 2004	An Assessment of Limitations for Non-Dispatchable Generation on the Newfoundland Island System	NL Hydro	NL Hydro
2007	2007 Energy Plan: Focusing Our Energy	GNL	Public
14 Dec 2007	Lower Churchill Project – Project Risk Management Policy	NL Hydro	NL Hydro
14 Dec 2007	Project Execution Risk & Uncertainty Management Guidelines	NL Hydro	NL Hydro
14 Oct 2008	Lower Churchill Project – Gate 2a Risk Management Plan	NL Hydro/ Westney Consulting Group	NL Hydro
09 Dec 2009	Strategic Risk Management Process	NL Hydro	NL Hydro
03 Dec 2010	Lower Churchill Project – Strait of Belle Isle Crossing –	Westney Consulting Group	Nalcor

	Cost & Schedule Risk Assessment		
July 2010	Risk Analysis for the Option of Muskrat Falls First + The Island Link	Nalcor	Nalcor
July 2010	Generation Planning Issues: 2010 July Update	Nalcor	Nalcor
Sept 17 2010	Gate 2 Independent Project Review	Independent Project Review	Nalcor
Sept 2010	Summary of IPAs review of the MF Project	Independent Project Analysis	Nalcor
28 Jan 2011	Holyrood Thermal Generating Station – Condition Assessment & Lie Extension Study	AMEC	Nalcor
16 Jun 2011	Gate 2 Project Risk Analysis	Nalcor	Nalcor
30 Jun 2011	Project Risk Management Plan	Nalcor	Nalcor
6 Jul 2011	Nalcor Submission to PUB – Synopsis of 2010 Generation Expansion Decision	Nalcor	PUB
20 July 2011	Lower Churchill Project – Muskrat Falls North Spur (1999-2011)	Nalcor	
29 July 2011	Lower Churchill Project Design Progression (1998-2011)	Nalcor	
29 July 2011	Lower Churchill Project Cost Estimate Progression (1998 – 2011)	Nalcor	
July 2011	Historical Summary of the Labrador-Island HVdc System Configuration for the Lower Churchill Project (1974-Present)	Nalcor	
8 Aug 2011	Labrador-Island Link Overview	Nalcor	
14 Sep 2011	Independent Supply Decision Review	Navigant Consulting	Nalcor
2 Nov 2011	Two Generation Expansion Options High Level Review Report	Knight Piésold Consulting	Consumer Advocate
15 Dec 2011	LCP Risk Management Requirements for	Nalcor	Nalcor

	Contractors and Suppliers	SNC Lavalin	
Aug 2011	Report of the Joint Review Panel	Joint Review Panel	GNL and Federal Govt.
2011	Nalcor Business & Financial Report – Energy Comes with the Territory	Nalcor	
Jan 2012	Report on Two Generation Expansion Alternatives for the Island Interconnected Electrical System	MHI	PUB
2 Mar 2012	Consumer Advocate's Submission to the PUB	Consumer Advocate/ Knight Piesold	PUB
2 Mar 2012	Nalcor's Final Submission to the PUB	Nalcor	PUB
15 Mar 2012	GNL Response to Joint Review Panel	GNL	Joint Review Panel
30 Mar 2012	PUB Report to Government	PUB	GNL
08 June 2012	Lower Churchill Project – Risk Management Philosophy	Nalcor	Nalcor
7 Aug 2012	Wind Integration Study – Isolated Island	Hatch	PUB
18 Aug 2012	Wind Integration Study – Isolated Island: Technical Study of Voltage Regulation and System Stability	John Flynn, Eng.	NL Hydro
24 Sep 2012	Economic Impact Analysis of Iron Ore Mining Industry in Labrador 2011-31	Wade Locke and Strategic Concepts Ltd.	DNR, GNL
2012	Wade Locke Analysis of Mining Developments – Terms of Reference	Wade Locke	DNR, GNL
01 Oct 2012	DG3 Project Cost and Schedule Risk Analysis Report	Nalcor Westney Consulting Group	Nalcor
26 Oct 2012	Review of the Muskrat Falls and Labrador Island HVdc Link and the Isolated Island Options	MHI	DNR, GNL
26 Oct 2012	Assessment of Wind for the Isolated Island of Newfoundland	MHI	DNR, GNL

2012	MHI Wind Analysis – Terms of Reference	MHI	DNR, GNL
26 Oct 2012	PIRA's Forecast Methodology and Assessment of Future Oil Price Trends	PIRA Energy Group	GNL
2012	PIRA – Terms of Reference	PIRA Energy Group	GNL
30 Oct 2012	Natural Gas as an Island Power Generation Option	Ziff Energy Group	GNL
31 Oct 2012	Natural Gas: Technical Briefing	GNL	GNL
2012	Ziff Energy – LNG Analysis – Terms of Reference	Ziff Energy Group	GNL
Nov 2012	Review of Grand Banks Natural Gas As An Island Electric Generation Option	Wood Mackenzie	DNR, GNL
Nov 2012	Legal Options: S92A, Good Faith and Regulatory Proceedings in Quebec	DNR	GNL
Nov 2012	Electricity Demand Forecast: Do We Need the Power?	DNR	GNL
Nov 2012	Labrador mining and power: how much and where from?	DNR	GNL
Nov 2012	Electricity Rates Forecasting: Muskrat Falls Will Stabilize Rates for Consumers	DNR	GNL
Nov 2012	Electricity Rates Forecasting: Technical Briefing	DNR	GNL
Nov 2012	Gull Island: Why not develop Gull Island First?	DNR	GNL
Nov 2012	Upper Churchill: Can we wait until 2041?	DNR	GNL
Nov 2012	Environmental Benefits of Closing the Holyrood Thermal Generating Station	DNR	GNL
17 Dec 2012	Project Oversight Agreement	GNL, Nova Scotia, Nalcor, Emera	GNL, Nova Scotia, Nalcor, Emera
2012	Backgrounder: Muskrat Falls Engineering and Planning Progress	GNL	Public
2012	Backgrounder: Key Changes Affecting Project Estimate	GNL	Public
2012	Backgrounder: Cumulative Present Worth of	GNL	Public

	Alternatives		
2012	Backgrounder: Capital Cost Summary – DG2 – DG3	GNL	Public
9 Mar 2013	The North Spur Quick Play Instability and Landslide Problems: The Weak Link in Nalcor's MF Project	Cabot Martin	
March 2013	Feasibility Study of Hydraulic Potential of Coastal Labrador – Phase 2: Project Definition Phase (Final Report)	Hatch	Nalcor
18 Apr 2013	Lower Churchill Project: Request for Financing Overview	Nalcor	
31 May 2013	Request for Financing – MF-Labrador Transmission Assets in Labrador Island Link Funding Tests	Nalcor	
29 Nov 2013	Interim Independent Engineer's Report – Lower Churchill Project	Govt. of Canada	MWH Americas, Inc.
2013	Nalcor Monthly Reports (2013-2015)	Nalcor	
2013	Nalcor: Value to Shareholder Report	Nalcor	
2013	Net Benefits to NL in DG3	Nalcor	
17 Dec 2014	Supply Issues and Power Outages Review Island Interconnected System	Liberty Consulting Group	PUB
Aug 2014	Nalcor Presentation – Electricity Markets – August 2014	Nalcor	GNL
2014 - Present	Muskrat Falls – Quarterly Reports (2014)	Nalcor	GNL
2014 - Present	Independent Engineer – Site Visit Reports	Govt. of Canada & Nalcor	MWH
26 Oct 2015	Review of the Newfoundland and Labrador Electricity System	Power Advisory LLC/ Hatch Ltd.	GNL/DNR
29 Oct 2015	Report on the Review of Muskrat Falls Project Cost and Schedule Management Processes and Controls	EY	GNL
Dec 2015	Mid-Execution Assessment:	Independent	Nalcor

	Nalcor Lower Churchill Project	Protect Analysis Inc. (IPA)	
July 2014 – Present	Muskrat Falls Oversight Committee Repots	Muskrat Falls Oversight Committee	Cabinet

118. Former Premier Williams was of the strong belief that the Province had the ability to complete the Project on its own and stated quite emphatically his belief in the ability of Newfoundland and Labradorians:

“MR. D. WILLIAMS: Yeah, you know, and the term, Mr. Learmonth, masters of our own destiny, that’s something I used a lot because I believed in it. I really felt that, as Newfoundlanders and Labradorians, we shouldn’t be subservient to the whims of Quebec.

You know, we have bountiful resources. I mean, you know, given what can happen offshore and everything else, I mean, you know, we have tremendous potential here. But the other thing is on the whole hydroelectric projects, you know, Newfoundlanders and Labradorians built the Upper Churchill – granted it, it was originally built by BRINCO but BRINCO hired Newfoundlanders and Labradorians to do it. So, you know, we’re at that 50 years. We also built Bay d’Espoir, Granite Canal, Hinds Lake, Cat Arm.

So, you know, we’ve got a lot of expertise in our province in doing these projects. The Upper Churchill, I think, is probably the eighth largest in the world – the fourth largest in Canada. So, this is not something we’re going into with our eyes closed that we don’t know anything about.

You know, as well, we’ve also built the oil and gas megaprojects. So, you know, our tradespeople in this province are very, very skilled on megaprojects. And a lot of these skills are translatable to – from oil and gas to hydroelectric projects.

And that gets into as well – I mean, we can probably talk about it in another question – it’s just, you know, whether we were properly staffed or competent to handle this. I mean, that’s ridiculous. I mean, we’re as competent, you know, as anybody in the world as far as I’m concerned. And where we don’t have expertise in specific areas, we bring it in.

So masters of our own destiny – absolutely. I think it was about time we finally, you know, took control of these. And, of course, – and again, the plan was to use these bountiful non-renewable resource revenues to help pay the freight.”⁹⁴

119. In regard to former Premier Williams’ relationship with Nalcor Energy, he states quite assuredly that during his tenure he had full and complete confidence in the organization and its management and project teams and had no reason to think otherwise. He felt that the Corporation was fully qualified to undertake the Project as contemplated having a wide of expertise within the organization and the ability to retain experts where necessary.

120. Nalcor Energy was a creation of the Williams administration and was structured to operate as an energy warehouse that would be responsible, in part, for the development and management of the Provinces renewable and non-renewable energy resources. This is explicitly referenced in their enabling legislation, the *Energy Corporation Act*:

5. (1) The objects of the corporation are to invest in, engage in, and carry out activities in all areas of the energy sector in the province and elsewhere, including,

(a) the development, generation, production, transmission, distribution, delivery, supply, sale, export, purchase and use of power from wind, water, steam, gas, coal, oil, hydrogen or other products used or useful in the production of power;

⁹⁴ Hearing Transcript, October 1, 2018, at page 19-20.

(b) the exploration for, development, production, refining, marketing and transportation of hydrocarbons and products from hydrocarbons;

(c) the manufacture, production, distribution and sale of energy related products and services; and

(d) research and development.⁹⁵

121. With respect to the relationship as between Nalcor and GNL, it was Mr. Williams' view that Nalcor operated as an extension of GNL in that it housed the means and resources, both human and financial, to provide the guidance, expertise and skill level required to carry out a mega project of the nature of the Muskrat Falls Project. As such, GNL relied on Nalcor to a great extent to provide accurate and detailed information, as well as updates with respect to various crucial elements of the Project including risk assessments, costing and scheduling. The underlying rationale for the same was that GNL did not house the level of required expertise internally and Nalcor, being a Crown Corporation with its sole shareholder being the Province, would have been considered to be pursuing the same best interests as GNL and they had no reason to think otherwise or second guess the information being provided to them. In speaking to this issue in an exchange of questioning from Commission Counsel, Mr. Williams stated there was **"never a point where [he] sat back and said I think they're keeping something from me."**⁹⁶

122. In concluding his testimony Mr. Williams indicated his optimism for the Project remains high and that despite regrettable cost increases and scheduling delays, he strongly remains committed to the view that the long term benefits of the Muskrat Falls Project far outweigh the cost consequences incurred in the interim. In addressing the ongoing concerns of increased utility rates, Mr. Williams allows that their original concept, as outlined under the "Our Goals" section of the Energy Plan⁹⁹, was that increased revenues realized from non-renewable resources could be utilized to offset any accelerating rate increases. Mr. Williams'

⁹⁵ Energy Corporation Act, SNL 2007, c. E-11.01.

⁹⁶ Hearing Transcript, October 1, 2018, at page 50.

⁹⁹ Exhibit P-00029, at page 11-12.

testimony was that this was always the plan, and Group 2003-2015 submit that it is evident that this concept is one of the more substantive options that is currently under review by the current Government to address the issue of rate mitigation. Mr. Williams explained the idea as follows:

“MR. D. WILLIAMS: If my electricity bill doubles, I can’t live here.

So when this project was put in place, there was never an understanding that we were gonna get it for nothing. You know, you obviously have to pay for a project. You don’t put a 6 or a \$10 billion project on the ground and get it given to you. So there has to be some cost related.

But what’s important to know in this – whether that commission rate was 11 or 12 cents – that there was gonna be an actual increase anyway in rates. Rates had kind of been held here for a while. Rates, without the Muskrat Falls Project, would have gone up 4 or 5 cents. They would’ve gone up to 16, 17 cent range.

And there are all kinds of different things driving them – I don’t know what all of them were – but, you know, Bay d’Espoir required an upgrade, Holyrood’s required an upgrade. We had the Dark Newfoundland that required some extra work. And so – and, of course, we had a seriously depleting asset at Churchill Falls, which even though we don’t get the money from Upper Churchill, we got to pay for it. So all of that goes to drive rates up nearly halfway.

The other part – the other half is doing the Muskrat Falls. When we put this project together, when we did this term sheet back in the day, there was an 8.4 per cent return built in. There’s an extra \$3 billion worth of profits that can come from excess sales. We have the returns now that can come from the Upper Churchill redress power because we now have a link over.

But equally important is that this whole Nalcor concept was built on non-renewable revenues assisting and helping to pay for renewable energy. So as the profits of Nalcor increase – and they will increase. They'll increase dramatically as a result of the extra profits that we have gotten. Not royalties, but extra shares that we have gotten, and some super royalties, of course, from the oil and gas projects. Nalcor will be a much more profitable company – and I've labelled it as the golden goose; the goose that lays the golden egg for the province. And as those profits increase, then that money can also be used to help mitigate rates.

So the safeguards are there from the beginning. They were there when we put them there in 2010. We anticipated where these are coming from, and they will be used to reduce rates. And I can guarantee the people of this province that these rates will not double as a result of Muskrat Falls. And if they go high, there are the tools and there are the mechanisms and there are the safeguards and there are the pools of revenue there to put them back.

And if we were in government, we would've done it. And I understand that the Liberal government right now is going to do the same thing. But there is no need for families to be, you know, frightened to death over rates. And I understand it. It's a big deal in a household, but, you know, the critics can't just throw all this on the back of Muskrat Falls: if your power bill is going up, well it's all because of that Muskrat Falls Project. Well, there's a long-term benefit to Muskrat Falls and also, you know, there's this short term escalation of rates, but the ability there is to take care of it.

[...]

First of all, the discussions did take place. They took place among our Cabinet and it took place with Nalcor officials that, in fact, there would be relief granted at some point in time on rates. And these funds – the whole

principle of the Energy Plan if you – and you’ve read it, are that the, you know, renewables will pay – or non-renewables will pay for renewables. That’s the whole attempt.

So we’re gonna build this corporation, this energy warehouse, but you’re gonna pool the funds. That’s why Nalcor was combined. That’s why oil and gas was brought in .”¹⁰⁰

123. Prior to concluding his direct examination, Commission Counsel Learmonth provided former Premier Williams with an opportunity to speak at length as to what he saw as the benefits of the Muskrat Falls Project. Given that the Inquiry process has been steeped in much criticism of the Project, it is felt that in order to maintain some semblance of balance, that it is worthy to repeat these remarks in full at this stage of our submission as other attempts to do so have previously been rejected, as the Commissioner stated “I’m not interested as a Commissioner here in people’s perceptions of the future benefits. That’s not what this Inquiry is about.”¹⁰¹ Group 2003-2015 respectfully submit that the benefits of the Project are a relevant and important issue for consideration, as outlined by Mr. Williams:

“MR. D. WILLIAMS: So bear with me for a few minutes just so I can go through it. And it’s not in any logical sequence; it may be somewhat disjointed, but I’m just trying to, off the top of my head, list whatever ones I thought were benefits.

So first of all, there’s system reliability. We have two-way capability, and we’re interconnected with Canada. That’s just so important, and it goes to the transportation link as well. You know, PEI’s got a link, and linkage is really important in this country.

Jobs – speaks for itself. I can’t put a number on it, because I don’t have the information, but I’m told, being up fishing up in Labrador, that there’s over

¹⁰⁰ Hearing Transcript, October 1, 2018, at pages 65-66.

¹⁰¹ Hearing Transcript, December 12, 2018, at page 42.

5,000 people there, at some point in time, that were working. So there's over 5,000 at peak.

But the economic growth during construction and after is huge. I also know, from having visited Labrador, that the beneficial effect of this project on Labrador over the last six years has to be enormous, because there hasn't been a lot of things happening, and we had the close at Wabush, and now, of course, there's the uptick with the Vale Inco mines. So that now will start to turn around, but over the last five or six years, there has been a huge gap, and it's been critical to Labrador.

The New Dawn Agreement, the benefits for the Innu, the chance to give them redress, the opportunity to get that finalized and get their land claims settled, I think that's one of the – more – my prouder accomplishments while I was in government, and hats off to the people who negotiated that.

Finally – not finally, you know, we have, as I said before, some of the greatest hydro assets in the world. You know, we've got the Upper Churchill; we've got Gull; we've got Muskrat; we even have these small hydro projects in the province. Finally, after 500 years – that might be unfair. Let's say six – 50 years – we are in the hydro business. We are finally in the business. We now produce and sell and profit from our own water, hydro energy.

Stable long term rates – we got in in the – at a good time, a perfect time, when rates were depleted and down, and we've locked them in. They're probably some among the best in North America, I would think.

THE COMMISSIONER: Interest rates.

MR. D. WILLIAMS: Yeah, I'm sorry, yes, interest rates.

Newfoundland needed more power. A big driver in this whole exercise was the fact that we need to have more power, and at the time that this decision was made, there was a capacity deficit in 2015, and then a full deficit in 2019. And I fully believe that this will come back. We got into a – went to downturn here in the province, and a lot of the mining, you know, industries that were happening at the time have since went away but are now coming back again.

Muskrat Falls and the LIL was deemed to be the lowest cost option, and that's for the Commissioner to decide at the end of the day based on the evidence that's before him and before the entire Inquiry, but I'm stating that that is the lowest cost option, and on different analysis, that will prove to be the case.

We're replacing the Holyrood thermal generating station, a facility which is now over 40-years old, which is antiquated. There's the emissions that come from that, and there's also the health aspects. There's been residents in that area up there that have been concerned about the health aspects up there, so not only are we getting rid of an antiquated facility, we're also – there is a related health benefit.

We're investing in an asset that we own, finally, and are getting the benefit from and, ultimately, to return billions to the people of the province. We're investing in Newfoundland's future, as opposed to paying the majority of our electricity costs to outside oil companies for fuel. So in other words, we're buying, and we're not renting. So when that fuel is burnt, that's gone. That's wasted. That money is lost forever.

Our benefits are intergenerational. I suggest, Mr. Commissioner, that this is not a project that can be looked at in the cold light of day on October 1, 2018. This is a multi-generational project. When we did the Energy Plan, we were looking to 2041 and beyond, and this is a century plan, but we had to

be realistic, of course, on forecast, but it will go on forever. This water runs forever.

The clean power – the power generation in our province, at the end of the day, will be 98 per cent clean on our emissions, also avoids some carbon tax implications, as well, and opens up the possibilities of developing wind here on the province. Also, it's clean energy for the country, which is struggling to meeting the original Kyoto targets and, now, the more recent targets. For example, it not only benefits, you know, Newfoundland and the thermal, for example, if you go to Nova Scotia, it will replace coal. Perhaps, at some point, it may replace nuclear in some jurisdictions (inaudible).

Yes. There's also the – not only is it the jobs and the economy, but there's also the direct, indirect and induced benefits that come from this project. I haven't seen – there was numbers that were actually published on the – with the release of this project in 2010. I have not seen the new numbers as a result of the increased cost. But if it was X for 6 billion, it's X plus Y for 10 billion. So in fact, there is a certain amount of this capital cost that is recovered by the people of Newfoundland and Labrador in the forms of – in the form of labour, the Government of Newfoundland and Labrador in the form of taxes and, of course, the Government of Canada as well and also the rest of Canada.

It creates surplus power for Newfoundland's needs and export but also allows us to import – not allows us to import – allows us to have new industry come to the province. While we were there, we had discussions based on Gull with Alcoa and other mining industries. These are all big loss to Quebec, because Quebec are using our cheap power in order to get these industries.

We're connected both ways to North American markets for the first time, and we're no longer isolated. That goes back to that map whereby the only link that we had was Churchill Falls into the border of Labrador.

Our assets will be fully paid off. It might be 35, it might be 40 years, just depends on how far we amortize out in order to lessen the cost in the short term, but we'll own it. We'll own the house, and the water will continue to flow. We'll have to upgrade the assets, just as we're doing with the Upper Churchill, but at the end of the day we're not renting anymore, we own this asset. And even though this asset has created debt and it creates debt for the province, it is an asset that has value.

I can't quantify the value of that asset, but I would suggest to you that it's in excess of \$10 billion. So, therefore, from a balance sheet perspective, you got an asset and you got a liability, then we're left with that asset, which is a good thing.

The federal loan guarantee was acquired in recognition of the GHG reduction – greenhouse gas reduction benefits that we had. We should save as a result of that guarantee in excess of 35 – I'm sorry, in excess of \$6 billion interest over 35 to 40 years.

Also, finally, it strategically positions us in conjunction with our oil assets to negotiate the right deal for the Upper Churchill post-2041 and to put us in position as an energy superpower. I mean, we are.

If those – if 20 per cent of those wild reserves are proven to fruition, when we get our share of the Upper Churchill back, when Gull gets developed, when Muskrat gets developed, with everything else we've gone on in this province, couple that with the best wind regime in North America – you know, we'll be on the pig's back here, and that's the way I felt for the – for a long time, but you have to be patient.

You cannot look at this on October 1, 2018 when it's a multi-generational project and take a snapshot in time. We took a snapshot a couple years ago, oil was 40 bucks. Now oil is 80 bucks, the dollar is down to 76 cents, which extrapolates the price of oil up again; so we're now back to \$100 oil. So, you know, I just think on balance there, there are enormous benefits."¹⁰²

124. In summary, former Premier Williams provided two days of forthright and credible evidence in respect to the strong and convincing business case for proceeding with the Muskrat Falls Project during the time of his tenure. Given that his term in office was prior to the sanctioning and execution of the Project itself, Mr. Williams was able to provide significant insight of the in-depth analysis and consideration that was pursued by the Government of Newfoundland and Labrador over a seven year period, prior to deciding to proceed with one of the most significant developments in the Province's history. It is clear from a review of this evidence that all previous economic, jurisdictional and related issues had been considered and that the Province was then well positioned to proceed with such a significant development at that point in the Province's history.

ii. Shawn Skinner (Minister of Natural Resources, December 10, 2010 – October 28, 2011)

125. The next Group 2003-2015 witness was Shawn Skinner who was the Minister of Natural Resources, for the period of December 10th, 2010 to October 28th, 2011. While Minister Skinner only served in this portfolio for a brief period of time, he was a very experienced member of Cabinet having served as Minister of various other Government Departments including the Dept. of Human Resources and Labour and Employment, as well as Innovation, Trade and Rural Development over the previous four years and was a seasoned member of Cabinet. As such he would have had a working knowledge of the Muskrat Falls Project when he assumed the Natural Resources portfolio.

¹⁰² Hearing Transcript, October 1, 2018, at pages 71-72.

126. Mr. Skinner's evidence is most pertinent in that it was during his tenure that issues pertaining to the Muskrat Falls Project were being considered for referral to the Public Utilities Board (PUB) for review and consideration. Mr. Skinner confirmed that while his Department was the lead Government Department in respect of the Project, there would have been substantial involvement of the Premier's Office, under the leadership of former Premier Dunderdale, particularly as it related to the finalizing of the Term Sheet between Emera Energy and Nalcor on November 18, 2010 as it pertains to the Maritime Link and ongoing negotiation related to the Federal Loan Guarantee.
127. Through the course of his examination, Mr. Skinner acknowledged that he was not aware of the removal of the \$500 million of Strategic Risk Reserve by Nalcor, an issue which surfaced with all Group 2003-2015 who were members of Cabinet at the time. Mr. Skinner did state categorically that this was a matter of concern in that it was, ***"my position that all of the information that we had available should be made available, obviously to me as a Minister. And my goal was to make sure it was made available to the public generally so that people understood the project and all the factors around it."***¹⁰³
128. The focus of Mr. Skinner's evidence was centered on the referral of a question to the PUB pertaining to the lowest cost option available for energy generation for the Province. Given public interest and issues in relation to the involvement of the PUB, in June of 2011 Government decided that a reference question would be referred to the Board to be considered. Mr. Skinner confirmed that the underlying rationale for the referral was to either confirm or contradict Government's decision at the time that the Muskrat Falls Project was the least cost option. It is worthy of note that GNL's consideration at this point in time was subsequent to years of detailed analysis by Nalcor and the completion of numerous reports and studies. The review process was also still ongoing through the utilization of the widely accepted industry project management practice known as the Decision Gate Process.
129. It is fundamental when considering this issue of the PUB referral to note that GNL was under no legal obligation to make any such referral to the PUB given that pursuant to the Labrador Hydro Project Exemption Order, an enactment of the previous Tulk administration,

¹⁰³ Hearing Transcript, November 2, 2018, at page 2.

the Project was specifically exempted.¹⁰⁴ The question which was ultimately referred to the PUB was as follows:

“The Board shall review and report to Government on whether the Projects represent the least-cost option for the supply of power to the Island Interconnected Customers over the period of 2011-2067, as compared to the Isolated Option, this being the ‘Reference Question’

In answering the Reference Question, the Board:

- **Shall consider and evaluate factors it considered relevant including NLHs and Nalcor’s forecasts and assumptions for the Island load, system planning assumptions, and the pressures for developing and comparing the estimated costs for the supply of power to Island Interconnected Customers, and**
- **Shall assume that any power from the Projects which is in excess of the needs of the Province is not monetized or utilized, and therefore the Board shall not include consideration of the options and decisions respecting the monetization of excess power from the Muskrat Falls generation facility, including the Maritime Link project.”¹⁰⁵**

130. Through the course of the Inquiry, criticism has been levied that the scope of the question referred to the Board was too narrow, but as readily acknowledged by Grant Thornton, the Commission’s own expert, Nalcor had already appropriately considered and dismissed a majority of the alternative energy options.¹⁰⁶ Given the extent of the preliminary work and assessment that had already been completed by Nalcor to this point in time,

¹⁰⁴ Labrador Hydro Project Exemption Order under the *Electrical Power Control Act, 1994* and the *Public Utilities Act*, O.C. 2000-206 & O.C. 2000-207.

