

Commission of Inquiry Respecting the Muskrat Falls Project

**FINAL SUMMATION ON BEHALF OF
GRAND RIVERKEEPER LABRADOR INC. AND LABRADOR LAND PROTECTORS**

AUGUST 9, 2019

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Introduction

- [1] Grand Riverkeeper Labrador (“GRK”) and Labrador Land Protectors (“LLP”) were granted limited standing at this Commission of Inquiry into the Muskrat Falls Project in a Decision by Commissioner Justice LeBlanc on April 16, 2018, which was affirmed in a decision dated May 16, 2018. These submissions are made pursuant to the request of the Commissioner.
- [2] The aim of these summations is to provide the Commission with the position of the GRK and LLP and respond to the following:
 - (i) Identify significant facts
 - (ii) Identify significant issues
 - (iii) Provide recommendations that address the issues
- [3] Following an overview of the background of the Grand Riverkeeper Labrador and Labrador Land Protectors, this submission will cover the following themes which have emerged from the evidence:
 - (i) Appearance of consultation, but not binding
 - (ii) Focus on exploiting lower Churchill River clouded vision
 - (iii) Commitments made but not monitored or enforced
 - (iv) Invisibility of Labradorians and local impacts
- [4] GRK repeats its submissions from phase 1 and states that provincial and federal politicians have sacrificed the sustainability of the province’s natural capital in exchange for short-term political gains, and economic gains for the province that may never be realized. When the Project is completed, the waters of the Grand River will be contaminated with methylmercury, traditional

trapping and portage routes will be submerged, winter travel will be more perilous, the people downstream will live in fear of the failure of the North Spur and the fish, waterfowl, mammals and flora that relied on the Grand River will be displaced, depleted or extinct. Additionally, the benefits that the Joint Review Panel “JRP” promised would largely depend on the re-investment of revenues from the project into Labrador: a vision that will never come to fruition because the project cost has escalated so significantly in relation to projected revenue.

Background of Grand Riverkeeper Labrador Inc. and Labrador Land Protectors

- [5] In 1998 when the former Premier of Newfoundland and Labrador, Brian Tobin and the Premier of Quebec, Lucien Bouchard, met and reached an agreement on the Gull Island and Muskrat Falls Hydroelectric project (referred to then as the Lower Churchill Project), a group of concerned citizens with diverse backgrounds came together in Happy Valley-Goose Bay to discuss what could be done about what they felt was a major environmental and cultural threat to the Grand (a.k.a. Churchill) River. The group included Elders, local knowledge keepers and members of both Inuit communities, Nunatsiavut and NunatuKavut, and from Sheshatshiu Innu First Nation, as well as settler people from the surrounding communities. (P-352)
- [6] Despite the fact that the Tobin/ Bouchard proposal did not come to fruition, the concerned citizens group resolved during the next few years to learn what they could about hydroelectric dams. In particular, they researched about the ecosystem and the Grand River watershed, as well as the environmental, social and cultural impacts of any future natural resource and hydro projects.
- [7] With very little capacity and no funds in the beginning, the group did their best to bring in new members and to share and disseminate information about their research, including the negative effects of dams as a whole, and particularly any dam that might be built on the Grand River. At some point, the group began to call themselves the Friends of the Grand River and later, when some of the Innu members joined the Innu word Mista Shipu (Great or Big River) was added.

- [8] The Friends of the Grand River, Mista Shipu (“**FGRMS**”) shared their knowledge with members of the community through every possible means including: e-mail, meetings, presentations to local schools, presentations to the Labrador Métis Nation (now NunatuKavut Community Council), presentations to people in St. John’s with help from the Newfoundland and Labrador Environment Network and outreach to various experts for help and information. The FGRMS maintained that the environment, social and cultural consequences were paramount, but feared that in the end, financial incentives would win out.
- [9] By that time, the group had set out its goals as:
- (i) Protecting the river and its watershed,
 - (ii) The promotion of other types of renewable energy and sustainable economic development that would provide local jobs while maintaining the natural flow of the river, and
 - (iii) Sharing the beauty of the river that we enjoyed as paddlers on the river by promoting annual trips from Churchill Falls to Muskrat Falls and sharing photos of the upper river with as many people as possible.
- [10] In 2005, FGRMS became a member of the Waterkeepers Alliance and were incorporated federally as Grand Riverkeeper Labrador, Inc. (“**GRK**”), with the mandate to **maintain the ecological integrity of Mista Shipu, the Grand River.**
- [11] GRK shared its knowledge with the broader public through open information and education sessions, from a session co-hosted with Sierra Club of Canada in 2007 through to participation in two Muskrat Falls Symposiums in 2018, on the ground actions, letters to the editor and much more. GRK brought forward the perspective of many Labradorians that as citizens of the

affected communities, they have a unique understanding of the risks and impacts of the projects, from the social and economic impacts on the community (such as increased costs of housing, food and fuel, increased income disparity), to the differentiated impacts on Indigenous and Settler people, the spiritual and cultural losses inflicted on Indigenous people and the environmental impacts. These concerns were brought forward in the course of the Energy Plan, the Joint Review Panel, to the Public Utility Board and to Nalcor as well as local, provincial and federal officials. (P-352)

- [12] Following the publication in 2015 of studies on potential methylmercury impacts in the region, many citizens including GRK members began engaging in direct action to stop the construction of Muskrat Falls. These concerned citizens were involved in direct action and the group merged into what Justin Brake of The Independent, called the “**Labrador Land Protectors**”.
- [13] Many Labrador Land Protectors have faced and continue to face both civil and criminal prosecution for their efforts to protect the river ecosystem, its inhabitants and all those who rely upon it from the harmful impacts of the project, including methylmercury and flooding as a result of dam failure. In addition, the project has caused deep division in the community, resulting in reputational damage to those who have dared to challenge it.

