

COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

FINAL SUBMISSIONS OF JULIA MULLALEY AND CHARLES BOWN

1. The Commission of inquiry into the Muskrat Falls Project is governed by the Terms of Reference dated November 20, 2017, and the “Interpretation of the Terms of Reference For the Muskrat Falls Inquiry” provided by Commissioner Leblanc dated March 14, 2018. Section 4 of the Terms of Reference establishes what the Commission “shall” inquire into and Section 5 sets out what the Commission “shall” consider in carrying out the Terms of Reference in Section 4. In the Interpretation of the Terms of Reference dated March 14, 2018, Commissioner Leblanc provided guiding principles which include:

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 that time, not what we know today.

In light of the foregoing, it is imperative that context be kept at the forefront in evaluating the decisions made by public officials during the sanctioning, construction, and oversight

of the Muskrat Falls Project to ensure that any assessment of their conduct is conducted in a fair manner consistent with the Commission of Inquiry's guiding principles.

2. In terms of context, the Energy Corporation Act S.N.L. 2007 c. E-11.01 (Ex. P-00431) sets out the statutory framework pursuant to which the Muskrat Falls Project would be developed. The government of the day passed this legislation creating what would become Nalcor Energy and clearly enumerated the objects of the corporation in s. 5 which reads as follows:

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;

(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.

(2) Notwithstanding subsection (1), the corporation may engage in those other activities that the Lieutenant-Governor in Council may approve

3. The objectives of the Energy Corporation are all encompassing and recognize that it is the corporation that is to "carry out activities in all areas of the energy sector in the province." In order for the Energy Corporation to carry out its statutory objectives it required the necessary expertise to develop the province's energy sector. A review of the provisions of the Energy Corporation Act S.N.L. 2007 c. E-11.01, demonstrates that it was to be the entity advising government with respect to energy policy in the province on a go forward basis. This is an important contextual factor that must be kept in mind when

examining the decisions that were made throughout the development of the Muskrat Falls Project.

4. With respect to corporate governance and oversight of the activities of the Energy Corporation, s. 6 of the Energy Corporation Act established a board of directors, who pursuant to s.4 of the Act were subject to numerous provisions of the Corporations Act, R.S.N.L. 1990 c. C-36, including section 203 which reads as follows:

203. (1) A director and officer of a corporation in exercising his or her powers and discharging his or her duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
[underlining added]

5. Contextually, it is important to recognize that in establishing the Energy Corporation the government made the directors and officers of the corporation subject to the duty to exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances, and the duty to act honestly and in good faith with a view to the best interests of the corporation. Having established a crown corporation that was tasked with the development of the province's energy sector, and having appointed an independent board of professionals to oversee the corporation, it was not unreasonable in the circumstances that public officials would expect the directors, officers, and other professionals in the Corporation to carry out their duties honestly and in good faith in the best interests of the Corporation, and its sole shareholder, the Government of Newfoundland and Labrador. It is in this context that information was being received by public officials and decisions were being implemented.
6. In examining context, it is also relevant to consider the views of the current Chief Executive Officer of Nalcor Energy, Stan Marshall, who given his wealth of board and practical experience in the area of hydro electricity, provided the Commission with key insights into how oversight of the energy sector should operate in the Province and the

role that the Energy Corporation should play. During his testimony on July 2, 2019 he made the following insightful comments at pages 36 and 37 of his transcript:

*I think it is absolutely essential that the government have great oversight of this project. **The vehicle has to be something like a Nalcor, you know, put good directors in there; directors will need a specialized expertise and they can engage them with special advisors.....***

....

Nalcor has to be their principal vehicle of oversight. It has to be.

...

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, and they would normally engage specialized advisors to them.

...

*.... And so Nalcor has the obligation to try and get that into a format that the government can understand. **Government is not expected to be – and deputy ministers and ministers are not expected to be experts.** So it's a challenge here to try to distill it so that they can understand the big picture.*

....