¹⁰⁵ Exhibit P-00038, at page 1.

¹⁰⁶ Exhibit P-00014, at pages 22-23, 26 and 29.

Government quite properly had concluded that the most viable options would have been either the Interconnected Island Option or the Isolated Island Option.

131. It is difficult to reconcile the arguments being put forth by some critics given that at the time (2011) they were requesting to have the matter referred to the PUB¹⁰⁷ and then at the time of the Inquiry, criticism was levied that the reference was too early with only Decision Gate 2 numbers being complete. When questioned by Counsel Williams if at any time had any opponents or critics, or those with any interest requested that Government wait the period until after DG3 numbers were complete before referring it to the PUB, Mr. Skinner replied ***“No, that was not a discussion or an issue that was brought forward by anyone, you know, commenting publicly or otherwise about the project being referenced to the PUB.”***¹⁰⁸

132. The argument was also raised that the time frame which the PUB was provided with to complete their report was insufficient in order for them to complete their work. While there were legitimate concerns expressed by the PUB regarding the flow of information from Nalcor, at no time during Minister Skinner’s tenure did he ever receive a request for an extension from the PUB for filing of their report. It is acknowledged that a subsequent extension was granted by Ministers Skinner’s successor, Minister Jerome Kennedy. Mr. Skinner had since retired from politics as of October of 2012.

133. It was the position of GNL that while the original time frame may have served to be somewhat of a challenge, the Department of Natural Resources and the applicable Ministers at the relevant times, did work with the PUB to address the concerns they had expressed in respect to disclosure issues with Nalcor. To that end, Government did provide an additional three (3) month extension in which to file their report, which will be discussed in further detail below under former Minister Kennedy’s evidence. As indicated in above referenced letter by Messrs. Penny and Vardy referenced above, they stated, **“We are confident that the Board can expedite the hearing process so there is no undue delay.”** It is noted that the PUB’s own experts Manitoba Hydro International (MHI), who were retained by the PUB to

¹⁰⁷ Exhibit P-00843, at page 1.

¹⁰⁸ Hearing Transcript, November 2, 2018, at page 58.

conduct an independent review for the use of the PUB, were able to complete and file their report within the time frames required. In addition, the Consumer Advocate and their expert Knight Piesold, who was also requested to comment on the question posed to the PUB and was able to file a response, neither of which suggested they did not have sufficient time to conduct their review.

134. Accordingly the testimony of Mr. Skinner was very useful for shedding light on many issues pertaining to the PUB reference. This issue shall be dealt with further in this submission under the evidence of Jerome Kennedy and the Terms of Reference section.

iii. Thomas Marshall, Q.C. (Minister of Finance , October 7, 2009 – January 16, 2013)

135. Mr. Tom Marshall Q.C. was called as a witness both in Phase 1 and 2 of the Inquiry given his extended term in Government and the various senior portfolios which he occupied during his tenure. Prior to being first elected to Government in 2003, Mr. Marshall had a long standing and respected legal career having been a practising lawyer in Corner Brook, Newfoundland for approximately 30 years. Upon his election in 2003 Mr. Marshall was first appointed as Minister of Justice and Attorney General, later also assuming the role Minister of Intergovernmental Affairs. In 2006 Mr. Marshall changed portfolios and became the Minister of Finance and President of Treasury Board, a Ministry he would hold on several occasions, his first appointment ending in 2008, when he returned to the Dept. of Justice. In 2009 Mr. Marshall was re-appointed as Minister of Finance and President of Treasury Board and took on the additional responsibility of Attorney General in 2012. In January of 2013 Mr. Marshall was appointed the Minister of Natural Resources while remaining Attorney General only to return to Finance on one more occasion in October of 2013 until he was sworn in as the Provinces' 11th Premier on January 24th, 2014 having succeeded former Premier Kathy Dunderdale. Mr. Marshall would remain in this role until September of 2014 when he was succeeded by then Premier Paul Davis. He resigned from public life on November 3rd, 2014.

136. It is clear from the extensive and varied roles which Mr. Marshall occupied over his 11 year career in Government, as well as his experience as a lawyer for the previous 30 years,

that he provided a vast amount of experience in the positions which he occupied. Mr. Marshall presented before the Inquiry as a very honest and forthright witness for whose evidence we would respectively submit should be given substantial credibility and reliance.

137. Mr. Marshall was questioned at length by Commission Counsel, as were most if not all other Group 2003-2015 members, with respect to his knowledge of the removal of the \$500 million Strategic Risk Reserve by Nalcor in presenting the DG2 numbers. Mr. Marshall indicated that, ***“I wasn’t aware that any contingency built into the estimates had been excluded from the estimate...all costs, including contingencies for risk, should obviously be in the estimate.”***¹⁰⁹ In terms of the discussion of risk, Commission Counsel and the witness had the following exchange:

“MR. T. MARSHALL: No. I knew that when they do their – build the estimates, after they do the first estimate, you know, the base estimate, there is a consideration of what’s going to happen in the future and what risk there, and there’s contingencies or provisions or risk premiums put in the estimates for these risks, but I didn’t have a discussion about what the different – you know, what’s a strategic risk and what’s a tactical risk or ... They were looking at risks for what adverse events that could happen and affect the project in the future.

MR. LEARMONTH: Yeah, but whether it’s tactical risk or exposure risk, if there’s a dollar sign assigned to it, it doesn’t really make much difference under what category you put it. Do you agree?

MR. T. MARSHALL: That’s right. That’s right.

MR. LEARMONTH: Yeah. Okay.

So just before we leave that, if there was an exposure of approximately \$500 million for exposure risk – for strategic risk, you’re saying, I take it,

¹⁰⁹ Hearing Transcript, November 6, 2018, at page 3.

that that should've been included in the cost estimate that was provided to Cabinet for consideration on the sanction question?

MR. T. MARSHALL: Yes.

MR. LEARMONTH: Yes. Okay. And it – and if it wasn't, that would be a matter of concern for you?

MR. T. MARSHALL: If it wasn't, yes.

MR. LEARMONTH: Yes. Okay. Because the announcement to the public that was made by government was that the total cost for the province was 6.2 billion. Correct?

MR. T. MARSHALL: Capital cost.

MR. LEARMONTH: Yeah, the cost of the – the capital cost of the project. So if there was a \$500 million amount that was not included, that would not be a full disclosure to the public. Do you agree with that?

MR. T. MARSHALL: I do.

MR. LEARMONTH: You do. Okay, thank you.

And that's a problem – fundamental problem for a Cabinet minister such as yourself, is it not? That if you're giving information to the public – even though you may believe it's true, if you find out later that it isn't really true or accurate, that is an item of concern, is it?

MR. T. MARSHALL: It would be. You know, you get information, you know, there's financial information – you know, it changes, cost estimates change

from time to time. So it's important that you give the right number that you have at the time from the best people there are –

MR. LEARMONTH: Yeah.

MR. T. MARSHALL: – based on the best evidence they have. You get the right number – obviously get the right number out to the public.

MR. LEARMONTH: Because you want to make sure that you're telling – giving it straight to the public. Is that right?

MR. T. MARSHALL: Correct.”¹¹⁰

138. In regard to matters pertaining to Project scheduling, Mr. Marshall confirmed that at the time of sanction in December of 2012 he was not aware of the P1 scheduling projection and that there was a 99% chance the schedule could not be met and he believed at the time that first power was to be in July, 2017. In summary he stated;

“MR. T. MARSHALL: And I also thought that the project would also provide value to the people of the province. I thought it was a great project. We knew what the cost – we were told what the costs were going to be.

The cost estimates were done by the project team and SNC-Lavalin had done the base estimate. Then they had it reviewed by independent reviewers like Validation Estimating. They then had a different company do the risk analysis and they had that reviewed. And, yes, we were satisfied that that number was right and they were going to get it done on time.

MR. LEARMONTH: By July 15, 2017.

¹¹⁰ Hearing Transcript, November 6, 2018, at page 4.

MR. T. MARSHALL: Well, I – well, that was the date. The year '17 was the date. Now, you mean you always recognize that there could be cost overruns and there could be cost underruns and there could be cost – there could be schedule overruns and underruns as well.”¹¹¹

139. A further issue which had arisen during the early course of the Inquiry was the question of whether GNL had any responsibility to conduct its own separate, independent review and audit of the base cost estimates pertaining to the project which were being forwarded to them by their own Crown Corporation, Nalcor Energy. Evidence was adduced to support the fact that Government did not have the internal means to conduct its own review. In confirmation of same, Terry Paddon (former Deputy Minister of the Department of Finance from 2004 to 2012, and later Auditor General of the Province), stated as follows:

MR. LEARMONTH: In June, sorry, yes.

Now, I want to ask you some questions about the – generally about the reviews, if any, that were completed by the Department of Finance for the Muskrat Falls Project.

MR. PADDON: Hmm.

MR. LEARMONTH: And I want to start off by asking you whether while you were deputy minister of Finance, whether the Department of Finance ever conducted a review of cost estimates for the Muskrat Falls Project?

MR. PADDON: I guess I would have to – it really would depend on how you would define review.

MR. LEARMONTH: I'm talking about a review of the project cost estimates.

¹¹¹ Hearing Transcript, November 6, 2018, at page 5.

MR. PADDON: Knowing what the estimate of costs was is not the same as a review of the costs.

MR. LEARMONTH: That's right.

MR. PADDON: So if your question is: Did the Department of Finance go into Nalcor and do a fairly in-depth review of how those costs were built up? The answer would be no.

MR. LEARMONTH: At no time while you were – so that would – that answer would apply to the financial information that's available on – for the November 18, 2010 term sheet. Correct?

MR. PADDON: That's correct, yeah.

MR. LEARMONTH: There was new – no detailed review done of the project cost estimates?

MR. PADDON: Not by the Department of Finance, no.

MR. LEARMONTH: And that would – I presume you would give, then, the same answer for the DG2 estimates and the DG3 estimates?

MR. PADDON: I can only speak to the DG3 estimates, up to the point that I left.

MR. LEARMONTH: Yeah.

MR. PADDON: 'Cause there would've been some work done subsequent to when I left. I think DG3 was in late 2012.

MR. LEARMONTH: Okay. So, anyway, there were – to your knowledge, until you left there were no –

MR. PADDON: We didn't do – we – well, I mean, we wouldn't have the capacity, really, to go in and have a detailed review of the costing – what's built up from the cost or the costing estimates coming out of Nalcor.

MR. LEARMONTH: So you wouldn't have had the resources, the capability to conduct such a review of project cost estimates?

MR. PADDON: Not to the level of detail I think you're thinking of.

I mean, really, what you're talking about is looking at the detailed engineering and saying, you know, are we satisfied that, you know, it's – the engineering is done properly and that everything that should be included is included.

I don't think we would have – you know, I'm not even sure where we would start if somebody asked us to do that. We would have to really go out and hire the expertise ourselves because, yeah, essentially, I guess the Department of Finance, in its simplest form, is a department of accountants and economists, not of engineers or people with the expertise that would be required, I think, to look at cost estimates in that level of detail.”¹¹²

140. Furthermore, the evidence of Stan Marshall, the current CEO of Nalcor Energy, during Phase II of the Inquiry is that it is not realistic to expect Government to double check all of Nalcor's work and that there must be a large degree of reliance on same:

MR. RALPH: No, fair enough. So, I see what you're saying is that Nalcor is the oversight –

¹¹²Hearing Transcript, November 5, 2018, at pages 29-30.

MR. S. MARSHALL: Nalcor –

MR. RALPH: – for the Government of Newfoundland.

MR. S. MARSHALL: Nalcor has to be their principle vehicle of oversight, it has to be.

MR. RALPH: So government is not going to be in a position to provide effective oversight of that project.

MR. S. MARSHALL: No, not directly, no. It has – I mean that's why you created Nalcor and that's what Nalcor should be doing. You have checks and balances, you have an independent board and the board – independent board because of the specialized project like Muskrat Falls that they would normally engage specialized advisors to them.”¹¹³

[...]

MS. E. BEST: Okay. So, then my next question has to do – because – I've taken some of the things that have come out of this Inquiry as if there has been almost a criticism of government because nobody in the Department of Natural Resources or in Finance checked the estimate – or the estimates.

So, what I want to ask you is how could government have checked the estimates? So, I'm talking about the estimates that SNC and Nalcor did because what I'm asking you, essentially, and I've said this before here at the Inquiry – it's almost like there was an expectation now – in hindsight – that government would have had sort of a Nalcor two – to do a whole separate estimate from the ground up and then compare the two and make sure that it's right.

¹¹³ Hearing Transcript, July 2, 2019, at page 46.

I mean, I want to – I want your comment on that – is that reasonable?

MR. S. MARSHALL: I think I'm realistic. I think that the government should be (inaudible) to rely on Nalcor for a proper estimate. There should be checks and balances as there are – like, you have a board there – the CEO should be able to go in and justify it to the premier and the energy minister. They would have to – you know, the government would ask: You know, have you engaged a consultant to check this? Normal due diligence as if you were a board –

MS. E. BEST: Yes.

MR. S. MARSHALL: – of what went into it. So I don't think it's realistic to expect the board to do – the government, rather, to do all the stuff. They should be entitled to rely on Nalcor."¹¹⁴

141. While the evidence of the relevant GNL witnesses was that they did not possess the internal capacity to conduct a detailed review of Nalcor's estimates, it was the role of the Department of Finance to confirm the financial capacity of the Province to take on such expenditures. Furthermore, Mr. Marshall did turn his mind to the possibility that cost overruns could occur, and considered the impact of same on the financial position of the Province. For instance, in an email from August of 2011, Mr. Marshall was seeking information on the impact that adding 50% cost overruns would have on the net debt to GDP ratio of the Province. This exhibit illustrates that Mr. Marshall was acutely aware of the impact the Project could have, but was also aware that the Province was in a very strong financial position at the time. In particular, it should be noted that due to successive budget surpluses the net debt had fallen by \$4 billion between approximately 2004 and 2012 while GDP had almost doubled in size. The strength of the Provincial economy at the time was discussed by Mr. Marshall during his testimony:

¹¹⁴ Hearing Transcript, July 2, 2019, at pages 135-136.

“MR. T. MARSHALL: On the 11th. And it was after the term sheet. We would have been satisfied that the province could come up with its – I mean, we were in a good financial position at the time. We had a strong cash position. I think we had enough cash we could have paid it ourselves.

But in terms of estimates, we – knowing that there, in the future, there could be estimates, there could be underestimates – or, I’m sorry, you know, it could go below estimates. And not being able to see the future or predict the future, you don’t know and you have to be satisfied that, you know, you’ve got a good estimate and that the risk analysis is appropriate.”¹¹⁵

142. Furthermore, prior to sanction Mr. Marshall also personally explored the issue of oil prices which would have a direct impact on the question of the least cost option. In this regard, Mr. Marshall and then Minister of Natural Resources Jerome Kennedy travelled to New York to meet with representatives from PIRA and Wood Mackenzie. At this time, they were advised that future oil prices would be violate and that the price trend would increase over time due to other sources of new supply in potentially volatile countries. This was discussed by Mr. Marshall during his testimony:

“MR. MARSHALL: ...Holyrood operates using oil. And oil at the time we were making these decisions, oil was rising. And it was volatile. And now there is a rate-stabilization plan in effect, as I understand, and – to deal with this. But that was – and I think they were burning 18,000 barrels a day, going full out for part of the year, the peak time of the year when it’s cold. And it was felt they were going higher. The – we had estimates from experts in New York that – PIRA and Wood Mackenzie from London. And we thought that it was going higher. And it would be better if we could get on lower hydro rates.”¹¹⁶

¹¹⁵ Hearing Transcript, November 6, 2018, at pages 35-36.

¹¹⁶ Hearing Transcript, November 7, 2018, at page 11.

143. Also related to this issue, it should be noted that the capital cost forecast estimate and related documentation was required to pass through the Cabinet process. Included would be input from all relevant government departments including Natural Resources, Finance, Justice, Environment and Aboriginal Affairs. Furthermore, subsequent to Cabinet approval and as part of the annual budget process, Natural Resources would make equity request for Nalcor as it relates to the Lower Churchill Project, and the impact of this request on the future of the Province's economy and fiscal forecast would be considered by Finance, Cabinet Secretariat and eventually Cabinet.
144. A core issue which has arisen from this which has been exhaustively canvassed was the reasonableness by which the Government of Newfoundland and Labrador relied upon their Crown Corporation to provide current updates, as well as the nature of the relationship that existed between the parties. In addressing his understanding of this relationship Mr. Thomas Marshall, who was Minister of Finance prior to sanction, stated as follows:

“MR. T. MARSHALL: Well, both, but Nalcor’s specific role was to carry out this project. They were the experts put together to do this project – to do the business case, to do the analysis. They – matter of fact, they – of the total cost, they borrowed the 5 billion. The government didn’t borrow the 5 billion. The government only would have to borrow for its equity contribution.

So Nalcor, in many ways, were like a government department, and in other ways, being a Crown corporation, they’re different because they have their own experts. You know, if a department is doing, as I said, like, a courthouse or a long-term care facility, they would come to Justice for legal advice; they’d come to Finance for all the money.

But Nalcor was set up the – they had all the expertise. They had, you know, their own lawyers internally. They had their downtown lawyers. They had lawyers in Ontario and Quebec. They had – I don’t know how many engineers. Cost accountants. Cost estimators. And then they would get

their numbers reviewed, as I mentioned, by people that would review them and MHI and Navigant and estimation validation [sp Validation Estimating] and IPA and IPC.

They were doing all that. They were part of government doing that. And then those numbers, as any department would do, brings those to Finance. And Finance looks at them and questions them, and there were a lot of meetings that – a lot of meetings in the Office of the Premier with senior ministers there, the clerk of the Executive Council there, questioning – constantly questioning – constantly questioning the Nalcor executives about the project.”¹¹⁷

145. Arising from this discussion was the concern that there existed insufficient oversight of the actions of Nalcor in terms of the execution of the Project and this was posed by Commission Counsel, ***“What is the oversight piece ? Describe to us how you feel that the government should have discharged its obligation to oversee the work of Nalcor on the Muskrat Falls Project.”***¹¹⁸ This line of questioning was pursued by various counsel including Mr. Budden on behalf of the Concerned Citizens Coalition. In response to this line of questioning, Mr. Marshall went on to list a number of groups, internal and external, that could be seen to address the oversight requirements. He listed the following groups or individuals:

- **Officials of the Departments of Finance and Natural Resources;**
- **Validation Estimating, who reviewed the base estimate;**
- **Westney Consulting, Nalcor’s risk consultant; ;**
- **Manitoba Hydro International, who reviewed DG3 numbers;**
- **Numerous internal reports completed by Government internally and published publicly;**
 - o **Labrador mining and power: how much and where from?**

¹¹⁷ Hearing Transcript, November 6, 2018, at page 9.

¹¹⁸ Hearing Transcript, November 6, 2018, at page 9.

- **Electricity Rates Forecasting: Muskrat Falls Will Stabilize Rates for Consumers;**
- **Gull Island: Why not develop Gull Island First?;**
- **Upper Churchill: Can we wait until 2041?;**
- **Environmental Benefits of Closing the Holyrood Thermal Generating Station;**
- **Nalcor's Project Team;**
- **Nalcor's Executive Team;**
- **Nalcor's Board of Directors;**
- **SNC-Lavalin;**
- **Federal Government Independent Engineer;**
- **External lawyers, accountants and engineers;**
- **Internal and External Auditors;**
- **Auditor General;**
- **Oversight Committee (est. in 2014).¹¹⁹**

146. It should also be noted that the Office of the Premier, GNL Executive and Clerk, Cabinet Secretariat and the various related Departments (Environment, Justice, Aboriginal Affairs) were not explicitly listed by Mr. Marshall but would be included in oversight. In concluding his overview, Mr. Marshall stated that **“the question is how far do you go? How far, how many reports, how many different people do you have look at it before, you know, we – in ‘14 we put in a government Oversight Committee, another oversight committee.”¹²⁰** Mr. Marshall would later go on to paraphrase current CEO Stan Marshall and attribute the following summary of his opinion that being there was more supervision and oversight on the project than any Project ever:

“MR. T. MARSHALL: So, you know, I mean, Nalcor had a big job to do and there was oversight coming at them every which way. And I believe Stan Marshall who, when he took over CEO, made the comment about all the oversight. He called it the most, I think, more sanction or more supervision

¹¹⁹ Hearing Transcript, November 6, 2018, at page 86.

¹²⁰ Hearing Transcript, November 6, 2018, at page 86.

on that project than any project ever. There was more oversight on any – more governance than any project –“¹²¹

147. Based upon these levels of oversight that had been pursued, Minister Marshall was of the view that Nalcor was using best practices. They had retained industry experts such as SNC-Lavalin and Westney Consulting, as well as the Province retaining MHI. He summarized this as follows:

MR. T. MARSHALL: – I do. I believe that they were using best practices. They had obtained experts, like SNC-Lavalin and Westney, and – you know, I wouldn’t know how to cost a hydro plant, and I wouldn’t know – I had never heard of some of these risk analysis techniques using P-factors or Monte Carlo stimulations and probabilistic analysis. I – that was not part of my world.

So I was satisfied that through the use of their experts that they were using best practices to come up with a number.

MR. LEARMONTH: You never doubted the – you never questioned whether you could rely on Nalcor’s presentation on cost estimates, is that fair enough?

MR. T. MARSHALL: Well, you always wonder – a cost estimate – you know, you would always wonder. But I felt that we had – you know, in Nalcor we had gotten top people who in turn had gotten other experts to verify, to independently review their work. Yes, I was certainly satisfied with what Mr. Martin was presenting.” ¹²²

148. In furtherance of issues pertaining to oversight, Mr. Marshall also indicated that he saw the composition of the Nalcor Board of Directors as playing a significant role in this regard.

¹²¹ Hearing Transcript, November 6, 2018, at page 93.

¹²² Hearing Transcript, November 6, 2018, at page 27.

While this issue was also considered in Phase 2 of the Inquiry, the matter did arise in Phase 1 as well in questioning by Counsel for the Citizens Coalition. Mr. Marshall indicated in his testimony that shortly after his becoming Minister of Natural Resources in January, 2013 he requested a meeting with then Nalcor CEO Ed Martin for purposes of being briefed on the status of the Project and as well ensuring that sufficient oversight mechanisms were in place, one of which was the role of the Board of Directors. At this time Minister Marshall questioned as to whether or not there was sufficient expertise on the Board as it, **“jumped out at me, I said, wouldn’t it be great to have somebody who had lots of experience in building hydroelectric projects on the Board.”**¹²³ Mr. Marshall indicated that while this suggestion appeared to have the support of Mr. Martin, he would later learn that given that the Nalcor / Muskrat Falls file remained under the control of then Premier Dunderdale and that she had her own views on what she wanted to do with the Board that he deferred to her.¹²⁴ He would once again pursue this issue regarding Board appointments when he later became Premier, and it was eventually altered under the administration of Paul Davis. While Mr. Marshall had a central role to play in the establishment of the Oversight Committee, this development will be more closely examined in subsequent Sections addressing Mr. Marshall’s Phase 2 testimony.

149. In cross examination by counsel for the Consumer Advocate, the issue of rates was raised and Mr. Marshall noted that at the time the decision was made to move forward with the Project in 2010, rates were projected to increase, even without the Project proceeding. In addition it was noted that at this point in time, electricity rates were artificially low in that Nalcor (NL Hydro) had not gone to the PUB to request a rate increase in quite some time and rates were not accurately reflecting the cost of service.¹²⁵ In recognizing that this scenario existed, it is of importance to note that an inevitable rate increase must be considered when applying any cost consequences of the Muskrat Falls Project on rates on a go forward basis. This fact was well known to GNL and was outlined in the Department of

¹²³ Hearing Transcript, November 6, 2018, at page 92.

¹²⁴ Hearing Transcript, November 6, 2018, at page 92.

¹²⁵ Hearing Transcript, November 7, 2018, at pages 12-13.