Appearance of consultation to pacify and distract

- [14] Throughout the colonial history of Labrador, successive colonial governments have exploited the bounty of Labrador, taking out the spoils of their plunder and leaving Labradorians to bear the consequences. Historically this has been done without regard for the Indigenous or local people.

- [15] When the Lower Churchill project resurfaced in the early 2000s, it was claimed that this project would be done differently, that Indigenous people would be meaningfully consulted, and environmental protection assured. However, the result was perhaps more insidious. GRK found public engagement events to be nothing more than information sessions lacking in opportunity for meaningful input: little more than token efforts to pacify the people of Labrador and keep them distracted until it was too late to stop the project.
- [16] Local residents, Indigenous governments and environmental groups took every opportunity to engage in the environmental assessment process in good faith at every step along the way. They expended time, energy and their very limited resources to ensure that relevant information was put before the Joint Review Panel and hoped that in this instance the preservation of the environment and protection of Labradorians were paramount and that those principles would prevail.
- [17] Despite sincere, good faith engagement at every step throughout the sanctioning process, the Project was approved in the face of credible evidence of the significant harm the Project would inflict on the Grand River and its environs. At this point in the process, unfortunately, hope has been replaced by despair, anger, frustration, loss of trust in our local, provincial and federal politicians, and a complete loss of trust in the Environmental Assessment process that the people had worked so hard to understand and participate in.

Environmental Assessment Process - Independent, objective, in-depth

- [18] The joint review process is designed to provide a robust, in-depth review of the costs and benefits of a proposed project that is independent, objective and at arms-length from both proponent and government. Throughout the Canadian legal system there exist a myriad of quasi-judicial administrative decision-making bodies, which operate with varying degrees of authority and independence. While the joint review panel has subpoena powers, receives written and oral evidence, conducts hearings and makes findings, the panel is limited to making recommendations and does not have the authority to make binding decisions. As a result, the ultimate decision-maker is not bound to make evidence-based decisions, but rather free to make political decisions.
- [19] It is clearly the intention of the environmental assessment acts and regulations that the evidentiary foundation and recommendations flowing from an environmental assessment (“EA”) remain independent of the proponent and the Crown. Dr. Squires describes this arms-length process: “the environmental assessment process allows for some of that distance between the proponent and the regulator, in this situation.” (Vol 58. P. 25, June 20, 2019, Dr. Squires)

Lower Churchill Generation Project – Joint Review Panel

- [20] GRK received funding and participated in the Environmental Impact Statement (“EIS”) Guidelines, the EIS and the Joint Review Panel. It retained experts, assisted community members in sharing their views, reviewed numerous reports and attended each day of the public hearings, presenting multiple times. A more detailed description of GRK involvement in this process is set out in Exhibit P-352.

[21] The Joint Review Panel report validated many of GRK's concerns. The report found the underlying justification for the Project to be inadequate and questioned the lack of integrated resource planning and conservation and demand management measures, concluding:

“The Panel concluded that Nalcor's analysis, showing Muskrat Falls to be the best and least-cost way to meet domestic demand requirements, was inadequate and recommended a new, independent analysis based on economic, energy and environmental considerations. The analysis would address domestic demand projections, conservation and demand management, alternate on-Island energy sources, the role of power from Churchill Falls, Nalcor's cost estimates and assumptions with respect to its no-Project thermal option, the possible use of offshore gas as a fuel for the Holyrood thermal generating facility, cash flow projections for Muskrat Falls, and the implications for the province's ratepayers and regulatory systems.” (P-41, p. 13)

“Net benefits to Labrador are even more dependent on a large-scale mitigation and adaptive management effort with respect to adverse social and biophysical effects expected for a long time to come. [...] The residual environmental effect would still be negative for Labrador. [...] The full Project [i.e. both Muskrat and Gull Island] would likely deliver net benefits to the Province. Whether it would also deliver net benefits to Labrador depends on whether enough of the revenues generated from the Project are re-invested in Labrador to ensure a net benefit. If Muskrat Falls only proceeds on the basis that it would be needed to meet Island energy needs, then it is much less clear that the Project will result in net benefits to the province as a whole or to Labrador.” (P-41, p. 275)

[22] It highlighted adverse impacts on the local community, such as effects on housing, inflation, loss of cultural sites and environmental impacts such as, loss of fish, riparian, wetland and terrestrial habitat, as well as potential adverse impacts, such as methylmercury contamination

and consumption advisories. The Panel concluded that Nalcor's approach to cumulative effects was "less than comprehensive" and that public participants "raised valid concerns that contributed to a broader understanding of the potential cumulative effects of the Project" (P-41, p. 267) and recommended a collaborative, regional assessment of effects of current and future developments in Labrador

[23] The Federal Court summarized the Panel's findings:

"Overall, the Panel determined that the Project was likely to have significant adverse effects in the areas of fish habitat and fish assemblage; terrestrial, wetland and riparian habitat; the Red Wine Mountain caribou herd; fishing and seal hunting in Lake Melville should consumption advisories be required; and culture and heritage (the "loss of the river") (Report page 269). It further identified that there was a range of potential benefits stemming from the Project."