*Well it's, certainly, all of them in terms of the board. The board – I mean, **a board of directors is oversight of management and oversight of the activities of the corporation. It's not to manage. So, as a shareholder - - as the shareholder, you know, the primary vehicle has to be the board of directors,.....***

7. The comments of Stan Marshall are in keeping with the legislative mechanism that the government established in creating the Energy Corporation and demonstrate that Nalcor Energy has to be the primary entity that the government of the province and public officials can rely upon in making well informed policy decisions. The fact that ministers and deputy ministers are not experts in the field of hydroelectric development was also

highlighted by Mr. Marshall and demonstrates that in that context the checks and balances and statutory duties to govern and oversee the project lies with the board of directors and officers of the corporation. This is the context within which public officials were operating during the development of the Muskrat Falls Project and it was not unreasonable for public officials to rely upon the expert advice they were receiving from the very entity that was created to develop the project.

8. Furthermore, given the nature of the duties upon the board members and officers, and the fact that many of the individuals public officials were dealing with were also subject to ethical duties imposed by professional regulators, it was reasonable for public officials to expect the provision of timely, accurate, and complete information from Nalcor Energy at all times. It is against the foregoing context that the conduct of public officials must be assessed in order for any assessment to respect and give meaning to the principle of fairness.
9. In the “Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities” (Tab A attached hereto) Justice Gomery addressed the roles and responsibilities of deputy ministers. At pages 40-41 he states the following:

Role and Responsibilities of the Deputy Minister

For information and guidance on this topic, the Commission relies on a government publication entitled, Guidance for Deputy Ministers, last modified on June 20, 2003. It states general principles applicable to the period relevant to the Commission’s mandate. It begins by defining the responsibilities of Ministers of the Crown as being collective, in support of the Cabinet team; and individual, for their performance in carrying out the responsibilities of the portfolio assigned to them.

The responsibilities of a Deputy Minister are best understood in the context of the support they provide to Ministers. The Deputy Minister is the principal source for a Minister in fulfilling his or her collective and individual responsibilities. In particular, the Deputy Minister is responsible for ensuring:

- *sound advice on policy development and implementation;*

- *effective department management;*
- *fulfillment of authorities that have been assigned to the Deputy Minister or his officials;*

With respect to the obligation to provide advice to the Minister, the publication describes this obligation in the following paragraph:

The Deputy Minister supports both the individual and collective ministerial responsibilities with respect to policy development and implementation. The Deputy Minister is counted on to provide the highest quality of advice on all relevant dimensions of a departmental issue, be they economic, social, or administrative. Within the priorities, objectives and standards established by the government, the Deputy Minister must provide advice on the possible impact of initiatives on the public, the department, and the government. Advice must be timely and candid, and presented fearlessly, and provide the best possible policy options based on impartial review of the public good and the declared objectives of the Minister and the government. Advice must challenge, guide and clarify, and generate new possibilities for improving the lives of Canadians. It must also demonstrate policy coherence from the perspective of departmental and portfolio management.

In the foregoing extract, emphasis is put upon the importance of the advice to be given to the Minister on policy development and implementation. It must be assumed that the decisions are to be made by the Minister, probably on the basis of advice received, but that the Deputy Minister is not the person making the decision. This concept corresponds to what has already been said concerning ministerial responsibility and the obligation of the Minister to work with the Deputy Minister and to give direction to him or her concerning the development of policy and its implementation. These matters are not left to the entire discretion of the Deputy Minister.

10. While the comments of Justice Gomery arose in the federal context, the principles identified with respect to the role of the Deputy Minister provide guidance to this Commission in its analysis of the conduct of deputy ministers. The duties of deputy ministers include providing sound advice on policy development and implementation, effective department management, and the fulfilling of authorities that have been

assigned to him or her. It is against this standard that the conduct of Charles Bown, while he was Deputy Minister of Natural Resources, and while Julia Mullaley, who by virtue of her role as Clerk of the Executive Council, was the Premier's deputy, must be assessed based upon the principle of fairness and not hindsight.