Natural Resources' paper entitled "Electricity Rates Forecasting: Muskrat Falls Will Stabilize Rates for Consumers."¹²⁶

150. In considering the issue of Government undertaking an independent review of the Project, and in furtherance of then Ministers Marshall's and Skinner's May, 2011 Direction Note to Cabinet recommending the same, Mr. Marshall indicated that he was satisfied that Government did act upon this recommendation. As disclosed in follow up questioning it was revealed that as of the date of the reference to the PUB in June of 2011, up to the date of sanction in December of 2012, with some very minor of exceptions, the Project was under constant review by either the PUB, MHI or the Federal Government, all of whom constitute independent bodies.¹²⁷ It was based upon this information Mr. Marshall stated at the close of his testimony, when asked if at the time of voting to sanction the Muskrat Falls Project if he felt that all reasonable efforts had been made to assure that it was the least cost option consistent with reliable service and in the best interest of the people of the Province he stated:

"MR. T. MARSHALL: I believe that. The lowest cost option was important to me because I know – you know, I had a feeling that the, you know, the people of the province were concerned about rising electricity rates and didn't want them to rise in the future. So this was the best option we had."¹²⁸

iv. Jerome Kennedy, Q.C. (Minister of Natural Resources, October 28, 2011 – January 16, 2013)

151. On December 3, 2018, Mr. Jerome Kennedy Q.C. was called to testify at the Inquiry given his tenure of having served in Cabinet in both the Williams and Dunderdale Governments in a number of portfolios. Mr. Kennedy was a high profile criminal defense lawyer who had practised law in the Province of Newfoundland and Labrador for over 25 years, having been called to the bar in 1986. Mr. Kennedy was first elected as a MHA in October of 2007 and went on to serve as Minister of Justice for the period of a year, then

¹²⁶ Exhibit P-00072.

¹²⁷ Hearing Transcript, November 7, 2018, at pages 24-25.

¹²⁸ Hearing Transcript, November 7, 2018, at page 26.

moving to the position of President of Treasury Board and Minister of Finance where he served two terms, Oct. 31st, 2008 – October 7th, 2009 and Jan. 16th, 2013 – October 2nd, 2013. Mr. Kennedy subsequently moved to the Ministry of Health and Community Services from October 7th, 2009 - to October, 28th, 2011. Immediately following this portfolio he was appointed Minister of the Dept. of Natural Resources where he remained until January 16th, 2013 when he moved back to the Dept. of Finance. Mr. Kennedy retired from political life on October 2nd, 2013 and returned to private law practice at that time.

152. Mr. Kennedy's evidence was perhaps most pertinent for the period he served as Minister of Natural Resources which happened to include the approximately one year period immediately preceding sanctioning of the Muskrat Falls Project in December of 2012. Mr. Kennedy's evidence can be characterized as being candid and forthcoming and it is respectfully submitted that he was unquestionably the most copious note taker to appear before the Commissioner over the course of the Inquiry. Mr. Kennedy's viva voce evidence was consistently supported by the very detailed notes he took during his term in office, which it is argued strengthened the reliability and credibility of the evidence he provided to the Inquiry. Mr. Kennedy summarized his note taking as follows:

“MR. KENNEDY: Mr. Commissioner, I've got hundreds of pages of notes that I made as I went through – it's just that something – I made notes on a daily basis just, I guess, a leftover of being in court and I did it with every department.”¹²⁹

153. The added value of Mr. Kennedy's evidence is that over the course of his two days of testimony, he outlines in great detail the extensive efforts which Government took to examine the various options which were still under review in respect to possibilities other than the Muskrat Falls Project. Given that there was much public speculation and innuendo during the period preceding sanctioning that the Project was a go at all costs, the evidence adduced by Mr. Kennedy will unequivocally establish that such a suggestion cannot be substantiated.

¹²⁹ Hearing Transcript, December 3, 2018, at page 13.

154. At the outset of his evidence Mr. Kennedy was questioned as to what he saw as his role as the Minister of Natural Resources given the “Integrated Team” approach that was described as existing between Nalcor and GNL by Clerk of the Executive Council, Robert Thompson in earlier evidence. Mr. Kennedy indicated that it was his practise to question the information which was being provided and he described his role as follows:

“MR. KENNEDY: It was integrated to the extent, Mr. Learmonth, that there had to be reliance on Nalcor in terms of provision of information to government. I saw my role as minister a little bit differently. I saw there being an obligation on me to learn as much about the project as I could and to dig down as far as I could in terms of trying to understand personally what was going on.

So I asked a lot of questions, but that was my – the way I did things, and tried to determine exactly who was doing what. So when I – I didn’t see my role as integrated with Nalcor at, you know, at all levels. Obviously, with some levels, Sir, we had to rely on them for information.”¹³⁰

155. Mr. Kennedy states that there were numerous and frequent meeting's with Nalcor and that it was quite common for Nalcor officials, including Mr. Martin, Mr. Bennett and occasionally Mr. Sturge, to make presentations to GNL and or to meet with him personally if requested. Mr. Kennedy described Mr. Martin, ***“as always very cooperative, always there, always available –Mr. Martin was always available.”¹³¹*** When queried by Commission Counsel regarding issues pertaining to transparency, the following exchange is reported:

“MR. LEARMONTH: Yes.

And while you were minister, right up to the time of sanction, did you have any reason to question whether Nalcor was giving you complete and – being transparent in the delivery of information to you?

¹³⁰ Hearing Transcript, December 3, 2018, at page 2.

¹³¹ Hearing Transcript, December 3, 2018, at page 6.

MR. KENNEDY: No, once we got over that first few months and the roles were better defined and people understood how I – I thought they understood how I approached things that I found that things were very good. I never – I had no reason to – not to trust Mr. Martin or anyone else at Nalcor.

MR. LEARMONTH: And you believed that you were being provided with all relevant information on the cost estimates?

MR. KENNEDY: Yeah, but I also questioned, Sir.”¹³²

156. Mr. Kennedy goes on to elaborate that he would drill down to raise questions, and recalls specifically asking questions concerning contingencies, as well as a breakdown of the cost of steel, gates, concrete and why there may have been increases pertaining to the same and his written notes confirm these facts. As like all other Group 2003-2015 members, Mr. Kennedy confirmed that he had no knowledge of the Strategic Risk amount of approximately \$497 million nor was he aware of the P 50 Risk Assessment or P1 Schedule Rating..¹³³

157. Mr. Kennedy stated throughout his testimony that his actions while Minister of Natural Resources, and at all times up to and prior to sanction, were guided constantly by posing and answering three fundamental questions: (1) Do we need the power? (2) Is our choice the lowest cost option?; and (3) What is the impact on the rate payer ? It was these guiding principles that lead Mr. Kennedy to pursue many of the inquiries and reports that GNL completed over the two years he was in the Ministry of Natural Resources. It is submitted that it becomes increasingly more evident that GNL, and more particular the members of the Group 2003-2015, were consistently driven by the need to have legitimate and accurate numbers released to the public in the most realistic and timely fashion possible.

¹³² Hearing Transcript, December 3, 2018, at pages 6-7.

¹³³ Hearing Transcript, December 3, 2018, at pages 7 and 15.

158. Perhaps one of the more substantive issues to arise during Mr. Kennedy's testimony were matters surrounding the reference to the PUB in respect to consideration of the least cost option. In terms of at the timeline involved, On June 13, 2011, the Board received the Terms of Reference which asked the Board to:

“review and report on whether the development of the Muskrat Falls generation facility and the Labrador-Island transmission line (The “Project”) is the least-cost option for the supply of power to the Island Interconnected system as compared to the isolated Island development scenario (Isolated Island Option) over the period 2011-2067.”¹³⁴

159. The Board held their first meeting relating to the Reference on May 16, 2011 to discuss the scope of the project, expertise required and tentative schedule.¹³⁵ Around May 20, 2011, the Board hired Mr. Fred Martin, a senior electrical engineer with extensive work completed on the Lower Churchill Project, as a consultant. Mr. Martin recommended that the Board retain an external expert engineering firm to assist with the Reference.¹³⁶ A Request for Proposals was eventually issued, and MHI was retained on July 4, 2011.¹³⁷

160. On June 17, 2011, the Board met with Nalcor officials and established a detailed schedule of important dates for their review. Throughout the process, the Board noted difficulty in obtaining required documentation for their review. These difficulties were conveyed to Mr. Kennedy around the time he became Minister of Natural Resources on October 28, 2011, as outlined in his hearing testimony:

“MR. KENNEDY: Sir, I was aware, and I became aware shortly after becoming Minister that there were issues – the PUB had issues with the way information was being delivered by Nalcor – especially with the timelines that were imposed upon them.

¹³⁴ Exhibit P-00537, at page 1.

¹³⁵ Exhibit P-00532, at page 1.

¹³⁶ Exhibit P-00537.

¹³⁷ Exhibit P-00547.

So there were meetings, and that note from Mr. Bown, actually, corresponds with what I have as my first note in relation to a PUB meeting. So there were issues – we were trying to define the issues...”¹³⁸

161. Mr. Kennedy met with the Board’s counsel Maureen Greene and Board Chair Andy Wells soon after he was appointed as Minister of Natural Resources. During his testimony, he outlined these meetings:

“MR. KENNEDY: And this is the first note I have, Sir, of a meeting in relation to the Public Utilities Board. And I think that Mr. Bown’s meeting with Ms. Greene stems from this meeting itself. And at that meeting, Sir, you’ll see there’s – Robert Thompson, Don Burrage, Diana Dalton, Brian Taylor, Charles Bown and myself.

And we were looking at various roles that people would be playing here, because Mr. – the chair of the PUB had expressed certain concerns, but meanwhile Nalcor were telling us that they had provided the information. And so, I was stuck in a situation that – and we were stuck, as a government, as a minister, and like, I don’t know who’s saying what. So my advice to the premier was that we retain a senior counsel from – a senior lawyer from downtown to assist in this matter, and to see if things could be moved along. That was one issue.

**MR. LEARMONTH: That was Mr. O’Reilly
(inaudible) –?**

MR. KENNEDY: That was Tom O’Reilly, Sir, yeah.

MR. LEARMONTH: Yeah.

MR. KENNEDY: Yeah.

¹³⁸ Hearing Transcript, December 3, 2018, at page 65.

And then there was – and one of the reasons that – and Mr. Burrage was present because we were acutely aware of the issues with the PUB; that we had to be careful how we approached it. So the – Mr. Bown met with Ms. Greene as a result, I think, of this meeting to see if he could facilitate, or how we could improve the flow of information.”¹³⁹

162. The above passage demonstrates that Mr. Kennedy quickly became aware of issues surrounding the PUB’s review and attempted to facilitate a workable solution. Subsequent to discussions with the parties involved, Mr. Kennedy wrote to PUB Chair Andy Wells on December 12, 2011 and granted an extension to March 31, 2012, stating as follows:

“We acknowledge that all parties have been diligently working towards meeting that deadline. Government is committed to facilitating the Board’s comparison and review of the Project and the isolated island options in a manner that is both thorough and timely. In her October interview with David Cochrane of CBC, Premier Dunderdale stated: ‘There is a lively debate as there ought to be on a project of this size and we would never go to sanction without bringing the House of Assembly together, giving the people of the province a chance to hear the debate on the floor of the House of Assembly.’

The House of Assembly is scheduled to open on March 5, 2012. During its sitting, the House will be busy with a throne speech, budget, and regular legislation. Therefore, it is imperative that we receive the report by March 31, 2012 to ensure that Members of the House of Assembly are not constrained in their ability to examine and debate the report.

Also, at the outset, government provided seven months to complete the Review. While we acknowledge that the formal submission has only recently been submitted, it was preceded by a considerable amount of project information that has allowed the Board and Manitoba Hydro

¹³⁹ Hearing Transcript, December 3, 2018, at page 66.

International to advance their assessment. In this context, we feel that the extension would be commensurate with the scope of the remaining task necessary to complete the Review Terms of Reference.

Rest assured that government is committed to assisting the Board in meeting the March 31, 2012 deadline, and would welcome the Board's advice as to what, if anything, is needed in order to meet this objective. For example, at your request government is willing to provide the means to enable the Board to adjust its processes and hearing schedule for other matters currently on its plate.”¹⁴⁰

163. Nalcor's submission to the PUB was received on November 10, 2011. Manitoba Hydro International, the Board's expert consultant, submitted their report to the PUB in January of 2012. On February 1, 2012, the PUB released a Notice wherein they established the schedule for completion of their review. The Consumer Advocate, with the assistance of their expert consultant Knight Piesold, also submitted his report to the Board on March 2, 2012. Both MHI and the Consumer Advocate were able to provide a full and comprehensive answer to the Reference Question, determining that the Interconnected Option was the least cost option for power supply to the Island during the period in question.

164. The Board released their Final Report on March 30, 2012, but determined that **“the information provided by Nalcor in the review is not detailed, complete or current enough”** to answer the Reference Question.¹⁴¹ This was despite the Board's own expert (MHI) and the Consumer Advocate being able to provide an answer to the Reference Question. It should be noted that during Phase III of the Inquiry, Pelino Colaiacovo of Morrison Park Advisors, a witness retained by the Commission of Inquiry to prepare a report to the Commission to review the 2012 decision making process, was quite critical of the PUB's failure to render a decision:

¹⁴⁰ Exhibit P-00045.

¹⁴¹ Exhibit P-00052, at page 6.

“MR. COLAIACOVO: ...It was an abdication of responsibility – I mean these decisions are always difficult, and they’re always judgments, and they always involve a massive amount of grey area, and it doesn’t mean you can simply not decide.

The Holyrood plant needed to be replaced, there needed to be a system plan to replace it, you need to come to a decision. And the decision is never going to be perfect and it is never going to be certain, but you need to come to a decision.”¹⁴²¹⁴³

165. Given the Board’s conclusion, questions have been raised as to whether the Board was afforded sufficient time to complete their review. Past Board reviews provide some context in this regard. For instance, in 2004 – 2005, the Board completed a review of Automobile Insurance in the Province of Newfoundland and Labrador. This was an extremely comprehensive study, which required several consultants who contributed to the review. This review had a broader mandate as compared to the Reference Question which was a strictly focused review. The Board was issued their Terms of Reference in October of 2004 and the Board’s final report was submitted to GNL on March 31, 2005 (approximately seven (7) months). Similarly, the Board’s 2005 Power Outage Review was completed in approximately ten (10) months. As such, the nine (9) months required to complete the review was not unreasonable. Mr. Kennedy reasonably granted a first extension; however, the nine (9) month period provided was adequate.

166. Furthermore, Mr. Kennedy provided evidence during his testimony as to the reasons why a further extension could not be granted:

“MR. KENNEDY: There were a number of reasons, Sir. Again, you remember, like, these meetings are taking place, there’s different officials present and there’s a number of people and discussions are had. And one of the issues, Sir, was the House of Assembly. The second was Nalcor’s

¹⁴² Hearing Transcript, July 17, 2019, at page 11.

¹⁴³ Exhibit P-04464, at page 26.

timelines. The third, though, was that the – there was a feeling among some people that Nalcor – or, excuse me, that the PUB had six months and now another three months would be appropriate, and then there was the other issue that MHI had been hired to do an independent –

MR. LEARMONTH: Yeah.

MR. KENNEDY: – report.”¹⁴⁴

167. As such, there were legitimate reasons why Minister Kennedy did not provide a further extension to the Board. This decision was reasonable based on the information that was provided to Mr. Kennedy at the time. In any event, the nine (9) months provided was sufficient based on past Board hearings. Finally, given that this was a reference question from GNL, the responsibility for making this decision was a policy decision of GNL.

168. An additional area of interest as raised repeatedly by Commission Counsel over the course of the Inquiry were the efforts that Government took with respect oversight and in particular a review of the base cost estimates which were being put forth by Nalcor. Given that Minister Kennedy was at the helm of the Natural Resources portfolio at the relevant time up to sanction, his evidence in this regard is of value to the Commissioner.

169. Prior to reviewing Mr. Kennedy’s evidence in this regard, it is important to reiterate that Nalcor Energy was established pursuant to the *Energy Corporation Act*, which as cited previously contains a number of stated objectives in Section 5. In order to meet these objectives, Nalcor required the internal expertise to develop and manage a project of this magnitude. GNL developed Nalcor for this purpose, and relied on their expertise in this regard as an agent of the Crown and the Provincial Government being its sole shareholder. Nalcor completed extensive due diligence on the Project which has been outlined throughout this Inquiry. GNL did not have the internal infrastructure to thoroughly assess the information provided independent of that provided by Nalcor as it related to project cost estimates and where necessary would rely on outside experts. This arrangement is not

¹⁴⁴ Hearing Transcript, December 3, 2018, at pages 67-68.

dissimilar to other Canadian provincial crown utility companies. For instance, the Site C Clean Energy Project in British Columbia is currently being designed and constructed by BC Hydro on behalf of the Province. BC Hydro has conducted their own due diligence and has retained independent consultants to review their findings, as did Nalcor Energy as it relates to Muskrat Falls. The BC Government has, until recently, had a limited oversight role as it relates to the work of BC Hydro in completing the project on behalf of the Province. The BC Government has also exempted the Site C Project from the oversight of the BC Utilities Commission by virtue of the Clean Energy Act.

170. The final DG3 capital cost estimate was completed in June of 2012 and was an AACE Class 3 estimate. Approximately 70% of the DG3 base estimate was completed by SNC-Lavalin, a Montreal based engineering, procurement and construction (EPC) company with considerable hydroelectric and internationally recognized mega-project experience. The remainder of the estimate (approximately 30%) was completed by Nalcor. It should also be noted that prior to sanction, Nalcor engaged external consultants to review the DG3 estimate including Validation Estimating and several check estimates.¹⁴⁵

171. As noted, Nalcor Energy was created as a Crown Corporation with the requisite skills and personnel to manage similar projects on behalf of the Province. Nalcor engaged in a due diligence process and retained several consultants and experts to assist in the development of their DG3 cost estimate. GNL reasonably placed a large degree of reliance on Nalcor, but did hold the Corporation accountable in terms of regular reporting to GNL through meetings with GNL officials in addition to regular presentations to Cabinet. This was discussed during Mr. Kennedy's testimony on December 3, 2018:

“MR. KENNEDY: The – what I tried to do, Mr. Learmonth, was not accept everything that was told to me at face value. I saw there being a duty of due diligence imposed on me as the minister and as an elected official to ensure that the information being provided to us was tested, to ensure, as best we could, that we were doing the right thing.

¹⁴⁵ Exhibit P-00014, at page 58-59.

So there was different levels of oversight, if I could use that term, Sir, in relation to Nalcor. By that I mean the premier was very involved in meetings and dealings with Nalcor – the premier to premier’s office. The civil service, from Mr. Thompson to Mr. Bown, they were very involved. And there was Cabinet oversight in terms of the – Cabinet was fully aware of everything that was going on. And when I say fully aware, Site, there were presentations to Cabinet on a regular basis from Nalcor.”¹⁴⁶

172. Unlike the British Columbia Site C example cited above, GNL did make an effort to involve our Provincial utilities regulator. In June of 2011, GNL issued a reference to the Board of Commissioners of Public Utilities (PUB) to review and report on whether the development of the Muskrat Falls generation facility and the Labrador-Island Link transmission line was the least-cost option for the supply of power to Island Interconnected customers, as compared to the Isolated Island development scenario.
173. Manitoba Hydro International (“MHI”) was engaged through a Request-For-Proposal (RFP) process as the PUB’s expert consultant to assist the PUB in their review of information submitted by Nalcor. MHI found, based on the reference question, that the Interconnected Island Option was the least-cost option for supply of power compared to the Isolated Option. The Consumer Advocate also agreed with this finding. In their March 2012 Report, the PUB determined that they were unable to render a decision on the basis of the information provided. All decisions were made on the basis of DG2 Numbers.¹⁴⁷
174. Given that the PUB found that they were unable to render a decision, GNL contemplated an additional review of Nalcor’s DG3 capital cost estimate by a third party. This is evidenced in an email from Don Burrage (GNL Dept. of Justice) to Charles Bown (GNL Deputy Minister of Natural Resources) wherein he noted that Minister Kennedy indicated that by April of 2012 GNL had “moved on” from the least cost option question and was focused on a “due diligence of the DG3 numbers.”¹⁴⁸ Given that Nalcor had completed considerable work on

¹⁴⁶ Hearing Transcript, December 3, 2018, at page 2.

¹⁴⁷ Exhibit P-00052.

¹⁴⁸ Exhibit P-00259.

the Project up to this point and that GNL lacked the internal infrastructure to review Nalcor's findings, this was an entirely reasonable approach.

175. In April of 2012, GNL contacted MHI for a third party review of Nalcor's work completed since DG2, including the reasonableness of Nalcor's DG3 cost estimate. The Department of Natural Resources formally ratified the decision to retain MHI for a DG3 review on May 29, 2012. On the same date, a Decision Note provided an overview of what was contemplated by this review:

"In preparation for DG3, or project sanction, MHI will examine work completed by Nalcor since DG2. Since DG2 in November 2010, engineering has progressed to a level required to support project sanction. The purpose of the review is to determine whether or not Nalcor's work was undertaken in accordance with Good Utility Practices whereby the processes, practices and standards used in the development of the work follows the practices, standards and processes of a majority of the utilities in Canada."¹⁴⁹

176. This action single handily demonstrates Government's efforts to review the DG3 numbers. The contract for services with MHI was signed on June 5, 2012. It is explicit in the Scope of Work that GNL required a review of Nalcor's DG3 capital cost estimate of \$6.2 billion:

"Outcome: A report of the reasonableness of the Muskrat Falls GS capital cost estimate and schedule as inputs to Nalcor's DG3 CPW analysis."

[...]

Outcome: A report on the reasonableness of the transmission capital cost estimates and schedule as inputs to Nalcor's DG3 CPW analysis.

[...]

¹⁴⁹ Exhibit P-01522.

Outcomes: A report on the reasonableness of Nalcor's SOBI cost estimate schedule as input to the DG3 CPW analysis.

[...]

Outcome: A report on the reasonableness of Nalcor's cost inputs for the other items adjusted since DG2.”¹⁵⁰

177. Mr. Kennedy was not involved in the process of drafting the Scope of Work, but did review the final document and assisted in presenting same to Cabinet for approval. Mr. Kennedy's understanding of MHI's engagement based on their Scope of Work was that they would review Nalcor's DG3 cost estimate in detail and provide commentary to GNL. This was discussed during Mr. Kennedy's testimony in Phase I:

MR. KENNEDY: Yes, from government's perspective, what we wanted to do – as I've indicated, Mr. Learmonth, we wanted the best possible information that we can get, and that would include, you know, the cost estimates, what are the real numbers that we will be going to the public with or going into the House of Assembly.”¹⁵¹

178. MHI's Final Report was submitted to Mr. Kennedy in October of 2012, subsequent to receipt of Nalcor's DG3 numbers by GNL. It is clear that MHI understood a review of Nalcor's capital cost estimate of \$6.2 billion as an essential element of their review, as outlined in the Executive Summary:

“MHI was asked to review the work completed by Nalcor Energy since Decision Gate 2 in preparation for Decision Gate 3 and to determine which option is the least cost based on the updated cost and technical data provided by Nalcor. MHI was also asked to complete a reasonableness assessment on all inputs into that analysis. The least cost metric for each

¹⁵⁰ Exhibit P-00770, at pages 9-11.

¹⁵¹ Hearing Transcript, December 3, 2018, at page 44.

option was computed by the application of the cumulative present work (CPW) method.”

“...The cumulative present worth (CPW) of the Interconnected Island option was estimated at \$8,36 million in 2012 dollars, which includes the present worth of the capital costs (\$6,202 million), operating and maintenance costs, fuel purchases, and power purchase agreement costs” [emphasis added].¹⁵²

179. MHI expressed confidence in the work completed by Nalcor to date, and maintained their view that the Interconnected option was the least cost option. In relation to Nalcor’s DG3 cost estimate, the following Key Findings are relevant:

“HVdc Transmission Line, Electrode, and Collector System. MHI reviewed the cost estimates, construction schedules, and design methodologies undertaken by Nalcor and its consultants for the HVdc transmission line, electrode, and collector system. In MHI’s opinion, Nalcor has used a diligent and appropriate approach in designing the transmission line to withstand many unique and severe climatic loading conditions along its length.

Strait of Belle Isle Crossing. MHI’s review of the work completed by Nalcor and its consultants has shown that the design definition and concept of the configuration of the marine crossing are well founded. Further bathymetric work and a test borehole have shown that costs have increased only marginally. MHI considers that the marine crossing is viable, within the AACE Class 3 estimate range, and that it can be completed as planned within the allotted time frame.

Muskrat Falls Generating Station. The cost estimates, construction schedules, and design work undertaken by Nalcor and its consultants were

¹⁵² Exhibit P-00058, at page 7.

reviewed as part of the Decision Gate 3 process. The proposed schedule is appropriate and consistent with best utility practices. Based on the amount of engineering completed and on the number of tenders for which estimates have been provided by potential suppliers, MHI considers the Decision Gate 3 cost estimate to be an AACE Class 3 and thus would be considered reasonable for a Decision Gate 3 project sanction. The Labrador transmission assets and also be appropriately designed and scheduled, and the cost estimate for them is consistent with good utility practice.”¹⁵³

180. Mr. Kennedy’s evidence establishes that the Department of Natural Resources, which is the Department properly charged by GNL for such responsibilities, did take the appropriate steps to conduct a proper review and analysis of Nalcor’s Decision Gate 3 cost estimate of \$6.2 billion. First, reasonable reliance was placed on Nalcor as a Crown Corporation to complete an accurate project estimate. Mr. Kennedy had no reason to believe that Nalcor was not providing all relevant information to GNL and MHI, and challenged to the best of his ability the information he was being provided. Secondly, Mr. Kennedy placed reasonable reliance on an independent third review completed by MHI. Regrettably, as has been detailed herein, evidence at this Inquiry has revealed that Nalcor withheld information that would have informed these reviews, particularly related to risk and schedule. However, this should not overshadow the fact that the steps taken to review the DG3 cost estimate were entirely reasonable in the circumstances. It is not reasonable to consider these actions in hindsight, but must be reviewed in light of the information that was accessible at the time.

181. A final area that was of substantive interest to the Commission was a review of the efforts taken by Government to consider other power supply options, over and above the Isolated Island Option, such as Natural Gas as a possible alternative to the development of the Muskrat Falls Project. It should be noted that this area was already reviewed by Grant Thornton and their findings reported to the Commission in their Phase 1 report, as outlined herein under section 3(c). Grant Thornton concluded that all alternatives, with the exception of the Quebec and 2041 options were reasonably dismissed. It is Group 2003-2015 strong

¹⁵³ Exhibit P-00058, at page 9.

opinion that there was more than adequate consideration given to alternate power supply options. The two identified exceptions referenced above are addressed in detail in this submission.