[24] The Report noted that Nalcor failed to provide information requested by the JRP requests, or requests were not fulsomely responded to, and the government was aware of these concerns:

MR. KENNEDY: No, I certainly wouldn't have used that term. I would have – there were issues and concerns that I had stemming from my reading of the environmental assessment or the Joint Review Panel report. And reading Mr. Wells' letters I certainly had concerns and I had concerns from a particular meeting that took place in ... And, again, Commissioner, some – this is, sometimes things stick with me. There was meeting on August 10, 2011, we were in the middle of the election, we were in Grand Bank. We were in the, I think it was the hotel – I don't know if it's called the motel Mortier.

MR. BUDDEN: Mmm.

MR. KENNEDY: And Mr. Bennett and Mr. Sturge were giving a presentation. And I asked Mr. Bennett a question and he didn't respond the way that I felt was appropriate. And I was not very pleased with that, so I then read the issue – I read in the environmental assessment panel – and, again, I don't know what page, Commissioner,

but there's a footnote where the Joint Review Panel asked for certain financial information. Nalcor wouldn't give it to them because they didn't feel it was necessary, or – again, I'm paraphrasing, Sir. (No. 51, p.74)

- [25] In addressing the Muskrat Falls component specifically, the JRP did not recommend that the project proceed, stating:

“The Panel concluded that if the recommended economic and alternatives studies show that there are alternative ways of meeting the electricity demands of the Island over the medium term in a manner that is economically viable and environmentally and socially responsible, **the Muskrat Falls portion of the Project should likely not be permitted to proceed for the purposes of meeting Island demand.** [emphasis added]” (P-41, p.33)

- [26] Despite the JRP's conclusion that Nalcor had not adequately demonstrated the need and justification for the project, nor adequately explored the alternatives, the government of Newfoundland and Labrador summarily dismissed this finding, responding:

“The Government of Newfoundland and Labrador does not accept this recommendation. The information provided by Nalcor to the JRP on the need, purpose and rationale for the Project provides an adequate basis to conclude that the interconnected Island alternative is the long-term, least cost option to meet domestic demand.” (P-51, p. 2)

Federal Court Appeal

- [27] Following the release of the JRP Report and prior to the Responses of the Government of Canada and Government of Newfoundland and Labrador, and release from EA, GRK together with Sierra Club of Canada and NunatuKavut Community Council appealed the JRP's Report. The Federal Court set out the steps of the EA process as follows:

- (i) Responsible authority determines whether *Canadian Environmental Assessment Act* (“CEAA”) applies and type of assessment
- (ii) The assessment is conducted
- (iii) Responsible authority determines whether, based on the assessment, the project should proceed
- (iv) Responsible authority gives notice to the public of its decision, mitigation measures are monitored, and potential follow-up programs are carried out. (P-1455, p. 5, para 11)

[28] Justice Near set out the purpose of environmental assessment as being: “is established to fulfill an information gathering and recommending function under CEAA. [...] The Panel does not render any final decisions with respect to the Project, nor does it make absolutely binding recommendations. Rather, its primary goal is to assist the [Responsible Authorities] – the ultimate decision-makers – in obtaining the information they need to make environmentally informed decisions.” (P-1455, p. 12, para 29).

[29] Justice Near goes on to review the mandate of the JRP as set out in the CEAA, the *Environmental Protection Act*, SNL 2002, cE-14.2, and the Terms of Reference and specifically as it pertains to the duty to consider the purpose, need and alternative means of carrying out the project. (P-1455, p. 17-23).

[30] In carrying out this mandate, the JRP “must make use of the production of evidence powers accorded to it under section 35 of CEAA to the full extent necessary to obtain and make available all information required for the conduct of its review” (P-1455, p. 23, para 49). To that end, Justice Near found:

“On the first part, the Applicants agree with the Panel’s determination that there was insufficient evidence on need and alternatives, but posit that, given the paucity of evidence, it should have both obtained, through the use of its subpoena powers and, then assessed the requisite information. However, there is no evidence provided by the Applicants that such information existed for the Panel to obtain and utilize. Further, I agree with the federal Respondents’ argument that the Panel’s subpoena power cannot be used to compel the creation of new information. [...] Further, the Panel clearly drew upon its expertise to conclude that the information it had on hand was sufficient to fulfill its mandate.” (P-1455, p. 26-27, paras. 56-570)

- [31] Thus, by failing to generate and prepare a robust analysis of the need and alternatives for the Projects, as well as cumulative effects of the project, Nalcor effectively circumvented the essential information gathering and assessment function of the environmental assessment process. The Federal Court found this to be reasonable given the “ongoing and dynamic nature of this large Project” (P-1455, p.30). However, GNL ultimately rejected the recommendation for further studies and reviews and as such, they were never produced.