11. Charles Bown is a career public servant who began working in government in 1988 as an economist with the Department of Mines and Energy. With respect to his involvement with the Muskrat Falls Project, he was appointed the assistant deputy minister of Energy Policy in 2006, was appointed the associate deputy minister of Energy in 2010, and was appointed the deputy minister of energy in 2012. (Transcript of Charles Bown – Dec.5,2018 pp. 57/58) Charles Bown was a member of the Oversight Committee, and subsequently chaired the Oversight Committee. Charles Bown has over 31 years of experience in the public service and has served governments led by different political parties. He is a non-political career public servant who provides sound advice and recommendations to his superiors on policy development and implementation, and once a decision is made by his Minister faithfully implements those instructions. This is the classic and undisputed role of a public servant.

12. As a result of the numerous positions Charles Bown held in the Department of Natural Resources, he was often a point of contact between officials at Nalcor Energy and the government depending on the matter that needed to be addressed. According to his evidence, there were several areas where the Department of Natural Resources was not the lead department and/or his department collaborated with other departments such as finance, justice, or aboriginal affairs as the development of the project moved forward. In addition, the Department of Environment was the lead department with respect to environmental assessment (Transcript of Charles Bown dated December 5, 2018 at page 63), and the Department of Finance took the lead with respect to financing arrangements.(Transcript of Charles Bown dated May 15, 2019 at page 9).

13. As one would expect, given the length of the Muskrat Falls Inquiry, there were several issues which arose that involved Charles Bown and his duty to provide sound advice on policy development and implementation. For instance, Exhibit P-00807 is entitled “Muskrat Falls Independent Review Decision Note” and was prepared by Paul Myrden, Department of Finance, and Approved by “Terry Paddon/Charles Bown”. This note was forwarded to their respective ministers for review and approval, Minister Shawn Skinner and Minister Thomas Marshall. It was signed by Minister Marshall on May 10, 2011 and by Minister Skinner on May 11, 2011. The timing of this note is significant as this was before the reference to the Public Utilities Board on June 17, 2011, and prior to sanction on December 17, 2012. With respect to the origins of this note Charles Bown stated the following on December 6, 2018 at page 52:

*Myself and Terry Paddon had had a number of conversations over the months about the process going forward for Muskrat Falls, and we both felt that an independent review was necessary before government made the sanction decision. **And we prepared this note; staff in my department worked with the staff in the Department of Finance in preparing this note.** And we shared this with both Minister Marshall and Minister Skinner, seeking their approval. They signed this, and it was forwarded to Cabinet Secretariat, as is the normal process.*

14. In this note Charles Bown and Terry Paddon set out the decision/direction required as follows:

Decision/Direction Required

- Whether to approve the selection and retention of a qualified consultant to provide an independent review on the detailed project analysis prepared or commissioned by Nalcor, including an assessment of the various risks associated with the Muskrat Falls Hydro Development Project (“MFP”) and their potential implications for the Province;
- Finance and Natural Resources are supportive of the proposed initiative as it represents both good business practice as well as an enhancement to the existing robust due diligence process.

15. Exhibit P-00807 continues to state, in part, the following:

- Project size and related financial requirements are significant relative to the capacity of the Province. Given the combined Nalcor and Provincial commitment of 4.4 billion, the development of the MFP will add substantially to Provincial debt and could possibly impact future borrowing capacity for other uses. For this reasons alone, it is prudent for the Province have a clear and independent review of project risks and their potential consequences. [underlining added]

16. With respect to the “Scope” of the independent review recommended on May 11, 2011 by the Departments of Finance and Natural Resources, Exhibit P-00807 reads as follows:

Scope

- The retention of an independent consultant by the Province would be intended to obtain a new MFP project specific assessment of both the fundamental assumptions underlying the project development plan and the detailed accompanying analysis completed by Nalcor or its agents and advisors. It could also include an assessment of the due diligence completed to date including a report on the rigour of this process. It would be a risk-based assessment which would focus on the various types of project risk and the potential implications for the Province.
- While preliminary in nature, the risk assessments that might be included in the consultants’ mandate could include the following:
 - Design and Engineering risk.
 - Construction risk
 - Generation/technical risk
 - Market risk
 - Financial risk
 - Contractual Risk.