182. The one alternate option which seemed to garner the most interest of the Commission, despite its having been dismissed by their own expert, was the viability and possible development of the Natural Gas option. To this end the Commission called as a witness a proponent of the Natural Gas alternative, Dr. Stephen Bruneau. While Mr. Bruneau is a self-proclaimed supporter of the Natural Gas alternative and is a graduate of the Faculty of Engineering, Memorial University of Newfoundland, his area of specialty is in ice risk management as it pertains to the oil and gas sector. It is worthy of note that the Commission called this witness and had a paper which was prepared by Dr. Bruneau entered as an exhibit, despite his limited expertise in this field.¹⁵⁴ Dr. Bruneau was not qualified as an expert in Natural Gas and furthermore, upon questioning by counsel for the Group 2003-2015, acknowledged that he did not have any specialized education or “expertise” in this area:

“MR. T. WILLIAMS: – you have not been qualified by Commission counsel as a legal expert in the area of natural gas?”

DR. BRUNEAU: No, Sir. Not that I’m aware of.

MR. T. WILLIAMS: Have you ever given any evidence and have been qualified as a legal expert in the area of natural gas?

DR. BRUNEAU: In a court, no.

MR. T. WILLIAMS: Okay.

¹⁵⁴ Exhibit P-00090.

With respect to expertise regarding financial analysis, have you any expertise in able – to be able to prepare cost-assessment opinions with respect to a project such as natural gas?

DR. BRUNEAU: Only that which is incumbent on me as a practising engineer, in terms of making estimations and net present value of projects and things. So that qualifies me insofar as any – most other professional civil engineers who are involved in projects.

MR. T. WILLIAMS: But you don't have training as a financial analyst in order to do a detailed cost assessment with respect to the viability of natural gas?

DR. BRUNEAU: You're right."¹⁵⁵

183. Accordingly it is asserted that any weight attributed to Mr. Bruneau's opinions, papers or viewpoints in this very technical area, are of limited value to the Commission in determining the validity of this alternative and such consideration should be given to recognized experts in the area.

184. The Government of Newfoundland and Labrador has been aware of the potential use of natural gas as possible energy resource for decades. In 2001, GNL engaged Pan Maritime Kenny – HIS Energy Alliance to complete a "detailed review of the technical and economic aspects of developing the offshore natural gas and associated liquid resources of Newfoundland and Labrador." Their report focused primarily on the Grand Banks area. The report concluded that the possible use of natural gas for domestic use in NL for power generation remained uncertain:

"Delivery of gas for domestic use for power generation, industrial, commercial and residential is not economically feasible without integral development for delivery to Eastern Canada and the US. This is due to the

¹⁵⁵ Hearing Transcript, November 5, 2018, at page 19.

small size of the potential domestic market and the resulting high unit cost of bringing the gas to shore combined with the cost of installing a gas pipeline from the Grand Banks to Come-by-Chance.”¹⁵⁶

185. In September of 2011, Navigant Consulting completed their “Independent Supply Decision Review” for Nalcor Energy. Therein, they reviewed the possibility of natural gas as an alternate power supply option for the Island, and concluded it was not a feasible alternative:

“A 500 MW natural gas-fired Combined Cycle Combustion Turbine (CCCT) would require 84,000 Mcfd of gas delivery capacity. Assuming 50 percent load factor for this plant, this would represent just over 5 percent of the 70,000 Mcfd rate. As such, it would not be possible for Nalcor’s potential natural gas demand for electricity generation to warrant development of an off-shore natural gas resource and transportation system without securing significantly more commitments from other customers and regions to make up the remaining 95 percent of the commercial volumes required.

Nalcor appropriately excluded natural gas generation in both generation expansion alternatives because natural gas is not commercially available on the Island and there are, as yet, not firm development plans to bring natural gas to the Island.”¹⁵⁷

186. Mr. Kennedy was heavily involved in GNL’s review of natural gas as an alternative power supply option. It should be noted that Mr. Kennedy was acutely aware that the natural gas option included two potential avenues: the pipeline option and liquefied natural gas. As noted during his hearing testimony, he first began to look at the issue early in his term as Minister of Natural Resources:

¹⁵⁶ Exhibit P-00088, at page 6.

¹⁵⁷ Exhibit P-00042, at page 36.

“MR. KENNEDY: I initially started exploring natural gas myself, as a minister, as result of comments that Cabot Martin – Mr. Martin has raised issues of the shale gas and the effects of shale gas on the electricity markets in the United States. And so that’s what led to the first meeting with – Wood Mackenzie. So then, Sir, we go further and Dr. Bruneau had raised – had raised issues on natural gas. So I’d said to the officials in the department: Find someone to review what he has to say. I’d never heard of Ziff Energy, Sir.

So, there were two issues – my understanding is there were two issues in relation to natural gas: there’s the pipeline and then there would be the liquefied natural gas. They were two separate options: one would be bringing natural gas from the Grand Banks, from one of the oil fields to Holyrood; the second would be bringing in liquefied natural gas. So the both issues, to the best of my knowledge, Mr. Learmonth, were explored.”¹⁵⁸

187. Mr. Kennedy instructed the Department of Natural Resources to retain an expert in natural gas to provide an independent opinion on the feasibility of the use of natural gas as an alternative power supply option for the island portion of Newfoundland and Labrador. Ziff Energy, an internationally recognized consultant in the natural gas industry was retained. Mr. Kennedy met with representatives from Ziff in Toronto on October 10, 2012. Mr. Kennedy provided a summary of Ziff’s findings to Premier Kathy Dunderdale in an email on the same date:

“We had a good meeting with Ziff in Toronto today. They will finalize their report and be ready to give a technical briefing when we release their report(s),

¹⁵⁸ Hearing Transcript, December 3, 2018, at page 49.

The following is some basic messaging on Ziff's conclusions (using Wade Locke's number of the price that gas would have to come in at to be comparable to Muskrat Falls):

1. LNG will be 3 times more expensive than Muskrat Falls
2. Dr. Stephen Bruneau's analysis is based on the false assumption that White Rose gas is commercially available. Under the Atlantic Accord this is not correct. Also, Husky wants to maintain the option to use the gas to enhance oil recovery, as outlined in their development plan."¹⁵⁹

188. Ziff concluded that both pipeline natural gas and LNG supplied natural gas were not viable options for Island energy supply:

"Grand Banks pipeline natural gas is not a viable replacement for the current oil-fired Holyrood electric generation facility. While natural gas is physically available offshore Newfoundland and Labrador, it is not available on commercially viable terms for power generation. Current surplus gas production is either injected for use in oil recovery, or stored for later use in oil recovery or for future monetization. Oil and gas companies have evaluated natural gas monetization opportunities and have yet to identify an economic project. The power generation demand on the Island is so small that any investment in offshore infrastructure (facilities, wells and pipeline) plus associated operating costs cannot produce the return(s) on capital required for oil and gas companies."

LNG supplied natural gas for power generation is not a viable alternative to the current oil-fired Holyrood generation of electricity. In order to address utility supply risks, LNG should be sourced under long term contracts which are predominantly oil-indexed. Oil-indexation suggests long term pricing at approximately 80 to 90% of World Oil Prices (Brent). Despite the

¹⁵⁹ Exhibit P-01277, at page 1.

abundance of shale gas in North America, oil indexation for LNG will be a sustaining commercial model going forward. The low and variable volumes of gas required to produce power at Holyrood are an economic barrier to securing long-term firm LNG Supply. The required investment in Regasification (“Regas”) and storage infrastructure, when amortized over such low and variable volumes, renders LNG as an Island power generation option uneconomic. Full cycle LNG supply costs will likely be similar, or in excess of, the current oil-fired power generation at Holyrood and higher than the proposed Muskrat Falls Project.”¹⁶⁰

189. As a final step in this review, the Department of Natural Resources engaged Wood Mackenzie for an independent review of Ziff’s findings. Mr. Kennedy initially met with representatives from Wood Mackenzie in London on January 18, 2012. This meeting primarily related to the issue of shale gas and international energy markets. At a subsequent meeting on June 29, 2012, the possible options for the use of natural gas (i.e. the pipeline and LNG) were discussed and Mr. Kennedy gained a better understanding of the issues, as discussed during his testimony:

“MR. KENNEDY: Again, Sir, I have – you know, I know it was discussed; it was discussed in detail, Commissioner. I have pages and pages of notes on the differences between what Wood – ‘cause we went to – one of the – my reasoning, Commissioner – and I apologize, Mr. Learmonth, but I’m trying to put this in some context, Commissioner – my reasoning for exploring natural gas was quite simple. There were issues being raised out there that I thought were very valid. I thought that the issues raised by Mr. Martin were valid; I thought the issues raised by Dr. Bruneau were valid, but I didn’t have the expertise to – or within the department to necessarily have that done.

So, I wanted to understand, Commissioner, as best I could whether or not natural gas was a viable option. I came to learn from my meetings with

¹⁶⁰ Exhibit P-00014, at pages 16-17.

Wood Mackenzie that there were two perspective [sp respective] ways of doing that – one being the pipeline – as suggested I think – I thought Dr. Bruneau’s suggestion was the pipeline –

MR. LEARMONTH: Yes.

MR. KENNEDY: – there was also the liquefied natural gas.

[...]

MR. KENNEDY: And I just wanted to find out who was right there, Commissioner. All I was trying to do at the end of the day –

MR. LEARMONTH: Yeah.

MR. KENNEDY: – is Dr. Bruneau right? Is Ziff? Like, who’s right?

So we went to Wood Mackenzie, and I certainly – I remember and I made my notes, and the notes clearly outlined the differences in their opinion. I certainly didn’t see any problem with it coming out that there was a couple of points upon which they, Ziff and Wood Mackenzie, disagreed. I quite frankly thought, Sir, that those were out outlined. I thought they were out in the public.”¹⁶¹

190. Mr. Kennedy met with Wood Mackenzie representatives again on August 31, 2012. By this time, Ziff has been engaged and Mr. Kennedy was primarily concerned with having Wood Mackenzie review Ziff’s findings to determine if they were accurate, as discussed during his testimony:

“MR. KENNEDY: And you’ll see the first page there: Natural gas versus the development of Muskrat Falls, okay? Then, underneath it I’ve got two separate areas: LNG slash importation. Are the costs outlined by Ziff

¹⁶¹ Hearing Transcript, December 3, 2018, at page 51.

accurate? These are the questions I'm asking. Any concerns about the Ziff report?

Then there is a discussion of the Henry Hub price, Sir, which at that point could have been 2.50, \$3 versus the delivery price at Holyrood.

Then your next section you'll see, Mr. Commissioner, in my writing, if you go down a little bit, is pipeline from the Grand Banks.

MR. LEARMONTH: Yeah.

MR. KENNEDY: So, I'm going through all of this – the next page, Sir, you'll see the domestic options versus the import options. You go down further on that page 4, Commissioner, you'll see regasification, when we're talking about \$10 per Mcf, and they – right here, it's, you know, the 1 billion to 2 billion way too high.

MR. LEARMONTH: Yeah.

MR. KENNEDY: WoodMac are disagreeing with Ziff, and I had no problem with that.

MR. LEARMONTH: Yeah.

MR. KENNEDY: Then they're talking about building the regasification terminal, and then the cost of – so there was – it was clear to me, Sir, in this meeting, that Wood Mackenzie did not agree with Ziff on everything, and I didn't have a problem with that.

MR. LEARMONTH: Yeah.

MR. KENNEDY: So those are the notes.

So then what I do, Mr. – you’ll see, Mr. Commissioner, what I’m doing is I’m writing notes on essentially what’s being told to me. I might have some questions, but I’m writing down – even if I don’t have a great understanding – I’m writing down what’s being told to me, and we go through all of this.

Now, you’ll see at page 7 – and I apologize, Mr. Learmonth, but this is really the question I was asking my – you know, I was asking everyone. In page 7, you will see there’s at the second – the third asterisk from the bottom, Commissioner: “at what number does natural gas become economically feasible than Muskrat Falls?” I mean, that’s –

MR. LEARMONTH: Yeah.

MR. KENNEDY: – the whole issue for me.

Then, I’m talking about Ziff regasification. So, what I do, Sir – go to page 6 – and, again, I apologize for going through this, but – you look at the pipeline report. Now, I’m not sure what I’m referring to, Sir – the last page – page 8 is –

it’s page 6 in my notes, but page 8 – there’s a pipeline report I’m referring to. I’m not quite sure what the pipeline report I’m referring to is, Sir.

So I’m reviewing all of these issues.

MR. LEARMONTH: Yes.

MR. KENNEDY: I wanna find answers. So I then come back, and what I – my normal practice, now, I will provide a report to the premier as to what I found out.

MR. LEARMONTH: Okay.

MR. KENNEDY: I'm summarizing my notes, essentially, Mr. Learmonth.

MR. LEARMONTH: Yeah, so you're proceeding with an open mind to considering –

MR. KENNEDY: I'm very open on this, Sir, yeah – I can – I thought natural gas – Commissioner, I thought natural gas – of all of them, okay – of –¹⁶²

191. As noted, Mr. Kennedy considered any disagreement between Ziff and Wood Mackenzie in relation to their review of natural gas as contributing to the conversation. Furthermore, it is clear from the evidence that Mr. Kennedy considered both the pipeline option and LNG to be under consideration by Wood Mackenzie:

MR. LEARMONTH: ...So you're meeting with him. So obviously Wood Mackenzie had been asked to comment on LNG, because you're meeting with and discussing it.

MR. KENNEDY: It was a prime topic of discussion, Mr. Learmonth.¹⁶³

192. Mr. Kennedy expended considerable effort in meeting with Wood Mackenzie on numerous occasions to understand the natural gas issue and provided specific direction to Wood Mackenzie to report on both the pipeline and LNG options. Mr. Kennedy met with both experts on a final occasion on October 10, 2012 and recalls having no concerns with their findings:

"MR. KENNEDY: No. And on October 10, Commissioner, before the reports were released, I remember I met with Wood Mackenzie again, 'cause I went back and met with PIRA. PIRA – I don't know if you've heard much discussion of PIRA, Commissioner, but they were the oil pricing agency.

¹⁶² Hearing Transcript, December 3, 2018, at pages 58-59.

¹⁶³ Hearing Transcript, December 3, 2018, at page 60.

And oil pricing was, obviously, very important here because the sensitivities in terms of the analysis for Holyrood, the Isolated Option, depended on the price of oil.

So I met with PIRA, met with Wood Mackenzie, and asked them, you know, like, where are you fellas, what's going on here. On my way back, we stopped at the airport in Toronto and I actually met with Ziff. Not, again, Mr. Learmonth, in terms of trying to influence anything. I – all I wanted to know was, like, we're getting ready to go into the House of Assembly, you know, there's supposed to be DG3 numbers; can people please tell me what your – how you see this.

And so I met with both of them on the same day, and I don't remember anything there being of any concern to me, Commissioner. And my notes are extensive. There was nothing that was of any concern to me in terms of what Wood Mackenzie and Ziff – in terms of how they differed.”¹⁶⁴

193. The version of the report sent to Mr. Kennedy on October 27, 2012 by Charles Bown included Wood Mackenzie's review of LNG.¹⁶⁵ Wood Mackenzie's reference to LNG was eventually removed from their report to GNL. However, Mr. Kennedy's evidence was that he was unaware that this occurred, and could not offer an explanation as to why they did so. He did agree that it was possible an email from Mr. Jim Keating on October 31, 2012 had some influence in this regard, however, Mr. Kennedy's evidence was that he was not aware that Mr. Keating had sent this email and that he considered it inappropriate in the circumstances.¹⁶⁶¹⁶⁷

194. Mr. Kennedy did not direct that the reference to LNG be removed from Wood Mackenzie's report. GNL and Mr. Kennedy in particular had conducted considerable due diligence on the natural gas option as an alternative power supply option to Muskrat Falls, in

¹⁶⁴ Hearing Transcript, December 3, 2018, at pages 51-51.

¹⁶⁵ Exhibit P-01312.

¹⁶⁶ Exhibit P-01206, at page 1.

¹⁶⁷ Hearing Transcript, December 3, 2018, at page 56.

particular the Pan Maritime Kenny and Ziff studies which determined that LNG was not a viable alternative. We reiterate that Grant Thornton found that the decision to exclude natural gas and LNG was reasonable based on their forensic audit:

“Nalcor’s decision to eliminate NG and LNG as a power supply option was based on an expert review dated from 2001 (10 years old at the time of their submission to the P.U.B.). At the time of the P.U.B. review, there were public submissions which opposed this conclusion. The GNL engaged external experts that supported their decision. Based on our review nothing has come to our attention which would suggest that excluding natural gas and LNG was unreasonable.”¹⁶⁸

195. In addition to the evidence of members of the Group 2003-2015 on this issue, there was extensive evidence provided by Nalcor Senior Executive, Mr. James Keating regarding the extensive efforts that were undertaken by Nalcor over a number of years prior to the sanctioning of the Project to evaluate and consider the Natural Gas option as a viable energy alternative. Many of these reviews were undertaken before any consideration was given to proceeding with the Project and, therefore, it could not be suggested that they were simply dismissed in favor of proceeding with the Muskrat Falls Project. This was discussed by Mr. Keating during his hearing testimony:

“MR. T. WILLIAMS: So the whole discussion over natural gas and LNG, that existed prior to Muskrat Falls, am I correct?”

MR. KEATING: Correct. Absolutely, for years, for decades, since the discoveries.

MR. T. WILLIAMS: Okay. And then that’s a good point, what time frame will we be talking that the consideration of the development of natural gas would’ve been an issue (inaudible)?

¹⁶⁸ Exhibit P-00014, at page 22.

MR. KEATING: Initially, it would've been with the early days of the concept selection of Hibernia, because Hibernia has a good deal of gas. And, of course, a good deal – a much better deal of oil. It was initially considered that gas, because of its miscibility – its ability to better clean or sweep a reservoir – was ideal in certain blocks of Hibernia, whereas water was better in other blocks. And then quickly, the proponents, the oil companies at the time says that, no, we're likely going to be using all that gas for pressure support, and they still do to this time. Then the next –

MR. T. WILLIAMS: On what date would that be, if you don't mind me –

MR. KEATING: Oh, that would've been in – sanction there was like 1990 or something.

MR. T. WILLIAMS: Okay.

[...]

MR. T. WILLIAMS: – up to 2000 – right up to – so let's take it up to serious consideration of Muskrat Falls Project in the evaluation of viable options.

MR. KEATING: Yes.

MR. T. WILLIAMS: Which is, I'll say, use the time frame 2010.

MR. KEATING: Yes.

MR. T. WILLIAMS: So, natural gas was always out there –

MR. KEATING: Correct.

MR. T. WILLIAMS: – being considered, regardless of Muskrat Falls or not.

MR. KEATING: Correct.

[...]

MR. T. WILLIAMS: – how many studies you would think have been completed with respect to the prospects of natural gas development in this region.

MR. KEATING: Don't have at my fingertip, but I did do an inventory of studies back in this time, 2010 and 2011, and I believe there may have been on the order of a dozen or so studies, maybe only three, four in the public domain. The balance would have been in the private sector companies' hands.

MR. T. WILLIAMS: Okay, so when Mr. Learmonth says you didn't go back and study natural gas again, were you satisfied that there had been studies done?

MR. KEATING: Yeah. Personally speaking, from my professional experience, there was enough robustness in those studies that I knew the significant factors that would change, that would need to change, to force an economic opportunity, and those opportunities did not materialize.

MR. T. WILLIAMS: And I trust nobody went back and studied the viability of coal development?

MR. KEATING: No.

MR. T. WILLIAMS: Or nuclear development?

MR. KEATING: No. Apparently they – it was okay for those to be discounted.

MR. T. WILLIAMS: Okay. And biomass or solar or a wave and tidal?

MR. KEATING: Correct.”¹⁶⁹

196. Mr. Keating stated that he was satisfied that natural gas was reasonably eliminated as a primary power supply option and that GNL had always presented a willingness to explore the possibility of such an option:

“MR. T. WILLIAMS: Okay, and are you aware that Grant Thornton in fact gave consideration – which is a consultant hired by the Commission – gave consideration to Nalcor’s review of natural gas and they felt their dismissal of that option was a reasonable consideration?

MR. KEATING: Yes, I am.

MR. T. WILLIAMS: So are you satisfied that government’s decision not to pursue natural gas as a viable option with respect to consideration of the Muskrat Falls Project was a reasonable decision?

MR. KEATING: Absolutely, and I’m proud of the work we did, and I think it stands up to those tests.

MR. T. WILLIAMS: Can you speak to the level of engagement at government in considering the natural gas – and I know there’s – we’ve seen references to Minister Kennedy, who was the minister of Natural Resources around that period of 2012, but can you speak in a general way to the engagement of government and the seriousness in terms of the consideration of the natural gas option?

MR. KEATING: Natural gas is always an important resource that any minister, when they assume the portfolio, is interested in. And I tend to

¹⁶⁹ Hearing Transcript, November 22, 2018, at pages 96-98.

believe it's not long after a minister is in place that I kind of give some kind of overview with the minister's staff.

So I don't think there was ever, and to this day, any lack of desire to pursue the production of natural gas, and I have seen nothing in my experience through maybe six or seven ministers and four or five premiers that would cause me to believe otherwise. They've all been interested in the commercial monetization of natural gas.”¹⁷⁰

197. In summary, the evidence of Mr. Kennedy was valuable to the Commission in that he was a Minister of Cabinet in the lead portfolio on the Project during a very relevant period of time in the years leading up to the sanctioning of the Muskrat Falls Project.

¹⁷⁰ Hearing Transcript, November 22, 2018, at page 98.

SECTION 4: PHASE II – CONSTRUCTION AND OVERSIGHT OF THE MUSKRAT FALLS PROJECT

4(a) Grant Thornton Forensic Audit (Phase II)

198. Grant Thornton was engaged by the Commission of Inquiry to conduct a forensic audit into the construction phase of the Muskrat Falls Project (December 17, 2012 to March 31, 2018). This report (Exhibit P-01677) addresses the considerations set out in paragraphs 4(b)(i) to (vi) of the Terms of Reference. In particular, Group 2003-2015 refers to section 4(b)(i)(D) of the Terms of Reference which states as follows:

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

[...]

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

[...]

- (D) **Nalcor made the government aware of the reports and assessments.¹⁷¹**

199. Grant Thornton's Report revealed several findings, some of which were largely unknown to GNL and the relevant members of Group 2003-2015. In particular, it is worth noting that Grant Thornton did not make any findings related to section 4(b)(i)(D) of the Terms of Reference, despite this being explicitly included in their Scope of Work.¹⁷² In particular, it should be noted that Grant Thornton did not conduct interviews with any members of GNL, including the members of Group 2003-2015. As such, we respectfully submit that Grant

¹⁷¹ *Commission of Inquiry Respecting the Muskrat Falls Project Order*, at Section 4.

¹⁷² Exhibit P-01677, at page 6.

Thornton did not find any evidence to suggest that several of these key risks were shared with GNL. The most important of Grant Thornton's findings will be detailed herein.

200. First, Group 2003-2015 submits that they were not made aware of the cost overruns on the Project that had occurred prior to financial close. Grant Thornton found that "bids were received which collectively exceeded the DG3 budget amount by \$600M – a 25% overage." This exceeded the DG3 tactical contingency of \$368M by over \$230M. As such, Nalcor should have been aware prior to financial close that the contingency amount was insufficient.¹⁷³ This information was never shared with GNL, despite explicit requests for updated information around the time of financial close. Group 2003-2015 refer to an email from Paul Myrden, Director of Debt Management for the Department of Finance, dated October 18, 2013 wherein then Minister of Finance Tom Marshall made the following requests:

"Minister Marshall has asked to be provided with the following financial information:

- 1. A breakdown of budgeted project costs by component showing total project costs along with the portion which is the responsibility of Nalcor/NL;**
- 2. For the portion of each that is our responsibility, the details of the funding split between debt and equity;**
- 3. For the equity requirement, the split between what is already in and what is still required;**
- 4. For the anticipated future equity requirement, the expected timing of the requirement broken down by government fiscal year and**
- 5. The most recent update on expected total project costs by component vs. budget (DG3?), if available. If not available, a reason why might be helpful along with an indication of when it might be available.**

¹⁷³ Exhibit P-01677, at page 12.

Needless to say, it would be appreciated if this could be provided expeditiously.”¹⁷⁴

201. In reply to this request, Auburn Warren (Nalcor Manager, Investment Evaluation) sent a spreadsheet on November 1, 2013 which listed the estimate construction capital expenditures to be \$6.202M, and external financing costs at \$1.2B for a total cost estimate of \$7.4B, the same as the DG3 capital cost estimate.¹⁷⁵ No reference was made to any cost overruns nor the extinguishment of contingency that may have occurred on the Project throughout 2013.
202. Secondly, Grant Thornton found that Nalcor was in possession of a risk assessment which indicated that their construction schedule was highly unlikely to achieve their target milestones. Grant Thornton notes that “Nalcor was aware that their original schedule was aggressive as this was noted in the DG3 Cost and Schedule Risk Analysis Report dated October 2012.”¹⁷⁶ As noted above, Westney Consulting found that there was only a 1-3% chance that the target first power date would be met. Despite this knowledge, the information provided by Nalcor to Group 2003-2015 was that the target milestone dates were achievable. This was discussed above in relation to Grant Thornton’s Phase I Report at paragraphs 70 and 71.
203. Grant Thornton found that several events occurred throughout 2013 which should have demonstrated that the Westney’s identified risks were materializing. In particular, they note that the delays in the Environmental Assessment and Federal Loan Guarantee processes meant that the schedule was compromised and would result in increased costs. Despite these delays, GNL was advised that the schedule remained achievable. As noted above, it was not until 2015 that GNL was advised that the schedule had been compromised.¹⁷⁷ We refer to the following evidence of Group 2003-2015 members in relation to this issue:

“MR. LEARMONTH: Yeah.