Nalcor Influence

Political and Policy framework for Nalcor and LCP

- [32] As succinctly noted by the Federal Court, “Nalcor is mandated to implement the Province’s energy policy, and is governed in this regards by: the *Energy Corporation Act*, above; and the Province’s long-term energy policy, *Focusing Our Energy* (“the Energy Plan”); and the *Electrical Power Control Act, 1994*, SNL 1994, c E-5.1.” (P-1455, p.4)

- [33] The 2007 Energy Plan, “Focusing Our Energy” sets out the government’s clear intention to exploit Lower Churchill hydroelectric power:

“Both electrical systems in the province have adequate generation to meet the demand of existing customers. This demand is forecast to grow at a fairly steady, moderate pace over the next several years. This would result in a need for new sources of supply on the Island prior to 2015, and later in Labrador. As a result, **we plan to develop the Lower Churchill project**, which will include a transmission link between Labrador and the Island. [...]

“The Lower Churchill Hydroelectric Project is the most attractive undeveloped hydroelectric project in North America. Its two installations at Gull Island and Muskrat Falls will have a combined capacity of over 2,800 MW and can provide 16.7 Terawatt hours (TWh) of electricity per year – enough to power 1.5 million homes without a requirement for significant reservoir flooding. The project will more than double the amount of renewable electricity available to the province and will dramatically increase the amount of power available for economic development in Labrador and on the Island. The project is expected to have a capital cost of \$6 to \$9 billion, is expected to create over 10,000 person years of employment during its construction, and provide economic benefits for decades to come.

“To ensure this project has every opportunity to move forward, the Provincial Government is leading its development through the Energy Corporation. The Energy Corporation has established a comprehensive and clearly-defined project execution plan and will continue to advance the project on multiple fronts, including engineering and the environmental assessment process, analysis of market access options and market destinations, and a financing strategy. The project is targeting sanction in 2009, with in-service of Gull Island in 2015.” (P-29, p.39-40)

- [34] As noted in the Energy Plan, there was significant political will brought to bear on the plan to exploit the Lower Churchill. The government of the day was aware of evidence that hydroelectric projects have significant negative environmental impacts, however, there was a failure to acknowledge evidence that conflicted with their view, instead referring to the body

of knowledge/research regarding methylmercury and environmental impacts from megaprojects and hydroelectric reservoirs as mere “opinion”:

MS. URQUHART: “So, I put this to you as – I expect that this was in May – on May 15 of 2006. So, at the time there was a body of research around the negative environmental impacts of mega-dams. So, I would put it to you that you were aware of that body of research?

MR. D. WILLIAMS: No, I would not have been aware of the volume of research; but I knew there was an opinion out there to that effect, yeah, and this is one of them.

- [35] Former Premier Williams further attempts to minimize legitimate concerns surrounding impacts of the project:

MS. URQUHART: So, you were aware that there was a criticism or a counter, a counter opinion that was that these projects had negative environmental impacts.

MR. D. WILLIAMS: Yes, some negative environmental impacts.

MS. URQUHART: But that they had negative environmental impact?

MR. D. WILLIAMS: Nope.

- [36] Further, Mr. Williams confirmed that he was aware of methylmercury concerns prior to the Energy Plan, but did not believe it would be prohibitive, and that on balance, the benefits to the Island would outweigh the impacts on Labrador:

MR. D. WILLIAMS: And we’re also aware that there are methylmercury issues in reservoirs in hydroelectric projects and they have gone ahead anyway. (VOL 8. P.35)

- [37] The government and Nalcor failed to consider and adequately fund conservation and demand management:

MS. URQUHART: And I would go back – if we can go back to 00175 at page 15. Again, this was one of the points of communication – was people should reduce. So, I guess, I would ask you whether – when you speak about the capacity deficit, whether or not – I believe you said was coming ahead at 2015 – whether or not that included conservation and demand management?

MR. D. WILLIAMS: That would've not have been what I was anticipating when I said capacity deficit. (No. 9, p. 72)

Nalcor an arm of government, not arms-length

[38] As set out in the Energy Plan, the government of Newfoundland and Labrador established the energy corporation to prosecute the project. The relationship between Nalcor and government was described by Ms. Mullaley as follows:

MR. SIMMONS: Right, okay. So can you describe for me what your conception or understanding was of what Nalcor Energy was meant to be when it was created following the adoption of the Energy Plan?

MS. MULLALEY: *I guess, certainly, it was meant to be the delivery arm of government's policy directions, per se.*

MR. SIMMONS: Mm-hmm.

MS. MULLALEY: And, you know, that included all elements of the Energy Plan.

MR. SIMMONS: Okay. Can you give us any reason why it was elected to do that through a separate corporation rather than just have the Department of Natural Resources do it as an ordinary government department?

MS. MULLALEY: You know, I think that that wouldn't be uncommon to structure a corporation to do that. You know, there is a still a strong governance perspective that belongs with that. Of course, you're still accountable –

MR. SIMMONS: Certainly.

MS. MULLALEY: – to the – to government and to the ministers, but often it can be put out there to have focus on things, to – you know, sometimes there's different legislation, and some of that legislation, of course, was incorporated for the corporation in order for procurement and other avenues like that.

MR. SIMMONS: Mm-hmm. Because Nalcor Energy was meant to participate, I'm going to suggest, in some private-sector activities –

MS. MULLALEY: Mm-hmm.

MR. SIMMONS: – offshore oil being one of them –

MS. MULLALEY: Mm-hmm.