These themes will have to be expanded into a detailed statement of work which will be required as a pre-condition of negotiating the retention of a consultant.

- A key component of the project financing structure will be a Power Purchase Agreement (“PPA”) between the Nalcor generating entity and NL Hydro. In addition to the risk assessments above, the consultant could be asked to provide an independent of the this PPA.

17. With respect to the process that an Independent Review would entail, Ex – P-00807 reads, in part, as follows:

Process

- To move this initiative forward, the first decision points involve the identification of possible qualified consultants and determination of the process which will be employed for the selection of a successful one. The ideal consultant would most likely be an international management consulting firm as they organizations have the ability to combine strong general business expertise and advice, while also incorporating expert input from in-house industry specialists. The pool of such potential candidates would appear to be limited by the fact that at least two are conflicted as a result of existing relationships with Nalcor. This would rule out Deloitte, as Nalcor's auditor, and PWC, as the current consultant to Nalcor on the Lower Churchill project generally. This leaves Ernst & Young, KPMG, and possibly Grant Thornton as potential candidates. [underlining added]
18. The Muskrat Falls Independent Review Decision Note of May 11, 2011 demonstrates an awareness by Charles Bown and Terry Paddon that given the potential significant financial impact the project could have upon the province, and the lack of expertise within government to conduct a full scale review, that it would be prudent to retain an outside "international management consulting firm" such as Grant Thornton or Ernst & Young to conduct a robust review of the project. This was the recommendation that was provided to the Minister of Natural Resources and the Minister of Finance.
19. The recommendation of Charles Bown and Terry Paddon was a reasonable and prudent course of action for the government to take given the financial implications for the Province. As noted by Justice Gomery, "*the Deputy Minister must provide advice on the possible impact of initiatives on the public, the department, and the government. Advice must be timely, and candid, presented fearlessly, and provide the best possible policy options based on impartial review of the public good and the declared objectives of the Minister and government.*" The May 11, 2011, Muskrat Falls Independent Review Decision Note is a prime example of fearless and impartial advice being provided to Ministers.
20. Instead of following the recommendations contained in the May 11, 2011 Muskrat Falls Independent Review Decision Note, the government decided to send a reference question to the Public Utilities Board. With respect to accountability, the decision of the

government to send the matter to the Public Utilities Board and not to conduct a robust review as recommended by Charles Bown and Terry Paddon, lies with the government of the day. As stated by Justice Gomery, *“It must be assumed that the decisions are to be made by the Minister, probably on the basis of the advice received, but that the Deputy Minister is not the person making the decision.”*

21. On the issue of whether or not the matter would go to the Public Utilities Board the public servants, as is their duty, provided a Decision/Direction Note entitled “Referral of Lower Churchill Project to the Board of Commissioners of Public Utilities (the Board).” This note appears as Exhibit P-00846 and is dated May 26, 2011, prepared by Paul Scott and Charles Bown, and approved by the Minister of Natural Resources, Shawn Skinner. This note sets out the pros and cons associated with the decision to refer the matter to the Public Utilities Board. This is another example of Charles Bown and other public servants providing sound advice and recommendations to the Minister of Natural Resources. This Decision/Direction Note must also be put into context as it is dated several weeks after the May 11, 2011 Decision/Direction Note wherein Charles Bown and Terry Paddon recommended a robust external review by an international management consulting firm. In this context, the duty was then upon the public service to provide advice on the course of action that the government was contemplating, the referral to the Public Utilities Board. Once again, the accountability for that decision in a parliamentary democracy lies with the Minister of Natural Resources and the government of the day. The public servants fulfilled their role by providing sound advice and recommendations on the issues they were tasked to examine.