¹⁷⁴ Exhibit P-02022, at page 1.

¹⁷⁵ Exhibit P-02024, at page 2.

¹⁷⁶ Exhibit P-01677, at page 12.

¹⁷⁷ Exhibit P-01677, at pages 12-13.

Did you – are you aware now that Westney, the consultant of Nalcor in Texas, had given an estimate in – or had made a statement in a report to Nalcor in September 2012, a few months before sanction, that the project had a 1 per cent chance of meeting schedule and that was later upgraded or revised to a 3 per cent chance.

So their consultant was saying the target for first power – which at the time, I believe, was July 1, 2017 – there was a 3 per cent chance of meeting that. Are you aware of that information now?

MR. DALLEY: I am now, yes.

MR. LEARMONTH: Okay. When did you first become aware of that information?

MR. DALLEY: Through this Inquiry.

MR. LEARMONTH: Through this Inquiry.

MR. DALLEY: Mm-hmm.

MR. LEARMONTH: Mr. Martin never told you?

MR. DALLEY: Not to my recollection.

MR. LEARMONTH: Yeah.

Now, the point is in – I'm not going to make – with every – make the same point, but assuming that information from Westney was reliable, you're starting off with a 3 per cent chance, then Astaldi doesn't perform in the first year. You can see that, with those two things taken into account, that

perhaps the P3 is even optimistic. Do you understand what I'm saying – suggesting?

MR. DALLEY: I do. You know, I don't profess to understand fully, you know, issues around P-factors. But it's, you know, the – and not aware of a 3 per cent chance of success. I mean, I was aware – Mr. Martin was clear, that this is an aggressive schedule and justified an aggressive schedule with respect to trying to manage the costs and the contractors and the bids. And, you know, we understood that, that there was an aggressive schedule. That was his approach to the project.

And, again, I think throughout all of the reports there was acknowledgement of schedule pressure throughout. And I think all the reports, from what I've read, and discussions, there was always some mitigation measures and plans in place and a confidence that we would overcome this.”¹⁷⁸

[...]

MR. LEARMONTH: Yeah.

Were you aware that in September 2012, that's, you know, three or four months before sanction –

MR. DAVIS: Mmm.

MR. LEARMONTH: – that Nalcor had received a strategic risk report from Westney consultants that first said that – said that the schedule for first power – I believe at the time it was July or sometime July 2017 – that there was a 1 per cent chance only of meeting that schedule? That was later upgraded to a 3 per cent chance of meeting that schedule.

¹⁷⁸ Hearing Transcript, February 27, 2019, at pages 25-26.

Were you – during the discussions that you had with Mr. Martin, were you aware of that?

MR. DAVIS: No.

MR. LEARMONTH: When you were premier, were you aware of that?

MR. DAVIS: When I was premier?

MR. LEARMONTH: Yes.

MR. DAVIS: No. No I don't – I didn't know. I don't have any recollection of that until preparing to come here.

MR. LEARMONTH: All right.

MR. DAVIS: And I certainly had no knowledge of it in 2012.

MR. LEARMONTH: Okay.

That would've – so he never mentioned that it was an aggressive schedule to begin with?

MR. DAVIS: You know, he may have used terms that – and acknowledged that there was pressure on the schedule and there were challenges on the schedule, but I don't remember any numbers like 1 per cent or 3 per cent likelihood of achieving the schedule. I –

MR. LEARMONTH: Yeah.

MR. DAVIS: – I don't have any recollection of that.

MR. LEARMONTH: All right.

The point being that if that figure of 1 per cent or 3 per cent was correct or close to being correct, when you add on the fact that Astaldi stumbled badly in the first year –

MR. DAVIS: Mm-hmm.

MR. LEARMONTH: – that would have – if you had known about the P1, P3, that would have probably changed your assessment of what Mr. Martin is telling you.

Is that a fair comment?

MR. DAVIS: I think it's in – would have been important information for us to have for sure.

MR. LEARMONTH: But he never mentioned it.

MR. DAVIS: No.¹⁷⁹

204. Thirdly, Grant Thornton found that there were numerous occasions where the forecast final cost (FFC) completed by Nalcor's Project Management Team (PMT) significantly exceeded the public Authorization For Expenditure (AFE) approved by the Board of Directors of Nalcor. In particular, Group 2003-2015 note the July 2013 FFC of \$7.0B exceeded the Board's AFE of \$6.2B by approximately \$800M, the March 2014 FFC of \$7.5B exceeded the Board's AFE of \$6.2B by approximately \$1.3B and the June 2014 FFC of \$7.5B exceeded the Board's AFE of \$7.0B by approximately \$500M. It was not until September of 2015 that these numbers aligned.¹⁸⁰

¹⁷⁹ Hearing Transcript, February 26, 2019, at page 45.

¹⁸⁰ Exhibit P-01677, at page 19.

205. GNL was not provided with the FFCs prepared by the PMT, and the capital cost updates provided by Nalcor at the executive level generally aligned with the AFE numbers. As such, GNL/Group 2003-2015 were not provided with the most accurate information available relating to potential risks associated with the Project. In particular, the July 2013 and March 2014 FFCs indicated that numerous project risks were materializing and that cost increases were inevitable. By not providing this information, GNL was led to believe that the Project was on time and on budget, despite Nalcor possessing information indicating that the opposite was true.
206. Fourth, GNL were not made aware of the existence of the April 2013 SNC Lavalin Risk Report. While the circumstances surrounding the commissioning of this report and Nalcor's involvement in same have been debated in evidence, Grant Thornton found that some members of Nalcor's executive were aware of the report and knew that it dealt with LCP project risks. This report found that project risks were in the range of \$2.4 billion, which Grant Thornton found exceeded Nalcor's risk calculations by \$600 million to \$1.7 billion.¹⁸¹
207. Finally, GNL was not provided with November 15, 2013 and November 29, 2013 drafts of the Independent Engineer report until 2014. Grant Thornton noted that these draft reports warned that Nalcor's contingency allowances were low for the stage of project development.¹⁸² Evidence at the Inquiry suggests that a civil servant for GNL who was involved in the Federal Loan Guarantee process had requested to be provided access to the drafts of the Independent Engineer's Report. An initial draft was completed in July of 2013, and certain members of the civil service could have been provided access to this report through the "data room," a file sharing medium. However, there is no evidence to indicate that members of GNL ever accessed this file. More importantly, GNL was not advised that Nalcor was in receipt of subsequent drafts of the Independent Engineer reports, and they were not posted in the data room.
208. Group 2003-2015 submits that evidence at this Commission of Inquiry has established that Nalcor did conduct several risk assessments, both internally and through external

¹⁸¹ Exhibit P-01677, at pages 135-136.

¹⁸² Exhibit P-01677, at page 16.

consultants. Several of these assessments warned or established that several important risks were likely and/or were materializing. Evidence has also established that Nalcor did not make GNL aware of all of these reports and assessments and, in particular, the risks contained therein. Group 2003-2015 reiterate that Grant Thornton's Phase II forensic audit report makes no findings in relation to section 4(b)(1)(D) of the Terms of Reference, which required an investigation into whether GNL were made aware of such risk reports. Given the lack of findings in this regard, Group 2003-2015 submit that it is evident that GNL was not made aware of same.

4(b) Evidence of Former Provincial Government Officials (2003-2015)

i. Paul Davis (Premier, September 26, 2014 – December 14, 2015)

209. During the course of Phase Two of the Inquiry there were three additional witnesses of the Group 2003-2015 called to give evidence, the first being former Premier Paul Davis who gave his testimony in Labrador on February 26, 2019. Mr. Davis had a previous long standing career with the Royal Newfoundland Constabulary and was Deputy Mayor of Conception Bay South before entering provincial politics in 2010 where he served in a number of portfolios between the years of 2011 – 2015. Mr. Davis was first sworn in to the House of Assembly on April 5, 2010 and following the 2011 General Election he became the Minister of Service NL. Subsequently in October of 2012 he was appointed Minister of Transportation and Works and in October of 2013 he was named Minister of Child Youth and Family Services where he remained until May 1, 2014 when then Premier Tom Marshall appointed Mr. Davis as the Minister of Health and Community Services. Mr. Davis resigned as Minister on July 2, 2014 to seek the leadership of the Progressive Conservative Party of Newfoundland and Labrador and on September 26, 2014 he was sworn in as the Province's 12th Premier, where he remained until December 14, 2015. Mr. Davis continued to be a MHA until he resigned from politics on November 2, 2018.

210. While Mr. Davis was a seasoned MHA and would have been a member of Cabinet at the time of sanctioning and up until December of 2015, his direct involvement in respect to the

Muskrat Falls Project was more limited, given that the Project had been sanctioned and the Federal Loan Guarantee completed by the time he had become Premier. As is evident in reviewing his evidence, the most relevant aspect of his testimony pertains to issues relating to cost increases that occurred during his 15 month tenure as Premier and what information had been shared with him in this regard. The evidence bears out that at this point in time, Nalcor Energy was encountering difficulties with their primary contractor Astaldi Canada Inc. and while there had been reference to the fact that issues were surfacing pertaining to pressures on cost and scheduling, disclosure was more of a generic nature with no details supplied to Government regarding the particulars of the same.

211. As did all Group 2003-2015 witnesses that testified before him, Mr. Davis in turn confirmed that he was not advised of overage of estimates pertaining to the tactical contingency prior to financial close in December of 2013, nor was he advised of forecasts arrived at by the Project Management Team that exceeded the 6.2 billion dollar original estimate.¹⁸⁴ In addition, matters in respect of the Strategic Risk Management Reserve or the P-1 Scheduling Rating had not been brought to his attention prior to sanctioning in 2012, or at any time subsequent.¹⁸⁵

212. Mr. Davis went on to confirm that he was only aware of three (3) cost estimates or increases during his time in Government. The first estimate that he was aware of was the 6.2 billion at sanctioning in December 2012, which he understood to still be the capital cost estimate at financial close. He was also aware of the subsequent increase to 6.99 billion which he learned in June of 2014 as this was the cost estimate when he became Premier.¹⁸⁶ The final increase to 7.65 billion was only disclosed to Government in an August 15th, 2015 briefing from Nalcor some two months prior the Provincial election, as discussed by Mr. Davis:

“MR. LEARMONTH: All right.

¹⁸⁴ Hearing Transcript, February 26, 2018, at pages 36-38.

¹⁸⁵ Hearing Transcript, February 26, 2018, at page 45.

¹⁸⁶ Hearing Transcript, February 26, 2018, at pages 38-41.

Now, the – tab 17, Exhibit P-02006, this is a document – a slide presentation from Nalcor:

“Lower Churchill Phase 1, August 2015 Project Update.”

Did you indicate that it was around this time that it was being communicated to you by Nalcor that there was going to be a bump in the cost estimate?

MR. DAVIS: Yes.

MR. LEARMONTH: Okay. And how was that first communicated to you?

MR. DAVIS: I’m not certain exactly when I first knew it or how it was communicated with me, but this deck here, I believe, would’ve been a briefing with me, according to the notes on it, in my office by Nalcor prior to a Cabinet meeting.

MR. LEARMONTH: Okay.

And I think if you just turn to page 42, that’s where you’ll see the increase in the estimate from –

MR. DAVIS: Yes.

MR. LEARMONTH: – to \$7.650 million. But you would’ve known about that before you got this slide deck, is that right?

MR. DAVIS: I think I knew it. I don’t know how much detail I knew, I don’t recall exactly, but I certainly knew it on this day.

MR. LEARMONTH: All right. The – so that was dated August – that document was August 2015 and –

MR. DAVIS: But the note – and bear in mind the notes indicates it was a September meeting.”¹⁸⁷

213. The later evidence of witnesses Siobhan Coady, Minister of Natural Resources, Premier Dwight Ball and Nalcor CEO Ed Martin all confirm that while Government may have been informed in the Spring of 2015 that there were ongoing issues with Astaldi, there is no evidence to suggest they had ever been provided with a breakdown of the specific numbers pertaining to the same. This is confirmed in the evidence of Mr. Martin wherein he stated:

“MR. LEARMONTH: Well – but you did know that there was a problem and you did know there was a schedule delay and you could have made a reasonable estimate, but you didn’t. And it was for that reason that Grant Thornton – excuse me, EY – said that the 7.65 AFE number was not reasonable. That was their view on it. Do you differ with that point of view?

MR. E. MARTIN: Yes, I do.

MR. LEARMONTH: You do. Okay.

MR. E. MARTIN: Yes, I do. And, once again, it’s difficult because, you know, the definition of term – so, maybe I’ll just talk about it a little bit to try to clarify what I mean.

So by – what I think is reasonable is that we knew we had cost impacts that we could quantify and do the things that I, sort of, defined as solid a moment ago, Commissioner, that kind of thing. That was 7.65. Then we were at a situation where we knew, yes, that there was issues with Astaldi, but we didn’t know what the magnitude of those issues were. And, once again, that falls in the definition of not being included in what I call solid because I didn’t know.

¹⁸⁷ Hearing Transcript, February 26, 2019, at page 52-53.

And, once again, you start laying numbers out there without the – it just doesn't work. So the way we handled it in that particular case was to be clear to the elected officials that that was not in there. And they asked tremendous questions, obviously, about what could it be and where could it go? And, frankly, I just had to talk them through that: Here's what we know – in that particular instance – but I can't give you a number. I just can't do it.

And that's why I think it was reasonable – it was a reasonable approach to how we would do it so that the government would be informed. But we just – I just can't – we just couldn't come up with the numbers. It's just not there because we didn't know where it was going to end up.”¹⁸⁸

214. As the evidence evolved it appeared that rough estimates pertaining to costs associated with Astaldi were only provided upon the change in Government in December of 2015 when Nalcor briefed the new administration on the status of the Project. Mr. Davis confirmed that when he left office in December of 2015 he understood the cost estimate to be \$7.65 billion and was not informed of any other increases.

215. In summary, Mr. Davis' evidence was of limited purpose given that, although he was Premier for a 15 month period during construction of the Project, the most significant terms and milestones had long since passed and his administration was primarily in a guidance role working in tandem with officials at Nalcor as construction progressed. Perhaps the most compelling aspect of Mr. Davis' evidence was the lack of financial disclosure that was being provided by Nalcor in a judicious manner to the Premier of the Province, who in turn had an obligation to keep the public informed in a timely fashion.

¹⁸⁸ Hearing Transcript, June 12, 2019, at page 77-78.

ii. Derrick Dalley (Minister of Natural Resources, October 9, 2013 – December 14, 2015)

216. Immediately following Mr. Davis' evidence, the Commission called Mr. Derrick Dalley, who served in the House of Assembly for the period of November 1, 2007 until November 30, 2015. In January of 2011 then Premier Kathy Dunderdale appointed Mr. Dalley to cabinet as Minister of Business. Following the October 2011 provincial election Mr. Dalley was appointed Minister of Tourism, Culture and Recreation where he remained for less than a year when he was moved to the Department of Fisheries and Aquaculture. He remained in this portfolio until being appointed in October of 2013 as Minister of Natural Resources.

217. It is in this most recent portfolio that Mr. Dalley had the most exposure to the Muskrat Falls Project and while a member of cabinet for the two years previous, he would have had limited involvement in details pertaining to the Project. As like the earlier witness Mr. Davis, Mr. Dalley's evidence is perhaps most relevant in respect to the cost increases which occurred in the subsequent two years following his appointment to the Natural Resources portfolio up to the election in November of 2015. Of particular interest to the Inquiry was the level of knowledge of Project costs which were known to the Minister at the time of financial close in December, 2013 and up to December of 2015.

218. As was the practise of Commission counsel when questioning members of the Group 2003-2015, matters pertaining to the level of particulars which were shared with Mr. Dalley in respect to earlier issues pertaining to Risk Assessment and Scheduling were raised. As with all other members of the Group 2003-2015, Mr. Dalley confirmed that he was not advised of such factors and that the same would have been important to him in reaching the decisions he did in relation to the Project. It should be noted that Mr. Dalley did not hold portfolios pertinent to the Muskrat Falls Project prior to the fall of 2013.

219. Commission Counsel Learmonth did question Mr. Dalley extensively as to what he understood the cost of the Project was at the time of Financial Close in November/December of 2013, for which he confirmed that he believed it to be \$6.2 billion. It was established through ongoing questioning that in fact bids that were received by Nalcor

had exceeded the DG3 budget and therefore there was an insufficient amount budgeted for this contingency amount. It is confirmed that as of November 19, 2013 Nalcor's Capital Cost Estimate was \$6.5 billion. Mr. Dalley confirms that he was never made aware of this fact and only learned it at the time of preparing for his evidence for the Inquiry.¹⁸⁹ As the examination disclosed, Mr. Dalley was so certain of the \$6.2 billion dollar cost estimate at the time of financial close and into the New Year that there was a January 20, 2014 press release by his Department confirming this number.¹⁹⁰¹⁹¹

220. In regard to matters concerning oversight Mr. Dalley testified that he was satisfied that Government had undertaken extensive efforts both pre and post sanction in terms of oversight:

“MR. DALLEY: My understanding at the time – that the oversight that was involved of the pre-sanction would have involved a number of independent analysis and reviews.

MR. LEARMONTH: Mm-hmm.

MR. DALLEY: In terms of Manitoba Hydro, Navigant, Knight Piésold, Public Utilities Board, Wade Locke, you know, I – my understanding was they were all involved in some aspect and then beyond sanction. The work around financial close, particularly around the federal government's work, around what the requirements were, as well the engagement of Justice and Finance and Premier's office. And then within Nalcor itself, the way it was structured and set up all the way through with respect to project management team, the executive team, the board, the internal audit functions, governance functions: all those things were in place and that

¹⁸⁹ Hearing Transcript, February 27, 2019, at page 6.

¹⁹⁰ Hearing Transcript, February 27, 2019, at page 18.

¹⁹¹ Exhibit P-02034, at page 1.

would've been my understanding that, you know, everyone in some way contributing to –“¹⁹²

221. Furthermore the then Minister was quoted at the time as saying he didn't see any merit in returning the matter to the PUB given that:

“The Public Utilities Board and their independent advisor, Manitoba Hydro International, have already reviewed the Muskrat Falls Project. Manitoba Hydro's report clearly acknowledged that Muskrat Falls is the least-cost option. Following a nine month review process and over \$2 million later, the conclusion of the Public Utilities Board was essentially that they could not come to a conclusion.”¹⁹³

222. When questioned as to why if satisfactory oversight measures had been implemented did Government see fit to establish a separate independent Oversight Committee, Mr. Dalley replied that' **“...I would certainly agree that this particular decision by Government and led by Minister or Premier Marshall at the time would certainly strengthen the oversight and certainly clarify it.”**¹⁹⁴

223. The next significant milestone was when the Mr. Dalley first learned of the increase in the Project cost from what he understood to be \$6.2 billion to \$6.99 billion in late June of 2014. Mr. Dalley confirmed in his evidence that it was only around the time of the Nalcor's Muskrat Falls: Value and Cost Update on June 25th, 2014 (Exhibit P-02046) that he was advised of the Project cost increase, some 6 months subsequent to financial close. He also confirmed that he was still of the understanding that first power was scheduled for December of 2017, despite the ongoing problems that had been encountered with Astaldi and this was still being suggested by Nalcor as late as March of 2015.¹⁹⁵ Mr. Dalley, in response to a question relating to the level of detail he would have been provided with,

¹⁹² Hearing Transcript, February 27, 2019, at pages 14-15.

¹⁹³ Exhibit P-02025, at page 1.

¹⁹⁴ Hearing Transcript, February 27, 2019, at page

¹⁹⁵ Exhibit P-02003.

replied **“so not in great detail but would’ve had some knowledge of some of the challenges.”** He went on to state that in describing the information he received from Nalcor:

“MR. DALLEY: During those discussions and, I think, at that stage and certainly throughout – up to 2015 – as I gave evidence earlier – I had a good working relationship with Mr. Martin and had, you know, discussions on a number of issues. But he always, I think without exception, was extremely confident in where the project was, acknowledging, you know, challenges, but felt that it was under control. He’s working it, mitigation was in place, we’re expecting to see improvements, we are seeing improvements: like, that was a – I think, without exception, that would describe Mr. Martin with respect to the schedule and where the project is.

So from a minister perspective, and having confidence and a trust in Mr. Martin, that would be around these kinds of issues. Throughout it was always very confident that mitigation measures were being put in place.”¹⁹⁶

224. Accordingly, it is submitted that the evidence of the Group 2003-2015 witnesses who testified as to the issues of when Government was made aware of the base cost increases, is not only consistent with one another, but their credibility is bolstered by the fact that there exists no documentary evidence to the contrary.

225. In respect to the final project cost increase from \$6.99 to \$7.65 billion, Mr. Dalley testified that it was only around the time of the September 21, 2015 Cabinet Update (Exhibit P-02010) that he would have learned of this by way of briefing from departmental officials in advance of the cabinet meeting and that there was a **“high level of concern”** expressed by Cabinet in respect of the same:

“MR. LEARMONTH: ...Was there a high level of concern when you found out that the project costs had gone up to – projected project costs had gone up to 7.65 billion?

¹⁹⁶ Hearing Transcript, February 27, 2019, at page 25.

MR. DALLEY: Yes, there was. You know, the – a number of factors. Concern, you know, from within but certainly within Cabinet around, you know, the cost of the project, the schedule of the project. And throughout, I think less from those of us directly involved but certainly those less involved, the differential number of least-cost option of \$2.4 billion was always – I think it was a simple way to associate where this project was going with respect to other options.

And very simple at that because we know there's a lot of factors go in to balance the two, but I think people saw the \$2.4 billion as the gap that we're working with. So, you know, there was concern around that and that extended, obviously, to the concern around rates. You know, I know our government and our Cabinet was concerned about rates and what that impact would be. But, again, you know, the value of the project, the mitigation: all of that would be somewhat alleviated.”¹⁹⁷

226. Prior to Mr. Dalley concluding his testimony, Commissioner LeBlanc posed some questions to him, the first was in respect to the Duty to Document and existing Government practises in relation to the same and the second dealt with Government's Responsibility pertaining to the Muskrat Falls Project. The issue of Duty to Document will be addressed further under Phase 3 of the Inquiry, but the latter issue is worthy of further attention in that it addresses one of the underlying questions which this Inquiry is going to be faced with addressing. While not a question which could be anticipated or for which this particular witness would have sole responsibility for answering, Mr. Dalley's response is worthy of repeating in that it was both enlightening and insightful in regards to the issue raised. For purposes of clarity the exchange between Commissioner LeBlanc and Mr. Dalley will be recited in full:

“THE COMMISSIONER: Right. One other question, too. And again, this is – not to pick on you because others have done the same – you were asked, by Mr. Budden, about the issue of, you know, how do you feel about things

¹⁹⁷ Hearing Transcript, February 27, 2019, at page 32.

right at the moment, at this particular point in time? And your comment is not like many others that I've heard from the politicians that were involved, in the sense that they're saying that they did the best they could with what they had.

Ultimately, from your point of view and in a democracy, when a government makes a decision, who is responsible for that decision?

MR. DALLEY: Government.

THE COMMISSIONER: Right.

So when you say government, is it the people who actually decide to make a decision – for instance Churchill – or Muskrat Falls. Like, your Cabinet, your government, basically, decided to proceed with Muskrat Falls. So I assume that there was an understanding that the responsibility for Muskrat Falls fell to the government of the day. And it was a responsibility to ensure that the project, actually, was done as a least cost to the province.

MR. DALLEY: Mm-hmm.

THE COMMISSIONER: Right?

So the responsibility then is with the government of the day yet – and I know it's necessary to rely on other people, whether it be within Nalcor or your civil service or whatever the situation is. But, ultimately, if – and I'm saying this at this stage of the game – if it is established that you weren't getting everything you should have been getting – whose responsibility was that?

MR. DALLEY: That's a tough question. I guess, ultimately, you'll decide but it's – you know, and I think it's a fair question from a government perspective. I mean we went through two elections from, you know, a

democracy point of view; we went through two elections on a Muskrat Falls mandate. The people of the province overwhelmingly supported that mandate. We moved forward with the project.

We had information put before us where we made a decision that we felt was in the best interests of the people of the province. Ultimately, in the end, some of that information appears to have changed. It may, obviously, impact the project. At the end of the day, you know, it's – I guess we have to take some responsibility, having made the decision, having went to the people of the province to support us to do it.

Beyond that I think there's a level of responsibility but there's also a level of accountability, as well, with respect to those people who were responsible to provide with us and tasked to deliver to us the information that we needed. You know, from a government perspective, politicians, in general, they have various backgrounds, various expertise, various levels of education.

These are the people in our democracy that are tasked with making the big decisions and carrying that responsibility, but understanding, as I alluded to today, you know, we can have, in my view, the inquiry – and it drilled down into Muskrat Falls in which – what we're doing and we're finding out a lot of things.

We're finding out as well a tremendous, tremendous amount of work where good work was done and put us in a position. But, beyond that, there was a thousand things going on in government at the same time and I think that's – when I sit back as a former politician, you know, again, the comment we did the best we could with what we had – does that negate responsibility? It's not my intent.

You know, I accept that we made that decision and we believed it was right. If it turns out that it's not, then you live with it, but if it turns out in the end, we'll be very satisfied.”¹⁹⁸

227. The significance of this exchange is that it brings to the forefront the delicate balance that exists between “responsibility” and “accountability” in assessing conduct which is being viewed in hindsight. At no time has the previous Government ever shirked its responsibility for the decisions they made in relation to the Muskrat Falls Project, but it is argued that at same time those affiliated with the Project, whether it be affiliated entities or third parties, need be held accountable for their decisions. If nothing else, this suggestion reinforces what has been demonstrated by the totality of the evidence over the course of this Inquiry, that many of the obstacles encountered in the furtherance of this Project are the result of a multi-faceted party involvement.

iii. Thomas Marshall, Q.C. (Minister of Finance, October 9, 2013 – January 24, 2014 and Premier, January 24, 2014 – September 26, 2014)

228. Given the earlier testimony of Mr. Marshall in Phase One of the Inquiry and the previous references to his background and political involvement, there is no necessity to repeat the same in this section of the submission. While Mr. Marshall was called as a witness in Phase 1 of the Inquiry which was designated to address issues pertaining to Pre-Sanction Considerations, despite best intentions to stay within this realm and as occurred throughout the hearing, there was frequent spill over into other areas which were to be addressed later in Inquiry process. This point having been noted, Phase 2 of the Inquiry was suggested to address Construction and Oversight of the Muskrat Falls Project, yet Mr. Marshall was questioned and provided copious evidence in relation to this area in Phase 1. Accordingly there is much duplication and cross over between his testimony during the two Phases. Having noted the same we shall address areas of his Phase 2 evidence which we feel are pertinent to the issues before the Commission.