MR. SIMMONS: – *did that mean that it was the policy of government that Nalcor had to operate at a greater length from government than an ordinary department would and that it would have to have more autonomy from government than an ordinary department would?*

MS. MULLALEY: *I don't know if I really agree with that* – I guess, you know, no matter how you're setting your corporations up, they're still ultimately accountable to the minister

MR. SIMMONS: Mm-hmm.

MS. MULLALEY: – from that perspective. So, you know, I think the autonomy side is certainly, maybe from a governance perspective, it's often brought because to bear focus on certain issues and to execute delivery of things like the Energy Plan. (*emphasis added*)

[39] Former CEO of Nalcor, Mr. Martin described Nalcor as an “arm of government”:

MR. O'FLAHERTY: So, Mr. Martin, you went to great lengths to tell the Commissioner that, in fact, the structure of Nalcor was it is an arm of government. It's not an arm's-length part of government; it is government, isn't it?

MR. E. MARTIN: That's correct. (Vol 53, p.114, June 13, 2019, Edmund Martin)

[40] It was acknowledged from the outset within Nalcor that proper mitigation measures often make hydroelectric projects cost prohibitive. Mr. Humphries discussed the concern that salmon may be found in the river:

MR. RYAN: Could you elaborate on why those particular projects would be unlikely to pass environmental assessment?

MR. HUMPHRIES: And, you know, not all of them, but I – as I recall, a lot of these had significant fisheries issues, salmon, in particular, that the feeling would be – I think the feeling was that to actually mitigate the fisheries issues to a satisfactory level would be – if it could be done at all – would be cost prohibitive, and the costs would be a significant portion of the overall cost of the project.

MR. RYAN: And when you say fisheries issues, can you just explain –

MR. HUMPHRIES: Well, these – a lot of these were salmon rivers and salmon go up these rivers every year and spawn and come back down, and so there was – there would've been a concern that the development would effect that resource.

MR. RYAN: So, generally speaking at Nalcor, the feeling was that a river that has salmon in it, unlikely to pass an environmental assessment.

MR. HUMPHRIES: Well, I think, you know, again, I'm not the environmental person, but based on developments that have already been done and the level of effort that had to be put into it to mitigate these types of issues, you know, there was some experience there in what this would cost and how it would impact the project. And some of these projects are pretty small so that, you know, you'd be – and in lots of cases, the mitigation costs for the small project could be just as significant as a larger 50- megawatt project, for argument sake. (No. 37, p. 65)

- [41] Nalcor's studies found no salmon above Muskrat Falls. However, experienced and knowledgeable local fishers and anglers have caught salmon upstream. That Nalcor was permitted to proceed based on studies that ignore, conflict with and appear to invalidate local knowledge contributed to the mistrust of local residents.

Nalcor Influence on Environmental Assessment

- [42] Evidence from the Environmental Panel confirmed that the JRP report was not addressed in a holistic way by the provincial government: instead the recommendations were divided amongst the relevant departments. Each was provided with proforma language and the responses were

cobbled together afterwards. Several witnesses suggested that an in-depth analysis was performed. However, there was no evidence of this. Further, several witnesses noted that an EA Committee existed, however, no notes of any meetings of this committee were produced. The resulting provincial government response was formulaic and sparse, rejecting important recommendations with little more than “we are satisfied” and not attaching specific information to substantiate and demonstrate the foundation of their decision to reject the recommendations.

- [43] In contrast, Nalcor retained experts to thoroughly review the JRP Report and recommendations and provide a detailed analysis and response to each, specifically **P-1491**: Transfert Environnement, “Nalcor Lower Churchill Project, Strategic Reviewing of the JRP Report September 13, 2011; and **P-1493**: SNC-Lavalin, “Nalcor Energy Lower Churchill Project - Analysis of the Report of the Joint Review Panel for the Lower Churchill Hydroelectric Generation Project” dated September 16, 2011.
- [44] In addition, Nalcor produced its own analysis and report at **P-1492**: Nalcor Energy, “JRP Report Recommendation Review - Lower Churchill Hydroelectric Generation Project” dated November 21, 2011. Nalcor’s responses were then discussed at the Deputy Minister’s Meeting of November 28, 2011 (P-988).
- [45] Throughout the Inquiry hearings, it was noted that senior management within Nalcor and senior bureaucrats worked closely together and had long-standing relationships based on working together to develop the LCP.
- [46] The pre-existing relationships between the government and Nalcor and the alignment fostered by their mutual goal of developing Muskrat Falls meant that even if Nalcor hadn’t been directly involved in shaping the government’s responses to the JRP Report, Nalcor’s position were

already known by government. For example, Nalcor and Department of Natural Resource officials met as early as 2010 to ensure alignment on clearing of vegetation from the reservoirs.

[47] In addition, Nalcor was directly involved in the government's response to the JRP Report. For example, immediately following the release of the Report, on August 26, 2011, meeting notes setting out CEO Edmund Martin's position in respect of the JRP Report were sent to senior officials (P-1534). On November 28, 2011, Nalcor's responses to the recommendations were discussed at the Deputy Minister's Meeting (P-988). On December 1, 2011, Nalcor Vice-President, Gilbert Bennett, wrote to Assistant Deputy Minister within Department of Natural Resources, Charles Bown, proposing wording for the government's response to the JRP Recommendations (P-1401 and P-1487).