¹⁹⁸ Hearing Transcript, February 27, 2019, at pages 78-79.

229. While at the time of sanction, being December 17th, 2012, Mr. Marshall was the Minister of Finance, immediately following this, on January 16th, 2013, Minister Marshall and Minister Kennedy switched portfolios at which time Mr. Marshall became Minister of Natural Resources where he remained until October 9th, 2013, at which time he returned to the Department of Finance.

230. As was disclosed by Mr. Marshall during the course of his testimony, given the financing arrangements as between Nalcor and GNL, the various components were handled through different mechanisms. First, the \$5 billion debt financing by Nalcor was dealt with by Nalcor and its financial and legal advisors. With respect to the Federal government providing the guarantee of Nalcor subsidiaries' debt, this was handled by Nalcor and the Office of the Premier. Further, with respect to the satisfaction of GNL undertakings and commitments to comply with the conditions precedent, this was handled by a joint team of Natural Resources, Finance and the Office of the Premier. Finally, with respect to the equity contribution of the Province, Nalcor provided GNL with capital cost and financing cost estimates to Natural Resources and Finance, and Natural Resources would request equity funding from Finance annually as part of the budget process. While typically the Premier and the Ministers of Natural Resources and Finance are signatories to these agreements, authorization for execution of the same by GNL and Nalcor must stem from Orders of Council originating from Cabinet approving the same after appropriate analysis by Cabinet Secretariat and completion of the Cabinet Process.¹⁹⁹

231. Mr. Marshall also addressed the issue which seemed to dominate discussions in Phase 2 of the Inquiry that being the knowledge which particular individuals had in relation to the change in the base cost estimate from \$6.2 to \$6.5 billion prior to Financial Close. Mr. Marshall's evidence remained consistent with other members of the Group 2003-2015 who testified on this issue, he was not aware of any such increase. It is worthy of note that this position in regards to all members of the Group 2003-2015 was not challenged nor disputed by Commission Counsel throughout the course of the Inquiry. In this regard Mr. Marshall stated:

¹⁹⁹ Hearing Transcript, February 27, 2019, at page 4.

“MR. LEARMONTH: Now, on November 29, 2013 when you signed the federal loan guarantee documents, what did you believe was the – to be the capital cost of the Muskrat Falls Project that was included in the financial close documents?”

MR. T. MARSHALL: I would have – the number was 6.2 – was the capital cost.

MR. LEARMONTH: Yeah.

MR. T. MARSHALL: It was 6.2. I don’t recall, at that time, like, seeing a document and I don’t remember seeing anything that indicated the number was higher at that (inaudible). I know, subsequent to that, I did see the 6.5 number. That was in March of 2014.”²⁰⁰

232. In further discussion of this issue by Commission Counsel Learmonth, he paraphrased Mr. Marshall’s earlier interview testimony that, “it was driving you crazy when you found out there was some suggestion about a 6.5 because you just don’t remember it.” Mr. Learmonth reaffirmed this evidence when he stated that, “Well, I can tell you we don’t have any evidence to suggest that you were told based upon the interviews we’ve done.” Mr. Marshall goes on to confirm that it was not until June 25th, 2014 that Nalcor briefed Government and that the base cost estimate went from \$6.2 billion to \$6.99 billion, and there was no mention of \$6.5 billion. He confirmed that Cabinet felt very strongly in respect to getting any numbers they had out to the public.²⁰¹ This evidence is reaffirmed by an e-mail from Deputy Minister of Natural Resources Charles Bown to then Auditor General Terry Paddon on January 19th, 2014 wherein he advised that, **“the capital cost of the Muskrat Falls Project remains unchanged as it was at DG3, being 6.2 billion.”²⁰²**

²⁰⁰ Hearing Transcript, April 1, 2019, at pages 4-5.

²⁰¹ Hearing Transcript, April 1, 2019, at pages 6-7.

²⁰² Exhibit P-00991.

233. Mr. Marshall went on to state that GNL was very cognizant that any numbers would be released to the public so as to remain totally transparent during the entire process. While at the outset of the Oversight Committee process, Government sought to have a monthly reporting period, it was determined that it was not practical and they had to resort to quarterly reporting. In respect to the oversight piece Mr. Marshall indicated that shortly after becoming Minister of Natural Resources he wanted to be advised as to what was in place in this regard and he asked that Mr. Martin come in and meet with him to address this:

“MR. T. MARSHALL: Yeah, I had asked when I became minister of Natural Resources to – you know, in my – in early days, I wanted to know what oversight there was in terms of the construction. Mr. Bown, who was the deputy minister, indicated to me we’re now – the project’s now in a new phase, completely new phase, and this is construction phase. You know, it had been sanctioned. We had the MHI report. Based on that, we sanctioned the project. There was now a construction project and I wanted to make sure that the oversight was in place for the construction.

Mr. Bown had Mr. Martin come in. Mr. Martin took me through the oversight that Nalcor had on the construction, and it was – you know, the people they had, the engineers they had, the accountants they had, the procedures they had in place was a lot more thorough than I would have been aware of. So I was confident that they had the people there to monitor the cost and, you know, to look monthly at the budgets and compare the budgets – the actuals to forecast or to estimates, and they would – so I said to Mr. Martin: I would bring – when there’s a material change, to bring it my attention. And he indicated he would do that or he’d let Mr. Bown know.

So, I knew it was being monitored and I knew if there was a material change that he’d bring it to my attention. So if there was an actual \$300-million

overrun – if the contingency was wiped out – of course I would expect that to come to my attention.”²⁰³

234. Mr. Marshall was questioned quite extensively by both Commission Counsel as well as counsel for other Parties with Standing regarding matters pertaining to the formation of the Oversight Committee. While a GNL initiative, the establishment of the Oversight Committee was seen to be largely the creation of Mr. Marshall who was then Premier at the time it was brought into being. Mr. Marshall testified that while GNL felt there was sufficient oversight of the Project at the time, the Committee was put in place in response to public concerns that had arisen suggesting that more oversight was needed. In addition, it was determined that Cabinet itself would benefit from advice on oversight from senior GNL officials, with knowledge that in specialized areas they could be supplemented by independent experts through the working group. It was viewed as a means to tie together and strengthen all the existing forms of oversight, which could then be reported online in an easily accessible format.

235. The structure and composition of the Committee was determined with the assistance of the Clerk of the Executive Council Julia Mullaley who made a recommendation to Cabinet in March of 2014 that was accepted. The Committee was made up of senior civil servants from the relevant Government Departments as well as from the Capital Projects team of Ernst & Young who were brought in to provide the expertise necessary to address and perceived gaps from an engineering and project management perspective.²⁰⁴

236. It is worthy of note that the establishment of the Oversight Committee in the spring of 2014 was not seen as a void in the Project Management structure, but was more of a supplement to what already had existed. It is noteworthy that this position is shared by current Nalcor CEO Stan Marshall who is on the public record as stating that the Muskrat Falls Project is the most over-governed project in the history of Newfoundland and Labrador and he confirmed the same during his Commission testimony.²⁰⁵

²⁰³ Hearing Transcript, February 27, 2019, at page 14.

²⁰⁴ Hearing Transcript, April 1, 2019, at pages 47-48.

²⁰⁵ Hearing Transcript, July 3, 2019, at pages 3-4.

237. While the issue of oversight was canvassed in Phase I, Mr. Tom Marshall did address it again during his testimony as the Project had now moved to the construction phase. Mr. Marshall listed the elements of oversight that were in place in addition to the Oversight Committee. While duplicitous of some of the evidence provided in paragraphs above, given that this Phase of the Inquiry was specifically dealing with Oversight, it is worth of referencing Mr. Marshall's evidence in this regard at his juncture:

“MR. T. WILLIAMS: I’m wondering, for the benefit of the Commission, can you list off for me, please, what elements of oversight were indicated to you at that time were in place for which you took some comfort in at that stage?

MR. T. MARSHALL: Okay. I’ve done this previously –

MR. T. WILLIAMS: I know you did it during your interview, but I don’t think we’ve listed them out here today and I think it’s important.

MR. T. MARSHALL: Again, my concern was that we’re in a new phase. The oversight that we thought for the business case was MHI. For this new phase, it was construction phase and we – I wanted to see what oversight was in place for this part of the project. And then in the future, there’d be the operations phase.

Mr. Martin took me through the project team and the engineers and the accountants and so on that would oversee that construction. And they would prepare the – they, you know, would prepare the monthly statements and there would be, you know, the comparison to estimated monthly statements and variances. The data would be determined, the variances would be analysed and then rectification actions could take place.

Then over and above that project team was the executive team, and the executive team under Mr. Martin would have been – Gilbert Bennett was

overseeing that whole project. Derrick Sturge was the finance person, and Mr. Sturge's reputation was well known and his previous experience working for Deloitte and their corporate governance office and so it was reassuring that he would be there to monitor that. They had a risk officer. And then Mr. Martin would be the CEO over that.

And then further oversight would then be the Board of Directors and Ken Marshall was the chair, Tom Clift was there from Memorial, Mr. Shortall was there – I didn't know him. I wish I did. I saw his testimony. I wish I knew him better. The committee had – the board had committees. They had a corporate governance committee and they had an audit committee and other committees, of course.

But the audit committee was key 'cause the audit committee would meet separately with the independent auditors that Nalcor had employed. And they would meet with the external auditor.

Then you had the reporting to government and government would be representing the shareholder and there'd be oversight from the – I guess the electricity division of the Department of Natural Resources. There was the Auditor General who had the right to go in any time he wished.

I'm drawing a blank now.

MR. T. WILLIAMS: What about the role of the independent engineer –?

MR. T. MARSHALL: And then the – there's the role of the independent engineer who was there. You know, again, they were providing that function for the benefit of the guarantor and the lenders. But Nalcor would obviously have access to that document.

And so then we put the government Oversight Committee in place in addition. Nalcor would have annual meetings; there'd be annual reports or

a number of reports. There was financial reports and we directed Nalcor to report quarterly as opposed to annually. We directed them to – their auditors to do a special report on validity of cost in addition to the normal audit and we directed the auditors to prepare a separate financial statement for the Muskrat Falls Project, separating it from Nalcor's entire operations.

So I would suggest that is – I mean, you know, obviously, from the auditor's work, that's assurance, that's fundamental.

MR. T. WILLIAMS: Hmm.

MR. T. MARSHALL: There were reports – there was the annual meeting that would be webcast across the province. People could go to the meetings, ask questions. There are other reports in the Transparency and Accountability Act. There were benefit reports put out as well and, of course, the government Oversight Committee using Ernst & Young, in addition, and then formalizing the arrangement with the IE so there'd be no question about the fact that the IE's information could come to the government through the Oversight Committee. And I think I recall Stan Marshall called it the most oversight in that – of that project, any project ever.

So I know Mr. Learmonth and I have debated this but there was lots of oversight. I'll just leave it at that.”²⁰⁶

²⁰⁶ Hearing Transcript, April 1, 2019, at pages 106-107.

SECTION 5: PHASE III: POLICY & SYSTEMIC MATTERS

238. Group 2003-2015 notes that while the topics to be covered in Phase III of the Inquiry are of interest to the Commission in fulfilling its mandate, not all serve as being relevant to the Group 2003 -2015 at this point in time and for reasons of brevity, those which may not be as applicable will be omitted from discussion or comment.

5(a) Financial Impact of the Muskrat Falls Project on Ratepayers and Taxpayers

239. The Commission saw merit in establishing a panel of 8 witnesses of varying backgrounds and levels of expertise to speak to the issues of the financial impact of the Muskrat Falls Project. While all witnesses have focused opinions as to what the impact may be, in reviewing the comments of those witnesses with limited or no expertise in electrical pricing schemes, it is respectfully submitted that the evidence of such individuals represents the views of some individuals and corporations with vested interests in the issue at hand. Therefore it is suggested that the evidence of those parties with no vested interests or constituencies be given the most weight in considering this evidence.

240. It served as no surprise that witnesses Alteen, Browne, Michael and Earle consistently echoed that the consumers, customers and constituencies they represent have concerns of what the impact of Muskrat Falls Project will have on a go forward basis. It would seem to be an obvious position as to whether or not electricity customers and the populace of the Province as a whole would not want to see an increase in electricity rates. To bring to the attention of the Commissioner that consumers of electricity do not want to see the doubling of rates is a given, it is submitted that the more important question to be answered is, is there a significant financial impact resulting from the construction of the Muskrat Falls Project and, if so, what are the viable and reasonable solutions to address this and can they be implemented without causing undue hardship to rate payers and tax payers as a whole?

241. It was of interest that it was only Dr. Brandon Schaufele (Ivey Business School, Western University) who was accepted as an expert in Energy Economics. Dr. Schaufele

commenced his discussions by stating that currently that the Province has some of the lowest electricity rates both nationally and in the Atlantic region.²⁰⁷ This evidence was further confirmed by Mr. Kevin Fagan of NL Hydro, but it is acknowledged that NL Hydro is scheduled to be before the PUB with a Rate Application requesting a rate increase to bring their rates more in line with current expenses. It was suggested by Dr. Schaufele that in order to address the issue of cost increases than it must be a multi-faceted approach.

242. It is submitted that if there is to be a true economic analysis of the Muskrat Falls Project, then there must be consideration of the following factors:

- What is the likely or anticipated increase to electricity rates in order to bring them in line with average electricity rates in 2020;
- What are the likely cost savings by not continuing with the operation of the existing thermal generating plant at Holyrood and the essential refurbishing required in order to keep it operational until 2041 and resulting impact on rates; and
- What is the likely or anticipated capital cost of developing other alternative options, be it isolated island alternatives or others and the resulting impact on rates.

243. Accordingly if one is to examine the impact of the Muskrat Falls Project, then any fair and reasonable assessment must take into the consideration what the required electrical power needs would have been and costs pertaining to the same which were required to satisfy the Province on a go forward basis. To neglect any such analysis is to add to the hysteria that Muskrat Falls is the "sole cause" of potential increases in electrical rates and such is not the case. Mr. Schaufele confirmed the value of such a multi-faceted approach in his evidence, while noting that such an all-encompassing review would be a significant undertaking:.

²⁰⁷ Exhibit P-04461, at pages 22-23.

“MR. SCHAUFLE: “I think your broader question is, well this project is a large scale project, it’s going to have spillover effects with the rest of the economy, we have tended to focus on impact on rates and the electricity market exclusively.

I think your general assessment is accurate that it will have what economist’s calls general equilibrium or unintended consequences for other areas of the economy...

[...]

You would need to do the type of full analysis such as those being done by the PUB to take into consideration some of the other factors – would be a large undertaking to consider all of these other factors.”²⁰⁸

244. This having been noted there is no mistaking that the increased cost of the Muskrat Falls Project over and above the original projection of \$6.2 billion will undoubtedly result in measures required to ease the burden on rate payers. Since the commencement of the Project it has always been anticipated that the Province was intending to utilize the growing non-renewable resources to supplement the development of renewable resources. This was explicitly contemplated in the 2007 Energy Plan, “Focusing our Energy”:

“Our Goals

Making the most of our energy assets and ensuring we use them wisely require long-term goals. These goals provide the structure for developing the individual policy actions to ensure consistency with the province’s energy principles. These goals were developed in the context of protecting our environment while maximizing opportunities to the province from current and future developments, including after 2041 when the

²⁰⁸ Hearing Testimony, July 16, 2019.

province is in the position to receive the full benefit from the Upper Churchill.

[...]

3. Sustainable Economic Development

We will develop our energy resources to help meet our social and economic responsibilities. We will reinvest the value we receive from our energy sector to secure our prosperity today and for future generations. We will ensure energy developments capitalize on our competitive advantages: our people, our industrial infrastructure, our geographic location and our political stability.

4. Maximizing Electricity Export Value

We will ensure we are positioned to maximize value over the long term from any electricity available for export and to invest the proceeds strategically.

5. Maximizing Long-Term Value of Oil and Gas

Oil and gas, once produced and consumed, are depleted forever. We will maximize and effectively invest the value received from these resources to ensure current and future generations benefit from their development, while still providing a fair return to oil and gas companies that participate in the development of our resources.”²⁰⁹

245. While the question to be answered therefore is what will be needed from a dollar perspective to address these projected increases there first needs to some sense of what that actual amount would be. The evidence of Premier Dwight Ball was that the GNL would

²⁰⁹ Exhibit P-00029, at pages 10-11.

be facing an annual \$726 million dollar revenue requirement, while panel member Mr. Kevin Fagan, VP Regulatory Affairs NL Hydro, noted in his presentation that this amount is more in the range of \$477 million.²¹⁰ It was disclosed through the cross examination of Mr. Fagan by Ms. Erin Best, that the approximate difference of some \$249 million dollars is as a result of GNL failing to factor in the cost saving resulting from the closure of the Holyrood thermal generating plant, such as oil, maintenance and refurbishment costs.²¹¹ Clearly these are savings that will be realized by Nalcor when Muskrat Falls comes on stream so that the financial burden the Province will be confronted with has been overestimated by some 35%, which substantially reduces the amount and duration for which the rate mitigation measures will be required.

246. GNL has assured the people of the Province that the costs of the Muskrat Falls Project will be covered through rate mitigation efforts that they have identified, with possible additional recommendations stemming from the ongoing PUB review dealing with this issue. Premier Ball confirmed during his Inquiry testimony that the residents of the Province would not be paying for the costs of the Muskrat Falls Project through either rate or tax increases beyond a base of 13.5 cent rate. This was in turn confirmed by panel member Denise Hanrahan of the Dept. of Finance who provided the specific details of the rate mitigation plan which will be adopted by GNL in the coming years to address this issue of rate mitigation.²¹² While it is not necessary to review the rate mitigation plan in great detail as it was dealt with in Ms. Hanrahan's presentation, it is worthy to note some of these measures can and will address the concerns of residents pertaining to Muskrat Falls Project costs.²¹³

247. It should be noted that Governments, past and present, are charged with the responsibility on a daily basis of making the difficult public policy decisions pertaining to the allocation of resources from one particular area of demand to another. This is what Governments are elected to do. It is short sighted to attempt to evaluate the financial impact of a Mega Project of this magnitude if we do not complete a detailed cost / benefit analysis factoring in all material considerations.

²¹⁰ Exhibit P-04455, at page 15.

²¹¹ Hearing Testimony, July 16, 2019.

²¹² Hearing Testimony, July 16, 2019.

²¹³ Exhibit P04449.

248. One cannot help but note that while there was much focus by the panel of the possible negative financial consequences of the Muskrat Falls Project, both past and present, the failure to reference the economic spin off that the Project has provided speaks volumes. On behalf of the Group 2003-2015 it is stated that while Labour Leaders and former MHAs were provided with a platform to expound upon all the negativity they could express in their presentations, there was not one panel member selected who could be seen to be a proponent of the Project. With the exception of Mr. Fagan of NL Hydro, who would be required to maintain a more factual position in this regard, and Dr. Schaufele, an unbiased expert, the panel was defunct of anyone speaking to this position.
249. One would have thought that any balanced discussion of the Financial Impact of the Muskrat Falls Project would have included at least at a minimum, some reference to the billions of dollars of economic spin off that the Muskrat Falls Project has injected into the Provincial economy over the last seven years and the potential into the future. Given that the Commission of Inquiry did not provide any forum for this prospective during the discussion, the Group 2003-2015 feels compelled to address the same for purposes of completeness of this topic.
250. The Lower Churchill Project has provided a substantial amount of employment opportunities to Newfoundlanders and Labradoreans since the project was first sanctioned. As of April 2019, the Lower Churchill Project has provided thirty seven million, two hundred and forty five thousand, four hundred and fifty six (37,245,456) hours of work for Newfoundland and Labrador residents alone²¹⁴, with employees receiving wages totalling approximately two billion, three hundred and seventy two million, five hundred and eighty five thousand, seven hundred and sixty six dollars (\$2,372,585,766)*. The tremendous number of jobs created and wages paid to Newfoundlanders and Labradoreans since the beginning of this project is a significant boost to the Newfoundland and Labrador economy.

²¹⁴ Nalcor Energy, Muskrat Falls Project Reports. (2019) *Muskrat Falls Project Monthly Report April 2019* at page 16;(*Approximate wages were calculated by using: Nalcor Energy, Annual Reports (2016). *2016 Annual Report* at page 17).

251. In addition to the Lower Churchill Project producing jobs for the people of Newfoundland and Labrador, it has also provided significant employment opportunities to the Aboriginal Communities of this province. As of April 2019, individuals with Aboriginal Affiliation have worked four million, six hundred thousand, five hundred and sixty (4,600,560) hours on the project²¹⁵, with over 1,100 indigenous people finding employment related to the project by the end of 2017.²¹⁶
252. Outside of the revenue being generated throughout the Newfoundland and Labrador economy through the wages of employees of the Project, Nalcor and the Newfoundland and Labrador Government have also stimulated the economy through Project related expenditures. As of April 2019, the Lower Churchill Project's expenditures have invested almost three (3) billion dollars into the Newfoundland and Labrador economy across a variety of industries.²¹⁷ In 2017 alone, the Lower Churchill Project worked with nearly 400 local businesses, communities and organizations across Newfoundland and Labrador.²¹⁸
253. The construction of the Muskrat Falls Project is a substantial investment for Nalcor and Newfoundland and Labrador as a province. The financial implications and benefits of owning such a modern and technically advanced hydroelectric generating station with related transmission lines cannot be understated. While it will take time to pay off this asset, clearly it will be a very valuable revenue generating asset for decades to come. These assets are vital to Nalcor as they can generate revenue for the corporation, increase the value of their business, and facilitate the running of their numerous lines of business, which in turn will produce higher dividends for their sole shareholder the GNL. The financial benefit of being connected to the North American grid in addition to storage capacity was discussed by Mr. Pelino Colaiacovo, a witness called by the Commission to speak to preparing for 2041:

²¹⁵ Nalcor Energy, Muskrat Falls Project Reports. (2019), *supra*, at page 20.

²¹⁶ Nalcor Energy, Annual Reports (2017). *2017 Annual Report* at page 19.

²¹⁷ Nalcor Energy, Muskrat Falls Project Reports. (2019) *Muskrat Falls Project Monthly Report April 2019* at page

24.

²¹⁸ Nalcor Energy, Muskrat Falls Project Reports. (2019), *supra*, at page 24.

“MR. COLAIACOVO: ...If you assume the continued decline of fossil fuels in the electricity system over the next 20 year, I think it’s quite possible that there would be a lot of interest in getting access to that power directly.

And on top of that...even if you assume that there’s lots of offshore wind and solar power that’s developed in the United States, as there probably will be, having storage capacity in a system is something that is often quite valuable, and so a connection from Churchill Falls to those markets is something that is going to have real value for a very very long time.”²¹⁹

5(b) Preparing for 2041

254. Also during Phase III of the Inquiry, the Commission called Pelino Colaiacovo of Morrison Park Advisors Inc. to speak to ways in which GNL may plan towards 2041 and the expiration of the 1969 contract. While much of Mr. Colaiacovo’s report (Exhibit P-04445) addresses issues which were canvassed in the pre-sanction phase of the Inquiry, he does make several observations relating to GNL’s options in 2041, particularly relating to the impact the Muskrat Falls Project will have on decisions that will need to be made.

255. As detailed above under the Early and Recent History of the Churchill River, Dr. Jason Churchill has described the 1969 contract has been a **“noose around the neck of Newfoundlander in dealing with Quebec negotiators”²²⁰** for decades. GNL has made numerous legal challenges to the contract, some of which were detailed herein. 2041 is a significant year for Newfoundland and Labrador, as the terms of the 1969 contract will expire. However, it is often overlooked that the expiration of the contract does not mean that GNL (through CLFCo) is entitled to 100% of the power produced at Churchill Falls. Hydro Quebec owns 34.2% of CFLCo and, as such, the expiration of the contract will still necessitate negotiations with Hydro Quebec. Given the past history of negotiations with Quebec, there is no reason to expect anything other than an extremely difficult commercial negotiation and GNL will want to be in the strongest position possible.

²¹⁹ Hearing Transcript, July 18, 2019, at page 54.

²²⁰ Exhibit P-00008, at page 13.

256. As acknowledged by Mr. Colaiacovo, the Muskrat Falls Project was always contemplated as part of the larger vision for Newfoundland and Labrador as set out in the 2007 Energy Plan. Related to this vision, Mr. Colaiacovo also recognized the fact that Muskrat Falls will provide GNL with the opportunity to export excess power, and that this was always part of the plan:

“MR. COLLINS: So you write in your report about the advantages of interconnection, that one of the advantages of the project is that we’re now connected to the North American grid. The province’s 2007 Energy Plan suggested that the province has a massive energy warehouse and that our energy strategy has to revolve around finding markets for that energy to get the value out of it.

So how – to what extent does the Muskrat Falls Project carry out that strategy? And how realistic was the strategy in 2007, 2012 and today?

MR. COLAIACOVO: Well, I think the Muskrat Falls plan does do what it intended to do in terms of getting access to market, right? The route to market was negotiated and it was guaranteed, right? So there is access to market. Now, the wire that goes from Newfoundland to Nova Scotia is 500 megawatts, so it’s skinnier than you would necessarily want, but it is a connection to market. And there’s already trading going on across that connection even before the Muskrat Falls is finished. So there will be trading. I think the design does what it promised to do, and, you know, Nalcor will be able to trade across that connection into market.”²²¹

[...]