[48] Mr. Bown describes the sentiment among government officials and notes that not all officials agreed with Nalcor's position:

MR. BOWN: – through the environmental assessment process, you know, there were conversations that were held there, and not everybody accepted that the recommendations that Nalcor were – or the proposals that Nalcor were making were ones that they would support, so that would –

MR. LEARMONTH: Okay. Who were those people? Who were they?

MR. BOWN: That would be – I don't recall, sorry.

MR. LEARMONTH: You know, you refer – you brought that up yourself.

MR. BOWN: Yes, I did.

MR. LEARMONTH: And I ask you particulars, and you can't give me any particulars.

MR. BOWN: Well, I was trying to answer a general question with a general response that was this general throughout government – full acceptance of Nalcor. Generally, no, not throughout government.

MR. LEARMONTH: Okay. Well, then you must have some basis for making that statement?

MR. BOWN: Just what I would've seen in particular occasions, but I can't highlight particular people and events.

MR. LEARMONTII: Well, what are the particular occasions?

MR. BOWN: When we were doing the environmental assessment, not everybody was in support of certain elements (No. 53, p. 50)

Broken system, broken trust

[49] Ultimately the environmental assessment process simply replicates and legitimizes colonial systems of oppression that justify resource extraction and leave the burden of the destruction on the local and Indigenous populations. While GRK and others participated in the process in good faith, dedicated immense time and energy to substantiate their concerns and were ultimately validated in the JRP Report, the decision to proceed in the face of this report was a political decision.

[50] GRK and its members felt that the process itself was also problematic. The process and its timelines were rigid and inaccessible for many without the means to pay their way to participate. Some Inuit and Innu participants felt that it was impossible to communicate and express their views, as the Proponent and government were starting from a completely different worldview, with different ways of understanding and communicating.

[51] Former Premier Williams expresses a pervasive perception that simply completing the environmental assessment process is sufficient to discharge the responsibility for environmental protection. However, it was clear throughout the EA process that there was insufficient information available to the panel to engage in a comprehensive analysis of many aspects of the project, in particular the need, alternatives and cumulative effects. While the EA

is intended to be one part of an ongoing and dynamic process, in the case of the Muskrat Falls Project, the recommendations to obtain further study and review were rejected and the in-depth analysis was never concluded:

“MR. D. WILLIAMS: No. You know, assessments were done of the, you know, the clearing, whether it be full clearing or partial clearing of the reservoir up there and, you know, that was done by Nalcor. But, you know, rightly or wrongly, you know, I would have assumed, as premier of the province, that, you know, we’re going through the environmental processes, we’ve gone through consultations, the Energy Plan we consulted with, you know, whatever stakeholder groups we can identify as being important and relevant, who had a point of view and people in Labrador. So we did all that and then you go through the federal and the provincial environmental processes. I would think for sure that they would address any methylmercury concerns.” (Vol.9, Page 24)

- [52] The concerns of non-Indigenous local people, Innu and Inuit are not being escalated/ brought to the attention of the Ministers/Premier - Danny Williams:

“From the Inuit perspective, it would be – like you said the Land Claims Agreement was done. I was not aware that there were still major outstanding issues, either through my ministers or through my own knowledge that there was, you know, any huge issues that were going to basically hold up a project, that were big enough to hold up a project. My understanding is that we are going through a lengthy and detailed environmental review process. Which I assumed, you know, would be dealing and would be addressing and would be questioning methylmercury issues.” (Vol 8. P. 35, October 1, 2018)

- [53] In the modern concept of Indigenous consultation and environmental assessment, this process is viewed as a hurdle to get over, rather than a gatekeeper.

Promises Made but Not Monitored

[54] Nalcor's persistent and continued denial of any effects beyond the mouth of the river is emblematic of the pattern of minimizing and ignoring concerns of local residents. As a result, GRK and other local residents had greater interest in following up on the commitments and outcomes. However, there was little, or no information provided.

[55] Former Minister of Natural Resources Jerome Kennedy confirmed:

MR. BUDDEN: No, sorry. There's a few more yet. Can you not see how you were perhaps - while no doubt doing what diligence you could on a personal level, you – your role in terms of putting in place systemic oversight was perhaps lacking. Do you concede that point?

MR. KENNEDY: Certainly. (No 51. P. 88)

Lack of capacity and expertise

[56] Throughout the hearings it became apparent that the bureaucracy lacked the capacity and capabilities to monitor and oversee Nalcor and the Lower Churchill Project, in particular, bureaucrats were tasked with addressing issues on an *ad hoc* basis as there was no point person within the government assigned to oversee the project. The situation was described by Todd Stanley as follows:

“Well, for the very reason that while you had a circumstance where there was – Nalcor was – had vast resources and was proceeding down a number of fronts at once, as I think I stated once or twice in my transcript, there was nobody in government whose job fulltime was to even keep track of what Nalcor was doing. Everybody in government that was working on the Muskrat Falls files was doing it off the corner of their desk in addition to their other responsibility.” (October 22, 2018, No. 22 p. 104)

[57] Lack of capacity coupled with lack of specific expertise, or alternatively the authority to retain external expertise, impeded the government's ability to provide robust and in-depth review and resulted in complete reliance on Nalcor and its expert reports, as described by Martin Goebel as follows:

“When we issue the permit, we obviously don't go through all the calculations. We cannot redo the calculations. We cannot redo the design, with the resources that we have in our department. What we do, is we look for that relationship that I spoke to earlier where there is a consultant, an independent consultant that does the work for the owner. And those consultants are where we – you know, where we expect all these questions to be answered, and to be analyzed and to be done properly.” (Vol 58. P. 23, June 20, 2019)

[58] However, the evidence has shown at least one report that contradicted Nalcor's assertion that there would be no effects beyond the mouth of the river was not disclosed and was only discovered when the authors chose to publish it themselves years later (P-352 at p.29 and No. 58, p.64, December 13, 2018, Edmund Martin).