“MR. COLAIACOVO: No, I think that on its face the plan clearly says there’s more power than is required in the early years and that power will be exported. I think there were – the documents were at pains to point out that

²²¹ Hearing Transcript, July 17, 2019, at page 42.

the risk of the export price will not affect Newfoundland ratepayers, and that was all part of the structure of the PPA. But there was no question that part of the plan was exporting from the very beginning...”²²²

257. Mr. Colaiacovo also stressed the value of having storage capacity in addition to a transmission route:

“MR. COLAIACOVO: ...And on top of that...even if you assume that there’s lots of offshore wind and solar power that’s developed in the United States, as there probably will be, having storage capacity in a system is something that is often quite valuable, and so a connection from Churchill Falls to those markets is something that is going to have real value for a very very long time”²²³

258. Also included in GNL’s vision as contemplated in the Energy Plan was an awareness of the eventual expiration of the 1969 contract and the inevitable negotiations with Hydro Quebec. As noted by Mr. Colaiacovo, one of the major advantages of the Interconnected Island Option as compared to the Isolated Island scenario is that in the Isolated Option we would be using “**bandaids**” to stretch the lifespan of Holyrood with an aim to make it to 2041 and the eventual negotiations with Hydro Quebec. However, he noted that this would be the equivalent of negotiating “**with a gun to your head,**” as GNL would be in a position of needing to get a deal done.²²⁴ It should be noted that such an imbalance in negotiating position was the major cause of the inequities of the 1969 contract.

259. Mr. Colaiacovo further outlined the importance of Interconnection to the North American grid through the Maritime Link, as it relates to future negotiations with Hydro Quebec. In particular, he noted that having an alternate route and not being required to go through Quebec is “critical” in these negotiations:

²²² Hearing Transcript, July 18, 2019, at pages 50-51.

²²³ Hearing Transcript, July 18, 2019, at page 54.

²²⁴ Hearing Transcript, July 17, 2019, at page 33.

“MR. COLAIACOVO: ...But the reality is if for whatever reason you can’t negotiate with Quebec, then having an alternate route is critical. And in order to negotiate effectively, having an alternate route is critical.”²²⁵

260. The transmission route established through the Maritime Link gives GNL the opportunity to sell energy for the first time in their history. Mr. Colaiacovo noted that the terms of the agreement between Nalcor and Emera are quite beneficial to Nalcor, as the price Nova Scotia ratepayers are paying for the Nova Scotia block is more than Nalcor could expect to get on the export market. Furthermore, Emera will be securing Nalcor’s transmission route through New Brunswick, which opens them up to the eastern United States.²²⁶

261. As is evident through the evidence of Mr. Colaiacovo, the Muskrat Falls Project has strengthened GNL’s position as we move towards 2041, particularly as it relates to negotiations with Hydro Quebec. Furthermore, it was stressed during his testimony that the timeframe for entering into such negotiations is much sooner than 2041, as these decisions will need to be made approximately 10 years prior to the expiration of the contract.²²⁷ While it is acknowledged that Newfoundland ratepayers may bear some of the cost consequences of developing this infrastructure, there will be significant benefits in the not too distant future. Finally, the current administration has advised that they have a sufficient plan in place to mitigate rates in the interim.

262. It is the submission of Group 2003-2015 that the value of the generation and transmission assets associated with the Muskrat Falls Project will far exceed their cost for completion. These are 100-year assets making the Project overall far more valuable and worthwhile to the Province when viewed from a strategic long term view. It should be reiterated that this concept was fundamental to the 2007 *Energy Plan*.

²²⁵ Hearing Transcript, July 18, 2019, at page 54.

²²⁶ Hearing Transcript, July 17, 2019.

²²⁷ Hearing Transcript, July 17, 2019.

5(c) The Role of the Civil Service, Record-Keeping, the Duty to Document and Document Production

263. The final topic covered during Phase III of the Inquiry which Group 2003-2015 wishes to address is the role of the civil service, record-keeping, the duty to document and document production. As a preamble, Group 2003-2015 wishes to acknowledge, as several members of the Group did during their hearing testimony, the hard work and dedication of the public service. While this area of the Inquiry has focused on specific areas that might be open to improvements or changes, Group 2003-2015 feels strongly that the members of the public service are by and large professional and committed individuals who serve the people of this province with skill and integrity.

264. The Commission called several witnesses to speak to these topics during Phase III. Commission Co-Counsel Gobhina Nagarajah made a presentation providing an overview of the *Access to Information and Protection of Privacy Act (ATIPPA)* and, in particular, the Report of the 2014 Statutory Review Committee chaired by Clyde Wells. This Committee was created in March of 2014 by the administration of Tom Marshall to complete a review of *ATIPPA* and to make recommendations to GNL. In general, many of the recommendations placed a greater emphasis on transparency. On March 3, 2015, then Premier Paul Davis announced that GNL had accepted the recommendations of the Committee and would proceed with an implementation plan.²²⁸

265. Included in the Committee's recommendations was that a duty to document be legislated and included within the *Management of Information Act*. It should be noted that in March of 2015 no other Canadian Province had legislated a duty to document. As such, there was no duty to document imposed on public officials (elected or non-elected). Since this time, only British Columbia has legislated a duty to document which occurred in 2017. Since adopting the Committee's recommendations, GNL has explored options relating to the best manner in which to adopt same, but a conclusion has not been reached as it relates to a legislated duty to document.

²²⁸ Exhibit P-04517.

266. The next witness called by the Commission in relation to this topic was the Honourable Justice Donovan Molloy, who spoke to his experiences as a former information and privacy commissioner for Newfoundland and Labrador as it relates to ATIPPA. Judge Molloy also saw fit to comment on his experience as a civil servant within the Department of Public Prosecutions. Judge Molloy's evidence suggested that the prior testimony of civil servants at the Inquiry did not reflect his experience in that they did not reflect the ability or inability to "speak truth to power."²²⁹ Group 2003-2015 submits that Judge Molloy's evidence is not reflective of the numerous current and former civil servants called to provide evidence at the Inquiry including Charles Bown, Terry Paddon, Todd Stanley, Julia Mullaley, Donna Brewer, Paul Myrden and Paul Morris, none of whom spoke to such a concern.

267. The Commission of Inquiry also saw fit to call as a witness Dr. Kelly Bilidook, an Associate Professor in the Department of Political Science of Memorial University. Dr. Bilidook was retained by the Commission to conduct a study of current and former civil servants as it relates to record keeping within the public service and any potential constraints on communicating different viewpoints to superiors. Dr. Bilidook was not tendered by the Commission as an expert and was not permitted to provide opinion evidence as it relates to this topic.

268. Dr. Bilidook completed a study which involved only 20 civil servants who volunteered to participate and provided information on a confidential basis. In his preamble to hearing testimony on July 25, 2019, the Commissioner noted that he saw value in hearing the comments from the civil servants interviewed, and this would not be unlike hearing from public servants who gave evidence at the Inquiry such as Judge Donovan Molloy or Todd Stanley.²³⁰ Group 2003-2015 respectfully submits that Dr. Bilidook's report is fundamentally different from the evidence of civil servants called at the Inquiry, as those appearing at the Inquiry provided their testimony under oath or affirmation. Furthermore, with the exception of the evidence of Judge Molloy, none of the civil servants called to provide evidence were asked as to their opinion on any constraints placed on their ability to communicate viewpoints to superiors, which was a fundamental aspect of Dr. Bilidook's survey. Such a

²²⁹ Hearing Testimony, July 22, 2019.

²³⁰ Hearing Testimony, July 25, 2019.

discrepancy does not align with the principle of fairness as contemplated in the Commissioner's Interpretation of the Terms of Reference. On the basis of the foregoing, Group 2003-2015 respectfully submits that Dr. Bilidook's evidence should not be provided any weight as it relates to this topic.

269. The final witness called to speak to this topic was Professor Mel Cappe, who was accepted by the Commission an expert in the areas of Governance and the role of the public service. Mr. Cappe noted that the role of the public service is to act as the conscience of government and to advise on risks and strategies. In relation record keeping in government, Mr. Cappe stressed the balance that must be struck between openness, which is desirable for accountability, and secrecy, which is desirable for candor and considering the options. While the trend in Newfoundland and Labrador has been towards greater transparency in government, Mr. Cappe's evidence suggests that there is an optimal degree of both openness and secrecy that leads to the best possible governance.²³¹

²³¹ Hearing Testimony, July 26, 2019.

SECTION 6: REPLY TO THE TERMS OF REFERENCE

270. It should be noted that the Commission of Inquiry process is one that is not new and is governed by the Public Inquiries Act, 2006. The purpose of the Public Inquiry in Canadian Law has been subject to much comment by judges and academic scholars alike. As outlined by Cory J. in *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* [1995] S.C.J. No. 36, two of the main purposes of the public Inquiry in Canadian law are to uncover “the truth” and to help “restore public confidence not only in the institution or situation investigated but also in the process of government as a whole.”²³²

271. Similarly, Professor Ed Ratushny makes the following comments on the general function of a commission of inquiry:

“A commission of inquiry has no authority to decide legal rights or obligations; the fact-finding function of a commissioner has an intrinsic value quite apart from that of serving as the foundation for determining rights or obligations. The public is entitled to know why its supply of drinking water became dangerous, causing illness and death in the community. It wants to know why a mine explosion occurred that killed workers in the community. It must know how and why our criminal justice system could convict and imprison someone for a heinous crime that he did not commit.”²³³

272. As outlined by Professor Ratushny, a commissioner must be independent and impartial as it is the commissioner's independence from government which is one of the most important features of a public inquiry. If public confidence is going to be regained then an independent commissioner must conduct an inquiry guided by the principles of efficiency, openness, transparency and thoroughness. A commissioner is not bound by the ordinary

²³² *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* [1995 S.C.J. No. 36, at para 62.

²³³ Ed Ratushny, "The Conduct of Public Inquiries: Law, Policy and Practice", Irwin Law, 2009, at page 162.

rules of evidence, but the guiding principle must be that of fairness. The public inquiry is generally described as being inquisitorial in nature, as opposed to adversarial.²³⁴

273. Professor Ratushny also notes that the “entire life of an inquiry is dictated by the terms of reference, which are legally binding”. The terms of reference establish the jurisdiction of the commission of inquiry and set the boundaries of that jurisdiction which dictate what the commission can and cannot do.”²³⁵

274. Accordingly, it is essential that the Commissioner consider all aspects of the evidence and that such examination be fair and the legal principles not only be respected, but properly applied. Given the vested interests of various parties appearing before the Inquiry, it is essential that the Commissioner distinguish inference from speculation and conduct his assessment of credibility applying the same factors as if he was sitting as a trial judge.

6(a) The PUB Oversight: (Terms Of Reference Section 4 (C))

275. Section 4(c) of the Terms of Reference states as follows:

- (c) whether the determination that the Muskrat Falls Project should be exempt from oversight by the Board of Commissioners of Public Utilities was justified and reasonable and what was the effect of this exemption, if any, on the development, costs and operation of the Muskrat Falls Project;**

276. The issue of the reference pertaining to the Muskrat Falls Project being put before the Board of Commissioners of Public Utilities (PUB) arose substantially in 2011 as a result of what appeared to be public pressure being mounted by critics of the Project, primarily the 2041 Group, a predecessor group to the Concerned Citizens Coalition, a Party with standing before the Commission, which is led by Mr. Ron Penney and Mr. David Vardy. The 2041 Group were spearheading the movement to have a reference put to the Public Utilities

²³⁴ Ratushny, *supra*, at pages 157-158.

²³⁵ Ratushny, *supra*, at page 130.

Board without haste.²³⁶ It should be noted that it was the position of this group at the time that the reference be made immediately, not a later date when there would have been more engineering work completed. Given the work that had already been completed in reviewing various alternative options to the Muskrat Falls Project, Government determined that it would put the following question before the PUB in order to address the concerns which were being raised in the public:

“The Board shall review and report to Government on whether the Projects represent the least-cost option for the supply of power to the Island Interconnected Customers over the period of 2011-2067, as compared to the Isolated Option, this being the ‘Reference Question’.”²³⁷

277. It should be noted that Dr. Guy Holburn, the Commission’s own expert who was certified in the area of regulation and governance in the energy sector, did provide an opinion on some of the potential disadvantages of sending a large project such as this to a utilities regulator for review. At page 9, he notes that regulators may not be able to consider all of the benefits that may flow from a potential project:

“...while regulators often have a primary mandate to consider the economic interests of producers and consumers, electricity infrastructure projects can have environmental and social impacts, the magnitude of which generally increases with project scale. A narrow regulatory mandate may thus not provide a comprehensive assessment of the public interest.”²³⁸

278. This potential disadvantage was explicitly noted by then Premier Kathy Dunderdale in 2011, as she noted that **“projects of this scope exceed the PUBs mandate as they are as much about economic development and job creation as they are about**

²³⁶ Exhibit P-00843.

²³⁷ Exhibit P-00038, at page 1.

²³⁸ Exhibit P-00528, at page 9.

electricity.²³⁹ Furthermore, Group 2003-2015 reiterates that the Muskrat Falls Project was part of a larger vision flowing out of the Energy Plan, and that this philosophy put emphasis on significant additional benefits including environmental, job creation and economic growth. Some of these benefits are discussed in more detail herein. Group 2003-2015 suggests that by submitting a Reference Question to the PUB, GNL was attempting to strike a balance between involving the PUB in the process as a utility regulator, while also considering the additional benefits in making the sanction decision.

279. As a result of the PUB ultimately making a determination that *“the information provided by Nalcor in the review is not detailed, complete or current enough”* to answer the Reference Question,²⁴⁰ there has been much criticism of whether or not the reference was made at the appropriate time, whether the PUB was supplied with sufficient time to conduct its review and whether the scope of the reference question was wide enough. When one reviews the Terms of Reference (see Section 4 (c)) then it is evident that the Commissioner is not tasked with answering any of these issues, in fact the question put before him to address is quite straight forward and states as follows: “whether the determination that the Muskrat Falls Project should be exempt from oversight by the Board of Commissioners of Public Utilities was justified and reasonable and what was the effect of this exemption, if any, on the development, costs and operation of the Muskrat Falls Project.”

280. The Board released their Final Report on March 30, 2012, but did not provide an answer to the Reference Question.²⁴¹ This was despite the Board’s own expert (MHI) and the Consumer Advocate being able to provide an answer to the question posed. It should be noted that during Phase III of the Inquiry, Mr. Pelino Colaiacovo of Morrison Park Advisors, an expert witness retained by the Commission of Inquiry, was critical of the PUB’s failure to render a decision:

“MR. COLAIACOVO: ...It was an abdication of responsibility – I mean these decisions are always difficult, and they’re always judgments, and they

²³⁹ Need Footnote – Find Article

²⁴⁰ Exhibit P-00052, at page 6.

²⁴¹ Exhibit P-00052, at page 6.

always involve a massive amount of grey area, and it doesn't mean you can simply not decide.

The Holyrood plant needed to be replaced, there needed to be a system plan to replace it, you need to come to a decision. And the decision is never going to be perfect and it is never going to be certain, but you need to come to a decision.”^{242 243}

281. While it is easy to get distracted in the minutia of the other ancillary issues referenced above and the details surrounding them, it is respectfully submitted that the task at hand for the Commissioner is narrow in scope, in that he must determine if GNL was “justified” and “reasonable” in the exemption of the Project from the oversight of the PUB. There is no mandate to examine and comment on the process pertaining to the reference question itself. To this extent one must first question was there any legislative or regulatory requirement on GNL in which they must adhere to in respect to having a role for the PUB in terms of oversight.

282. In this regard the question of whether the decision to maintain the existing exemption of the Project was “justified” is quite easily answered – Yes. Government was simply adhering to the existing proclaimed legislation being the Labrador Hydro Project Exemption Order under the Electrical Power Control Act, 1994 and the Public Utilities Act, which had been previously adopted.²⁴⁴ A previous Government had enacted the legislation to specifically achieve the end result of removing projects, including the Muskrat Falls Development, from the oversight of the PUB. This was a clear and unequivocal policy direction which Government made and is entitled to do. This leads us to the substantive question of whether the determination was a reasonable one.

283. In order to properly address this issue of “reasonableness”, then we are required to consider the more academic question of the policy role and function of Government and

²⁴² Hearing Transcript, July 17, 2019, at page 11.

²⁴³ Exhibit P-04464, at page 26.

²⁴⁴ Labrador Hydro Project Exemption Order under the *Electrical Power Control Act, 1994* and the *Public Utilities Act*, O.C. 2000-206 & O.C. 2000-207.

their right in exercising such authority for which they were democratically elected to invoke by the people of the Province. This issue was pursued with witnesses Penny and Vardy on cross-examination and even these long standing former civil servants had to acknowledge that it is totally within the purview of Government to formulate policy directives.

“MR. PENNEY:...And I should say I mean we recognize, because of our roles, that ultimately, yes, this is a public policy decision, no question about that. And government has the right to make that decision to either go ahead with this project or not.”²⁴⁵

284. This proposition is not only the position put forth by the Group 2003-2015, but is in fact a widely recognized by numerous academic authorities. In furtherance of the same we would refer to the following analysis from Craig Forcese and Aaron Freeman in their text “The Laws of Government”:

“Each branch has its own function: ‘[i]n broad terms, the role of the judiciary is.... to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.’ *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455 at 469-70.”²⁴⁶

“As the Supreme Court has noted, so long as it does not fundamentally alter or interfere with the constitutionalized relationship between the courts and the other branches of government, “[i]t is well within the power of the legislature to enact laws which some would consider draconian.” *Babcock v Canada*, [2002] 3 SCR 3 at para 57.”²⁴⁷

²⁴⁵ Hearing Transcript, October 10, 2018, at page 34.

²⁴⁶ Forcese, Craig and Aaron Freeman, *“The Laws of Government”*, (2nd edition). Chapter 2, Page 19

²⁴⁷ Forcese, Craig and Aaron Freeman, *“The Laws of Government”*, (2nd edition). Chapter 2, Page 19.

285. Furthermore, and perhaps most convincing is that the authority vests in the Province to institute such legislative provisions is specifically addressed under Section 92A.(1) of the Constitution Act, 1867 which states as follows:

“Laws respecting non-renewable natural resources, forestry resources and electrical energy.

92A. (1) In each province, the legislature may exclusively make laws in relation to

- (a) exploration for non-renewable natural resources in the province;**
- (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and**
- (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.**

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a

province conflict, the law of Parliament prevails to the extent of the conflict.

Taxation of resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

- (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and**
- (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,**

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

“Primary production”

(5) The expression “primary production” has the meaning assigned by the Sixth Schedule. Constitution Act, 1867 31

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.²⁴⁸

286. Hence one is at a loss as to how the Commissioner could make any other finding than that such exemption was reasonable given that it was in compliance with existing legislative authority. To find otherwise would be to circumvent the Constitutional authority which is vested in the Provincial Legislature. GNL actions to this extent were simply in compliance with the existing legislation that the previous administration was wholly within their authority to invoke.

²⁴⁸ The Constitution Act, 1867 (UK), 30 & 31 Victoria, c. 3, at Section 92A.

287. The last point raised in the Terms of Reference question under 4 (c) asks “*what was the effect, if any, on the development, costs and operation on the Muskrat Falls Project would such exemption not have made?*” Recognizing that the drafters of the Terms of Reference were tasked with this responsibility prior to the Inquiry being commenced, it seems practically implausible for one to make any determination as to effect of such a measure given the disclosure of evidence and participation of the numerous parties that played a role in the ultimate issues of concern which have arisen in respect to the Muskrat Falls Project. To make any conclusions in this regard would be mere speculation and there exists no evidentiary basis in which to reach such conclusions, or any such findings in this regard. It would be our respective submission that such conclusions would be grounded on pure hindsight and conjecture. Given the almost 6 million documents before the Commission, the almost 4,500 exhibits entered into evidence, the 139 days of testimony and the 134 witnesses called at this Inquiry, any specific findings outside of generalizations would be purely hypothecation. Furthermore given that the deficiencies in the processes surrounding the Muskrat Falls Project involved a multiple of players, then there is no reasonable basis in which to support any cost impact of such a legislative exemption.

6(b) Terms of Reference Section 4(D)

288. In respect the above provision of the Terms of Reference, the Commissioner has been tasked with addressing a twofold query as identified below:

(i) Was Government fully informed and was made aware of any risks or problems anticipated with the Muskrat Falls Project, so that the government had sufficient and accurate information upon which to appropriately decide to sanction the project;

(ii) Whether the Government employed appropriate measures to oversee the project particularly as it relates to the matters set out in paragraphs (a) to (c), focusing on governance arrangements and decision-making processes associated with the project.

289. As it pertains to issue (i) above there has been evidence that was elicited throughout the Inquiry process which confirms that the Government was not fully informed of all the risks or problems prior to sanctioning the Muskrat Falls Project. Once again it must be noted, that although it was identified that certain information was not shared with GNL, this evidence must be taken in the full context of the testimony of Nalcor Executives who offered some explanatory and contextual evidence in these matters.

290. In addressing this matter it is necessary to identify the issues which the relevant members of Group 2003-2015 assert that they were not informed as it pertains to the Project. Given the volume of evidence, it is not our intention to reference the overlapping evidence of all involved in this regard, but to identify the issues pertinent to this review. To this extent the relevant members of Group 2003-2015 suggest they were not fully informed on some of the relevant issues up to the time of sanction in December 2012, including the following:

- (a) Group 2003-2015 was not advised as to the manner in which the strategic risk contingency/management reserve structure was established, and was not aware that this was removed from the capital cost estimate nor the CPW analysis. The strategic risk amount, estimated at P50, was \$500 million.²⁴⁹
- (b) Group 2003-2015 was not advised or involved in the decision surrounding the selection of a P Risk Factor for the project. In particular, they were not aware that a P50 rating was assigned to the Project. Furthermore, Group 2003-2015 was not advised that this decision was contrary to the advice provided to Nalcor by their risk consultant, Westney Consulting.²⁵⁰
- (c) Group 2003-2015 was not advised that the estimated first power date of July 15, 2017 had been assigned a probability rating of P1 (later revised to P3), which suggested that there was only a 1-3% likelihood that the Project would be finished

²⁴⁹ Exhibit P-00014, at page 61.

²⁵⁰ Hearing Transcript, February 25, 2019, at page 9.

on time as previously projected. It was not until mid-2015 that GNL was advised that the schedule could no longer be met.

- (d) Group 2003-2015 was not advised that Nalcor had requested of MHI Consultants, who were retained on behalf of GNL to review DG3 numbers, to limit the scope of their review by not addressing Risk factors in their report.
- (e) Group 2003-2015 was not informed that Nalcor had completed the Independent Project Review ("IPR), which was a "cold eyes" review by third party experts. Furthermore, Group 2003-2015 was not aware that the IPR team had initially recommended that management and schedule reserve amounts be included in the capital cost estimate, and that this was later removed to state that these items be recognized in the decision making process.
- (f) Group 2003-2015 was not advised at the relevant time that all necessary prerequisites required to satisfy Federal Loan Guarantee conditions pertaining to approval by the Nova Scotia URAB in respect to the Maritime Link portion of the Project had not yet been satisfied.

291. It is argued that the above issues identified are substantial in nature such that each, in and of itself, could have cost consequences on the Project. This being recognised, it cannot be stated as to what, if any affect, the above noted information would have influenced the decision making process, but regardless as the sole shareholder, GNL should have been informed of the same and factor it into their determination as to sanctioning the Project. In addition and as required under the Terms of Reference, this analysis is limited to up to the date of sanction only.

292. As it pertains to matters of concern identified in Section (ii) above, there has been much discussion over the course of the Inquiry on the issue of Project Oversight and Governments role pertaining to the same. While Commission Counsel supported the proposition that there may have not been sufficient oversight by GNL in respect to the actions of Nalcor, there was a cornucopia of evidence in this regard.

293. As it pertains to the issue of oversight as whole, there has been two distinct viewpoints presented, one from the current Nalcor CEO, Mr. Stan Marshall who has been quoted as stating that the Muskrat Falls Project is **“the most over governed project in the provinces history”**²⁵³ and the Commissions Expert Dr. Guy Holburn, who spoke to the various models and components of oversight in mega projects.²⁵⁴

294. It is respectfully submitted that it is essential when considering the particulars related to this issue that the influences of hindsight do not cloud one’s perspective as to the adequacy of the measures that were implemented. While many of the shortcomings, financial and otherwise, of the 3rd party experts and contractors could not have been known at the relevant times, the question to be addressed is whether there was adequate oversight put in place based on the information known to the parties at the relevant points in time.

295. Over the course of the Inquiry there was much evidence lead in respect to the oversight measures which were put in place and it is the position of the Group 2003 –2015 that those measures that were implemented should be recognized to the appropriate degree. The fact that cost overruns and delays where incurred does not equate to the fact that insufficient oversight was put in place. It is amiss to equate one to the other and the evidence of the Commissions own expert Dr. George Jergeas confirmed this when he stated, that **“there is only one thing certain about a cost estimate: It will be wrong!!!”**²⁵⁵

296. A number of the Group 2003-2015 gave evidence and spoke to the measures of oversight that were instituted over the years related to the Project. While it would be impractical to reference each and every discussion in this regard, suffice it to say that there was an abundance of evidence as to the breadth of measures undertaken and implemented in this regard. For purposes of illustration it may be best to list out for the benefit of the Commissioner the oversight measures that were actually put in place to address this very issue as have been previously identified. These measures were outlined in the evidence of

²⁵³ Hearing Transcript, July 3, 2019, at page 3.

²⁵⁴ Hearing Transcript, February 26, 2019, at pages 4-5.