[59] In addition, the Inquiry has heard evidence of Nalcor requiring significant changes to expert reports and inappropriate relationships between Nalcor executives and the independent engineer (P-2267).

[60] Following the release of the JRP Report and given its findings, the Nunatsiavut Government (“NG”) wrote to the government of Newfoundland and Labrador supporting the findings of the Panel:

MS. URQUHART: So, this is a letter directed to then-premier Kathy Dunderdale. It's prepared by – written by President Lyall. And it indicates [...] this is in response to the panel report. Immediately thereafter, Nunatsiavut is writing to the government to

express, you know, its thoughts about those 83 recommendations. And it specifically says that Nunatsiavut echoes the concerns that the panel expressed, that the assessments that Nalcor did not extend beyond the mouth of the river and therefore did not consider impacts on them as Inuit.

And so – again, I just want to confirm that, in response, the position of government was we agree with Nalcor, there are no effects beyond the mouth of the river?

MR. GOEBEL: That is correct.

MS. URQUHART: And despite that, there was some awareness that consumption advisories may be required. That was something that was considered at the time.

MR. GOEBEL: Yeah, I think it was recognized that there would be effects from methylmercury in the reservoir itself and that if there were fish caught that were from the reservoir, they could be – if they're affected significantly – that there could be consumption advisories for those fish, or fish that perhaps travel downstream from that point, from that reservoir. (No. 58, p. 105)

[61] In 2014, the Nunatsiavut Government had requested funding to perform independent methylmercury studies and monitoring, this request was denied:

MS. URQUHART: [...] In 2014 – Nunatsiavut was denied funding for the monitoring. Was that – you're nodding, Mr. Chippett – was that you who was talking about that?

MR. CHIPPETT: We both commented, but I can –

MS. URQUHART: Okay. Correct me if I'm wrong, but I understood that the reason was because at that point, it was believed that the effects would not extend beyond the mouth of the river. Is that correct?

MR. CHIPPETT: That's my understanding. There may have been other – you know, other reasons, in terms of whether a department had budgeted for it or what have you. So I couldn't speak to those from another department, but I think generally, based on a

JRP response, government had accepted that those effects would not move further downstream.

MR. GOEBEL: Yeah.

MS. URQUHART: You're also agreeing, Mr. Goebel. (No. 58, p.103)

- [62] As a result, despite the fact that JRP expressed concern about the lack of evidence that there would be no effects beyond the mouth of the river (an assertion that was repeated by Nalcor executives), GNL continued to rely on the reports prepared for and provided by Nalcor. The failure to address the concerns of local and Indigenous people about downstream impacts was a significant breach of trust and resulted in further discontent among Labradorians.

Commitments not tracked

- [63] The JRP recommended (15.1) that all of the commitments made by Nalcor throughout the EA process be specified and listed in the regulations releasing the project from EA. However, the government failed to follow this recommendation and instead included a vague condition relating to these commitments which made it almost impossible for interested groups and individuals to assess compliance.

- [64] The provision is set out in the *Lower Churchill Hydroelectric Generation Project Undertaking Order*, NLR 18/12 (P-2702) as follows:

Conditions of release

4. The release of the Lower Churchill Hydroelectric Generation Project from environmental assessment under section 3 is subject to the following conditions:

- (a) Nalcor Energy shall abide by all commitments made by it in the Environmental Impact Statement dated February 2009, and all the

Environmental Impact Statement Additional Information Requests made by the Lower Churchill Hydroelectric Generation Project Environmental Assessment Panel and consequently submitted by Nalcor Energy, and the submissions made by Nalcor Energy during the panel hearings and, subsequent to the hearings, to the panel, unless one or more of the commitments, or a part of a commitment is specifically waived by the minister;

[65] Despite the fact that Nalcor is required to comply with all commitments made throughout the EA process, there was no mechanism for tracking or monitoring these commitments. In fact, the government at no time compiled, nor required Nalcor to compile and provide a list of the said commitments to be verified by the relevant departments.

[66] The Commission of Inquiry heard that the mechanisms for monitoring environmental compliance were the following: permitting and spreadsheet pertaining to the 83 JRP recommendations that was only updated twice prior to the Inquiry in 2012 and 2014. While permits were issued from various departments, the Department of Labrador and Aboriginal Affairs was responsible for maintaining a register of all permits relating to the project.

Lack of Monitoring and Enforcement against poaching

[67] Caribou poaching provides an example of the failure of monitoring and lack of capacity to adequately follow through on commitments. Participants in the JRP process expressed concerns around wildlife and poaching. One of the safeguards promised and established in this regard was the Woodland Caribou Recovery Team. While the Team has not met since 2011 (P-352, p. 60), Nalcor considers this commitment as ongoing:

MR. SIMMONS: [referring to P-4331] So, I want to draw your attention to – if you stop there – the second row from the bottom, as shown on the screen right there, and it says:

“Nalcor will continue participation as a member of the Labrador Woodland Caribou recovery Team and support research and other management initiatives.” Described as the Commitment.

You’d been asked some questions regarding caribou recovery, and I just wonder if this particular commitment and the response to it relates to that – to those questions.

MR. BENNETT: Yes, it does.

MR. SIMMONS: And this is described as a status ongoing.

MR. BENNETT: Right. (No. 61, p.104)

[68] To make matters worse, GNL has made significant cuts to the Wildlife Division, including reducing the number of Wildlife Officers in Labrador. These cuts are particularly problematic given the vastness of Labrador and the network of roads now cut into the bush as a result of the project and transmission lines. These roads permit access for the purposes of hunting and poaching to previously inaccessible remote areas. (P-352, p.48)

[69] Another example of the lack of follow through on commitments is in relation to the Harmful Habitat Alteration and Destruction plan relating to fish habitat. At a meeting with Nalcor and DFO on March 23, 2010, a commitment was made that Nalcor would be required to provide to DFO an irrevocable letter of credit as a form of security in the event that their planned fish habitat compensation plan was not successful (P-352, p. 57). Following that meeting, GRK wrote to DFO and made multiple ATIPPA requests, but there were no responsive records. During the Inquiry, Mr. Bennett confirmed that no such irrevocable letter of credit was provided. Concessions to address legitimate concerns have been token, for example the clearing of an additional 40-50 hectares, roughly a 2.7%:

MS. NAGARAJAH: Okay, so how much clearing of the reservoir has been completed to date?

MR. GOEBEL: Initially about 1.8 square kilometres, 1,800 hectares has been cleared. An additional – I don't know – 40 or 50 or so was cleared subsequent to, like, in 2017, '18 in that time period.” (Vol 58, p.27, June 20, Goebel)

Recommendations:

Grand Riverkeeper Labrador Inc and Labrador Land Protectors submit the following recommendations for the Commissioner's consideration.

Transparency:

- 1) There were persistent challenges in obtaining accurate, up to date information about the project, environmental protection actions and outcomes. Future projects should include improved transparency and access to information in a manner that is accessible and culturally appropriate. Specific ideas on how this could be achieved are the following:
 - a) Information belongs to the public:
 - i) All information about the project should be readily available, all reports commissioned by the Proponent should be public, including drafts and reports that result in contrary opinions (e.g. LGL Report)
 - b) Strengthen ATIPPA
 - i) Provide for an independent body to review and determine commercial sensitivity
 - c) Science translation
 - i) Ensure that an external, independent body (media, university, etc.) is available to provide clear plain language explanations that don't minimize or exaggerate risk
 - d) Accessible and culturally appropriate:
 - i) Posting information on Nalcor website is insufficient, and not culturally appropriate.
There is a need to address the gaps in understanding regarding the way information travels in Labrador and ways in which people access information
 - ii) Use of Facebook, radio and local bulletin boards to disseminate information

Collaboration

- 2) The process of consultation and environmental assessment did not result in meaningful change or accommodation and failed to build trust and partnership with local people. In the future, an approach that moves beyond consultation to collaboration with communities is recommended. While this approach takes more time and energy up front, it builds trust, respect and support.

Environmental Assessment

- 3) A stronger Environmental Assessment process would ensure the robust and balanced determinations of these processes are respected. There are a number of mechanisms which could be employed to accomplish this:
- a) Joint Review Panels can be granted the authority to make binding determinations, decisions and corollary orders.
 - b) Government can be required to respond to and address in a fulsome way to each and every recommendation of an EA
 - i) NGOs, Indigenous Governments and locals should have opportunity to reply and appeal all or part of the approval (assuming project approved)
 - c) Monitoring should be done publicly, and NGOs should be able to demand compliance in the event of failure to comply, alternative would be to properly administer bonds (DFO)

Focus on People and Ecosystems rather than Profits

- 4) Large scale developments are often approved on the basis that economic impact outweighs negative environmental and socio-economic impacts. GRK and LLP submit that the focus on cost and profits is misguided, and feel that important challenges facing Labradorians are not being addressed, for example:
- a) Long-term impact of local people and future generations
 - i) Can't fish
 - ii) Can't travel

iii) Traplines gone

iv) Camps and gravesites underwater

5) Address Methylmercury and the North Spur

- a) GRK and LLP submit that additional independent and fulsome testing and accessible, culturally appropriate information prepared to protect and inform local people of the risks of impoundment.
- b) In particular, they are requesting that the testing on the North Spur recommended by Dr. Bernander be performed. It is noted that failure of the North Spur would have impacts beyond the flood zone, electricity would be lost, ½ grocery stores and ½ pharmacies would be under water. Finally, and importantly failure would result in impacts to the whole project.

Dated at the City of St. John's in the Province of Newfoundland and Labrador this 9th day of August, 2019.



Smyth Woodland Del Rizzo Barrett

Counsel for Grand Riverkeeper Labrador Inc.
And Labrador Land Protectors

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Attention: Justice Richard D. LeBlanc, Commissioner