²⁵⁵ Exhibit P-04102, at page 63.

former Minister of Natural Resources and Premier Tom Marshall in his evidence before the Commission. The levels of oversight that were shown to exist were as follows:

- 1) **GNL Officials within the Department Natural Resources** – Natural Resources was the lead department on the Muskrat Falls file, and was the primary point of contact for dealings with Nalcor. Natural Resources was in constant contact with Nalcor as to issues relating to the Project, most importantly, they required Nalcor to present project updates to the Department and Cabinet. This process has been consistent with all Administrations to the date of writing. Furthermore, the Department was responsible for sending the Reference Question to the PUB, commissioned MHI's independent review of the DG3 numbers and undertook and produced numerous internal papers that were released publicly prior to sanction.
- 2) **GNL officials within the Departments of Finance** – Finance was involved primarily in confirming that the Province was in position to fund project costs including attending meetings in Toronto and New York with Nalcor, and officials from the Department also assisted with the Federal Loan Guarantee process.
- 3) **GNL officials within the Department of Justice** – Officials from the Department of Justice were involved in providing legal opinions on crucial legislative and policy issues, particularly as it relates to Water Rights Management and surrounding issues of the Churchill River. The Department of Justice also retained expert outside legal counsel when required.
- 4) **The Premier's Office** – Given the importance of the Muskrat Falls Project to the people of Newfoundland and Labrador, the Premier of the Province was always involved in the Project to varying degrees. At a minimum, this involved regular briefings from Nalcor executives, particularly CEO Ed Martin. These meetings provided the opportunity to ask questions and to challenge the information being presented.

- 5) **Westney Consulting** – Were retained as Nalcor’s independent risk advisor dating back as early as the 2007 subsequent to the EOI process. Westney provided risk analysis throughout the course of the Project.
- 6) **SNC Lavalin** – Were retained by Nalcor as the Engineering, Procurement and Construction Management (EPCM) contractor specifically for their significant experience in hydro-electric experience. SNC Lavalin also completed approximately 70% of the base estimate. Despite eventually being removed as the EPCM contractor, SNC remained on the Project in their engineering capacity.
- 7) **Validation Estimating** – Completed an independent third party review of Nalcor’s LCP Gate 3 capex estimate.
- 8) **Manitoba Hydro International** – MHI were retained by the PUB as their independent expert consultant for review of the Reference Question. MHI submitted a report to the PUB which determined that the Interconnected Island Option represented “the least-cost option of the two alternatives, when considered together with the underlying assumptions and inputs provided by Nalcor.”²⁵⁶ Subsequent to the PUB failing to render a decision, MHI were retained by GNL to provide an independent third party review of the work completed by Nalcor since DG2 in preparation for DG3 to determine which option is the least cost. MHI recommended that Nalcor pursue the Interconnected Island Option “as the least cost alternative to meet future generation requirements to meet the expected electrical load in Newfoundland and Labrador.”²⁵⁷
- 9) **Check Estimators (John Mulcahy and Paul Hewitt)** – Were engaged by Nalcor to complete check estimates of the DG3 base cost estimate.
- 10) **Nalcor’s Project Management Team (PMT)** – Nalcor assembled a team of experienced project managers, including those with significant experience in oil

²⁵⁶ Exhibit P-00048, at page 21.

²⁵⁷ Exhibit P-00058, at page 12.

and gas and hydroelectric megaprojects. While much has been made of an apparent lack of hydroelectric experience within the PMT, there were several individuals who did bring such a background.²⁵⁸ Furthermore, Pelino Colaiacovo, an expert witness at this Inquiry, opined that such experience would not be essential and that project management skills, particularly oil and gas, are transferable across project types.²⁵⁹ Furthermore, it should be noted that the core of the PMT remains on the Project to the present date and current Nalcor CEO Stan Marshall has stated that if he was to undertake a similar project, he would have full confidence in utilizing the same PMT.²⁶⁰

- 11) **Nalcor's Executive Team** – Nalcor's executive included individuals with enormous mega project management experience, including Edmund Martin/Stam Marshall (former/current CEO), Derrick Sturge (CFO), Gilbert Bennett (VP) and Paul Harrington (Director).
- 12) **Nalcor's Board of Directors** – Nalcor was created pursuant to the Energy Corporation Act, which also established a Board of Directors for the "exercise and discharge of the powers and duties of the corporation." Members are appointed to the Board by the Lieutenant-Governor in Council. While issues have been acknowledged relating to the composition of the Board at certain periods, it should be noted that this did improve over time and measures were put in place to strengthen the Board.
- 13) **Nalcor's Internal and External Auditors** – Nalcor's internal audit department which provides assurance mechanisms including risk management and internal control processes. Nalcor is also audited annually by Deloitte LLP and their findings are included in Nalcor's annual report.

²⁵⁸ Exhibit P-01677, at page 90.

²⁵⁹ Hearing Transcript, July 18, 2019, at page 58.

²⁶⁰ Hearing Transcript, June 28, 2019, at page 43.

- 14) **Federal Government Independent Engineer** – MWH Global was retained by the Federal Government to act as the Independent Engineer for the Project as part of the Federal Loan Guarantee process. Nik Argirov acted in this capacity and reviewed Nalcor's cost and schedule estimates. The Oversight Committee later gained access to the IE and the OC would update Cabinet on the status of the IE's findings.
- 15) **Auditor General of Newfoundland and Labrador** – The Auditor General of Newfoundland and Labrador is the independent Legislative Auditor of Government, and is permitted to audit any agency of the Crown.
- 16) **Muskrat Falls Oversight Committee** – In March of 2014, then Premier Tom Marshall established the Oversight Committee (OC) to strengthen and formalize the existing oversight mechanisms addressed above. It is comprised of senior officials from Executive Council and the Departments of Finance, Natural Resources and Justice. The OC previously retained Ernst & Young to act as the OC's independent consultant to assist in developing their scope of work, advise on best practices and assist in review of project documents outside of the expertise of the OC.

297. It is worthy of note that the Commission's own expert Dr. Guy Holburn, who is a recognised expert in the field of the governance of crown corporations gave evidence as to the acceptability of the above measures as it relates to oversight. In cross-examination by counsel for the Group 2003-2015, Dr. Holburn when questioned on this issue stated as follows:

MR. T. WILLIAMS: Okay. So in the example of Nalcor as it pertains to this project, there were a number of different structures within the organization as it pertained to the project itself. For example, there would have been a project management team established for which – would have had direct involvement with contractors, and would that be seen – in terms of identifying an element of oversight – would a project management team,

which was comprised of senior officials within the organization, be seen an element of – as an element of oversight?

DR. HOLBURN: Yes.

So perhaps we could turn to the slide where I provide that example of internal oversight for the Darlington Refurbishment committee, because I think that is a straight – exactly that point. So this would be slide 17 in this presentation.

MR. T. WILLIAMS: Okay.

DR. HOLBURN: So this shows – this is an excerpt from the report by the Auditor General of Ontario and this is showing the internal oversight governance mechanisms. So a governance mechanism provides that oversight and the bottom where it says OPG's Project Senior Management Team, that would be the internal – one internal governance mechanism to oversee the project.

MR. T. WILLIAMS: Okay.

And so I guess some of these may be readily – or obvious from their names, but obviously the corporate executive structure which – for which the project management team would be responsible to reporting would also be seen as an element of oversight.

DR. HOLBURN: That's right. And that would – that would be equivalent to the second bar here in this slide, which is the refurbishment construction review board.

This is an executive level committee within the organization that's overseeing the project. And the top one is the oversight mechanism within the board of directors.

MR. T. WILLIAMS: Okay. And if we could continue –

DR. HOLBURN: Mm-hmm.

MR. T. WILLIAMS: – along that lines, the – obviously, the corporate executive team would be responsible then to a board of directors which, again, would be another level of oversight.

DR. HOLBURN: That's correct.

MR. T. WILLIAMS: Okay.

And in terms of auditors, we have three examples of an audit function: We have an internal audit function –

DR. HOLBURN: Mm-hmm.

MR. T. WILLIAMS: – we have an external audit function and then we have – as you reference in a number of provinces – an AG unit, Auditor General function that has – so each of those three auditor functions would also provide a level of oversight?

DR. HOLBURN: That's correct.

MR. T. WILLIAMS: Then the corporate – the Crown corporation is responsible for answering while to government as the shareholder as a whole, it answers to a department. In this particular instance, it would be

the Department of Natural Resources and its minister, who in turn, you know, responds to – answers to government.

That, too, would be seen as a level of oversight?

DR. HOLBURN: This is a component of the external oversight.

The minister is responsible to the legislature, and the legislature typically would have a committee that is able to exert oversight over the corporation as well.

MR. T. WILLIAMS: Okay.

And the final aspect I'd like to identify would be – in this particular instance, due to financing obligations, there was an independent engineer that had been assigned to the project who was involved with respect to the financial package for the federal government, but on a continual basis in terms of monitoring the project as it moved along.

Would that also be seen as an element of oversight?

DR. HOLBURN: If there is external expertise being brought in to explicitly evaluate the project, then that is one element of oversight. And one of the questions would be to whom is that individual reporting?

MR. T. WILLIAMS: Okay, fine. Thank you.²⁶¹

298. Finally, it should be noted that Mel Cappe, an extremely experienced federal civil servant, provided evidence that if the federal government was proceeding with a similar project and lacked the internal expertise to carry out the necessary risk and related analysis, the Federal Government would be expected to assign a lead department which would

²⁶¹ Hearing Transcript, February 26, 2019, at pages 4-5.

collaborate with any other overlapping departments, and would then go out and hire any expertise required. Furthermore, Mr. Cappe opined that if the federal government was using one of its Crown Corporations to deliver the project, there would be no requirement for Government or the public service to check or complete a review of this documentation, but would provide a challenge function. Group 2003-2015 submits that this arrangement is quite similar to the approach that was taken to the Muskrat Falls Project. Mr. Cappe's comments in response to the Commissioner's question was as follows:

“THE COMMISSIONER: I think I know how you're going to answer this but I need to ask the question anyway. So let's take this example a little bit further and let's say that the project that's chosen, the federal government decides that it's going to use one of its crown corporations to deliver the project. Would there be any requirement then by government, public service or whatever if you were being provided with issues – with numbers related to risk and things of that nature – would there be any requirement to check or do some sort of review of what you're being given by your Crown Corporation?”

MR. CAPPE: ...I think that, if I understand the question you would have your officials in the department play a challenge role on the corporation. I spent some time talking about the role of treasury board and finance...but there is a role for those central agencies to play as a challenge function to the proponent department...the role of the finance department in worrying about the contingent liabilities and the treasury board in terms of the management preoccupations, they're playing a role vis-a-vie the department of natural resources or NR Can in the federal context, and they're pushing back and they're being demanding.”²⁶²

299. To the extent that Government was reasonably able to implement, it is respectfully submitted that there was more than sufficient elements of oversight in place at the relevant times. The mere fact that there exists issues with respect to various components of the

²⁶² Hearing Testimony, July 26, 2019.

Project as it relates to scheduling and costs does not demonstrate a failure of oversight, as it has been clearly established that the same arose from a myriad of sources including third party contractors and suppliers. The existence of additional oversight measures would not conclusively have eliminated the same. To reach a finding that there was insufficient oversight would be unfounded in that while there may have existed some weaknesses in elements of its oversight provided, there was an abundance of measures instituted. While there exists room for betterment in established documenting and reporting processes, there exists no one solution for the areas of vulnerability that have been identified. Furthermore there could be more attention provided to supports for the Board of Directors. It is not reasonable in the circumstances to conclude that the mere presence of process deficiencies is as result of lack of oversight. If such a solution was so easily attainable and readily apparent, then such systems would exist such that the inherent features of mega project development, being cost overruns and scheduling delays, would have long been eliminated and such is not the case.

SECTION 7: CONCLUSIONS

300. In attempting to draw conclusions in respect to this Inquiry one is torn between the legal obligations of the Commissioner to stay within the bounds of addressing the issues raised in the Terms of Reference and the balancing act of weighing out many of the ancillary matters which arose during the course of the 139 days the Inquiry heard evidence. While it is easy to raise the argument that much of the evidence may be said to have dealt with ancillary matters and not directly pertinent to the Terms of Reference, it must also be considered that such evidence can be seen to be contextual in nature and adds meaning to the evidence that may not otherwise be applied and considered in regard to its applicability to the Terms of Reference.

301. As stated above and as noted by Supreme Court of Canada Justice Cory J., two of the main purposes of the public inquiry are to uncover **“the truth” and to help “restore public confidence not only in the institution or situation investigated but also the process of government as a whole.”**²⁶³ While the Commissioner has the very onerous task of determining what constitutes the truth in any given situation and apportioning appropriate weight and credibility to the various witnesses, the latter objective is also difficult to achieve, but no less important.

302. While it is not our intention to make pronouncement on what constitutes the truth in all the various scenarios which arose during the course of the evidence as that will be left to the Commissioner to determine, the Group 2003-2015 does wish to address in some detail the latter point as to the public’s confidence in the system as whole. Before embarking on such an endeavor it should be stated at the outset that the objective here is not one of convincing the Commissioner or the public at large that all the various decisions of Government during the course of the Project were always correct, now given the benefit of hindsight. The genuine objective for which the Group 2003-2015 feels was borne out consistently throughout the course of this Inquiry was establishing that, at all material times, Government acted in an honest and responsible manner having given due consideration to the relevant

²⁶³263 Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy) [1995 S.C.J. No. 36, at para 62.

factors and information available to them at the time and reached decisions in reasonable and prudent fashion in the best interests of the Province as a whole given both short and long term considerations.

303. It is not reasonable at this stage to think that it is possible to review in detail all the facts which support this proposition given the over 11 months of evidence in relation to aspects of the same, but it is argued that there is a preponderance of evidence which does support this position. It is in this vein that the Group 2003-2015 feels strongly that the early history of the Project and the preliminary considerations that were undertaken by Government were so important in establishing the due diligence that was undertaken prior to sanctioning the Project. Additionally the early history of the Churchill River as addressed by Dr. Jason Churchill is also of critical importance as not only does it outline some of the historic obstacles that were encountered by the Province in dealing with the Province of Quebec, but it is useful in dispelling the suggestion that the “Quebec option” was dismissed without due consideration. This position was also supported by witnesses Danny Williams, Kathy Dunderdale, Robert Thompson and Edmund Martin who all confirmed that this option was not only considered and reviewed, but that the appropriate due diligence was given to the same. Independent of these parties, the evidence of Commission Expert Pelino Colaiacovo also suggested that a deal with Hydro Quebec would not have been a realistic possibility.²⁶⁴

304. In addition, the evidence which was adduced regarding the efforts of GNL between the years 2003 and 2012 confirms and dismisses the unfounded assertions that the Muskrat Falls Project was some form of “legacy project” that was intended to proceed “at all costs.” The Commissioner having heard an abundance of evidence to the contrary, particularly relating to the extensive assessment and evaluation process that was ongoing right up to the point of sanction, it is respectfully submitted, should confirm that the suggestion that there was no element of legitimacy to such allegations. Perhaps the most candid testimony in this regard was that of then Minister of Natural Resources Jerome Kennedy who told the anecdotal story of when he was on his way to hockey in early December of 2012 when he received a call from then Premier Kathy Dunderdale who indicated **the Project was off**

²⁶⁴ Hearing Transcript, July 17, 2019, at pages 51-53.

because of a perceived insurmountable problems relating to the Federal Loan Guarantee.²⁶⁵ While the same did not come to fruition, it is indicative of the position of Government at this late stage, that the Project was not a *fait accompli* until all preconditions were met.

305. There has been much discussion as to the efforts that were undertaken by GNL in not only evaluating the various alternative options that were available to them, but in providing oversight once such determination was made. It is stated without any uncertainty that it is the position of the Group 2003-2015 that based upon the information provided to them by their own Crown Corporation NL Hydro, it was not a matter of whether or not there was a need for further electrical generation, as this need was unquestionably confirmed, but it was a matter how much and in what form it would take. It is this premise that forms the foundation for the efforts that were put in place in regard to proceeding with the Project and the oversight that would be undertaken in the years to come.

306. The thorough and complex assessment process that was undertaken by GNL and their Crown Corporation, Nalcor Energy in arriving at a final decision to sanction the Project was one that extended over a number of years. It is perhaps the detailed review and analysis of these various components of the Project which has disclosed that most pertinent deficiencies that were encountered in both the planning and execution stages of the Project. While much criticism was levied at GNL for relying steadfastly on the information provided to them by Nalcor, it was repeatedly confirmed that GNL did not have the in house capacity nor skill set to undertake such reviews on their own initiative. In the case of reviews of such fundamental components as the base cost estimate, GNL did retain and rely on the opinion of experts such as Manitoba Hydro International to supply objective critique of the same. As to the interference or involvement of Nalcor in this process, this is something which only came to light through the Inquiry. An area for review moving forward should involve the level and manner of communication between crown corporations and Government officials (elected and non-elected). The deficiencies identified throughout the course of this Inquiry are cause for reflection and improvements would undoubtedly be beneficial, including any Projects undertaken moving forward. Reporting mechanisms and requirements need to be

²⁶⁵ Hearing Transcript, December 4, 2018, at page 30.

better identified and a system of checks and balances should be more clearly defined in policy.

307. The comments of expert Mr. Mel Cappe, OC, who was called as a witness by the Commission in the field of Governance could be beneficial to this extent. Mr. Cappe spoke to models and principles pertaining to governance as they relate to government entities, as well as a comparative approach with Crown Corporations. While not detailing the specifics of such models, Mr. Cappe's evidence did highlight the benefits which GNL could achieve by undertaking such a review for the benefit of establishing the relationships as between Government and its Crown Corporations.²⁶⁶

308. While GNL took numerous efforts to ensure oversight of the Project, some of the more latent defects would not have been identified through this process and while the hindsight review has disclosed the same, such obstacles were not readily identifiable. Numerous Group 2003-2015 witnesses spoke to the measures of oversight that were implemented and it is the position of the Group 2003-2015 as supported by the current Nalcor CEO Stan Marshall, that this project had an abundance of oversight provisions in place.

309. It should be noted that the mere presence of oversight mechanisms would not have eliminated many of the substantive difficulties that were encountered during the planning and construction phases of the Muskrat Falls Project. The significant issues that were encountered involving SNC Lavalin and Astaldi Canada Inc., two of the most important contractors on the Project, could not have been foreseen nor prevented by mere mechanisms of oversight. As is readily acknowledged by the current CEO Stan Marshall, these obstacles contributed in a significant way to where the Project stands today.

310. In respect to issues pertaining to the PUB it is the position of the Group 2003-2015 that they were wholly within their right to proceed in the manner in which they did in this regard for the reasons outlined in section 4(b) above. It must be remembered that while not obligated to do so, Government added an additional measure of oversight when they sent a reference question of the least cost option before the PUB when encouraged to do so by

²⁶⁶ Hearing Testimony, July 26, 2019.

critics of the Project. While much has been made pertaining to the time allotted for completion of the report, it must be noted that the PUB's own expert consultant MHI had sufficient time in which to file report as did the Consumer Advocate, and the Commission's own expert Pelino Colaiacovo also indicated that he felt that there was no excuse for the PUB not rendering a decision. Failure to do so was a dereliction of the responsibilities they were entrusted with.

311. It is submitted that throughout the Inquiry proceeding the evidence put forth by the Group 2003-2015 was not only forthright and consistent, but was credible and substantially supported by other independent witnesses. It has been consistent theme throughout the Inquiry by the Group 2003-2015 that when reviewing and assessing the Muskrat Falls Project as a whole, it cannot be done in isolation and that the long term objectives must also be considered, as well as well as the short term consequences. The people of the Province demand and have a right to know not only what this Project will mean to them over the next 2-5 years, but also what it will mean to their children and grandchildren into the future. The Muskrat Falls Project is the single biggest financial endeavor ever undertaken by the Province of Newfoundland and Labrador and has a shelf life of up to approximately 100 years, to deny this reality is to deny the future.

312. While it is appreciated that the Commissioner is governed by the Terms of Reference it is respectively submitted that it is within his mandate to reach certain conclusions when making recommendations to GNL going forward. There is more than a pure "determination role" for the Commissioner in fulfilling his function as Commissioner in this Inquiry. Commission witness Mr. Mel Cappe stated facetiously in his evidence that he knew of Inquiries that **"were looking for bad, but found good."**²⁶⁷ While stated in a light hearted tone it was a message that should not be lost.

313. While much has been alluded to from a political perspective from many parties which the Commissioner need not pay heed to, the reality is that the Muskrat Falls Project will play a significant role in the financial future of this province and will provide benefits far into the

²⁶⁷ Hearing Testimony, July 26, 2019.

future. As indicated by the Commission's own expert Pelino Colaiacovo towards the close of the proceedings:

“MR. COLAIACOVO: Well, I think the Muskrat Falls plan does do what it intended to do in terms of getting access to market, right? The route to market was negotiated and it was guaranteed, right? So there is access to market. Now, the wire that goes from Newfoundland to Nova Scotia is 500 megawatts, so it's skinnier than you would necessarily want, but it is a connection to market. And there's already trading going on across that connection even before the Muskrat Falls is finished. So there will be trading. I think the design does what it promised to do, and, you know, Nalcor will be able to trade across that connection into market.”²⁶⁸

[...]

MR. COLAIACOVO: ...connection from Churchill Falls to those markets is something that is going to have real value for a very very long time”²⁶⁹

314. Furthermore, Dr. George Jergeas, an expert in the field of project management called by the Commission, stressed that the true value of the Muskrat Falls Project should be measured in the future:

“ MR. T. WILLIAMS: So, to the naysayers, who at this point in time or in the past have said we should never do that project, what would your response be?

DR. JERGEAS: I think five year, 10 years from now, 20 years from now, say, wow, that was probably a good decision.”²⁷⁰

²⁶⁸ Hearing Transcript, July 17, 2019, at page 42.

²⁶⁹ Hearing Transcript, July 18, 2019, at page 54.

²⁷⁰ Hearing Transcript, June 19, at page 55.

315. As acknowledged by current Nalcor Chair Brendan Paddick, it is time to turn the page and get behind a project that CEO Stan Marshall is quoted as saying “...**I think any mega-project in the world would be happy to be where we are.**”²⁷¹ Furthermore, as stated by Mr. Paddick:

MR. T. WILLIAMS: And what’s your outlook for the project, both short and long term?

MR. PADDICK: I mean I think we’re going to finish strong and, you know, if there was one sort of take-away in this it’s – you know, it’s what I’ll call a self-fulfilling prophecy. And, you know, I’m a firm believer that people get up in the morning and when they’re driving to work they think about what they got to do today, what’s my timeline to do it, how much money do I have to spend to do it and I’ve got to do it diligently. They don’t do the opposite. People don’t get up in the morning, get a Starbucks and get in the car and go how can I screw up today? That’s not human nature, right? Human nature is I’m going to do a good job.

But, you know, if you’re – if it gets to a point where, you know, a transport truck blows over in Wreckhouse and that’s Nalcor’s fault, or it’s raining on May 24th weekend, that’s Nalcor’s fault, and nobody wants Nalcor to succeed for whatever reason –political reasons or special interest groups or whatever – guess what? It’s not going to succeed. And it’s really – if anything comes out of this Commission, hopefully it’s just – it’s a chance to start over and everybody put the jersey on and want Nalcor to get back to what it used to be, which was a very respected part of the community and a very important part of the community.

So I think if we can get there, so that everybody actually is cheering for you instead of trying to cut the legs out from under you, and people can go to work again and people will put on their résumé that they worked at Nalcor

²⁷¹ NTV News Story, “We’ve Turned a corner on Muskrat Falls, Stan Marshall says at Nalcor AGM”, April 19, 2018.

because right now they're wondering whether it's better to have a two-year holiday in my résumé than put I worked at Nalcor – like, that's where we've got to get, right?

And I think once we're all on the same bus, cheering for the same outcome, we'll – we can turn this around and it'll prove to be a project that – you know, you look at the Upper Churchill, however many years in we are now, 50 or 60 million – 50 or 60 years and we've put in place an asset management program to ensure that's got a long life.

Yes, there's all kinds of naysayers or people with opinions on whether it was a good deal or a bad deal and rewriting history as to how it came about, but hopefully the history on this one can be that we built an asset to be very proud of, that made us self-sufficient for centuries to come, that positioned us to be in a position to export power, control our own destiny. We've had billions of dollars of economic benefit flow to the province and it should continue to flow to the province, but we all got to make – we all want – we all got to want it to work. And if – you know, that's the main message. Like, you know, we – if nobody wants this thing to succeed, it hasn't got a chance to succeed.”²⁷²

316. In closing much can be gained from the extensive exercise that has been undertaken by this Inquiry. While the Commissioner will be tasked with making conclusions and recommendation arising out of the volume of evidence that was heard, it has become evident there could be improvements made in the reporting and communication protocols that exist as between the executive levels of Crown Corporations, their Board of Directors and the various levels of Government. As part of any such exercise Government would need to review its practice in terms of the appointment of Boards of Directors to ensure that not only is there a sufficient compliment of members, but that the appropriate level of necessary expertise and accompanying benefits are provided. In furtherance of this a clear and delineated line of communication and reporting should be established as between all three

²⁷² Hearing Transcript, June 18, 2019, at page 44.

levels, so as to form a system of checks and balances. When accompanied with a mandated document recording system this allows for an objective means in which to review performance and provide qualitative analysis of attainable goals and success.

317. While there are undoubtedly lessons to be learned as disclosed through the Inquiry itself, full consideration of the Muskrat Falls Project mandates that it be reviewed as a whole, not in isolation to any one moment or any point in time. While the Commissioner is mandated to address the Terms of Reference as drafted and report as required, it should be noted that the full story of the Muskrat Falls Project has not yet be written.

ALL OF WHICH is respectfully submitted for consideration on behalf of Former Provincial Government Officials (2003-2015).

DATED AT the City of St. John's, in the Province of Newfoundland and Labrador, this 9th day of August, 2019.

A handwritten signature in blue ink, reading "Thomas E. Williams Q.C.", with a horizontal line underneath. The signature is stylized and cursive.

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