22. We now know that had the government accepted the recommendation in the May 11, 2011 Decision/Direction note, it is likely that Ernst & Young and/or Grant Thornton would have made significant findings and recommendations in terms of the future development of the project. However, the decision to send the matter to the Public Utilities Board was in the purview of the government, and once the decision was made the duty was then upon the public service to faithfully implement that decision. The public servants fulfilled their duty by providing a detailed recommendation with respect to the course of action that should be followed in the circumstances. The fact that the politicians at the

time chose a different course of action was out of the control of the public service. The comments of Premier Dwight Ball on July 5, 2019 at page 11 of his testimony place this issue in context:

Mr. Ball: What I would say is, is as a result of the Inquiry, it is given the public of this province an opportunity to get a better understanding of the work that the public service was doing. And I think this Decision Note is a great example of some of the warnings and the advice that were being given to the decision-makers at the time, that was ignored before the final decision was made.

So, yes. I do. I understand that there's, you know, quite a bit of time and work that would go into preparing, you know, to sit in front of an inquiry. But yet, we look at a Decision Note here, which I think (inaudible) vindication in any way, but, I mean, I think it reinforces that – the independency of what the public service were doing. There were there to actually provide advice.

Whether a politician or decision makers actually take that advice, sometimes can be very frustrating. I think this here is an example of some of the signals that the public servants were sending to the decision-maker at the time.

23. The decision of the government to retain Manitoba Hydro International to conduct a review following the release of the report by the Public Utilities Board of March 31, 2011 was another issue which received attention during the inquiry. The evidence at the inquiry demonstrates that this was a decision of government, not the public service, and when the decision was made to retain Manitoba Hydro International, Charles Bown faithfully implemented that decision as directed. This issue was addressed by Jerome Kennedy, the Minister of Natural Resources, who stated the following at page 114 of his December 4, 2018 testimony during cross examination:

Mr. Kennedy: - or he- the message would have been delivered to him. He knew that this decision, my only issue Commissioner, was the timing of the email at 10 o'clock in the morning. We would have met before that? But we would – no question we met sometime that day, that Mr. Bown would not have gone off and hired MHI, Sir, without the premier or myself having said to him or the chief of staff saying – telling him to contact – premier wants him to contact MHI.

24. Charles Bown also confirmed in this testimony on December 5, 2018 at page 102 that it was the government that decided to retain Manitoba Hydro International:

Mr. Learmonth: Who made the decision to retain MHI?

Mr. Bown: that would've been government's decision.

Mr Learmonth: Okay, who in government?

Mr. Bown: It would have been the collective of the premier's office and likely the minister as well.

25. While the appropriateness of the government retaining an expert which had already did a report for the Public Utilities Board, and were still retained by the board, is an issue that the Commissioner will need to address, that was a decision of government, and the actions of Charles Bown in implementing the direction given by his superiors is in keeping with fulfilling his duties as a public servant. As noted by Justice Gomery, *"the Deputy Minister is responsible for ensuring fulfillment of authorities that have been assigned to the Deputy Minister."*

26. The issue of the removal of the strategic risk assessment from the scope of work being prepared for Manitoba Hydro International's review of work completed by Nalcor Energy since Decision Gate 2 in preparation for Decision Gate 3 is another issue that was examined during the inquiry. The evidence at the inquiry confirms that this was a decision that was made by government in consultation with Nalcor Energy, in particular Edmund Martin.

27. Exhibit P-00741 confirms that on April 3, 2012 Paul Wilson from Manitoba Hydro International provided a draft scope of work to Charles Bown. On receipt of the draft scope of work Exhibit P-01178, page 2, confirms that it was sent to Gilbert Bennett and Brian Crawley for review and comment. On Page 1 of Exhibit P-01178 Paul Harrington emails Brian Crawley, Gilbert Bennett, Paul Humphries and Jason Kean and states the following:

Please find my comments on the MHI proposal – In order for this to be performed in the time available it has to be focussed on what is needed, we do not want to have MHI tell us about reliability and

NERC and [sic.] return periods, the Basis of Design is fixed and we should not invite commentary on that – MHI should focus on the updated CPW analysis using updated numbers. This has to be an apples to apples comparison so the expansion plan used in this review has also to exclude the Maritime Link as per the DG2 review. This will make this more straightforward and achievable in the timeframe –

The DG3 review will be later when the expansion plan is complete and all other DG3 inputs available.

We must get MHI here in St. John's to do the work and not have IR's flying back and forth - - these will only go public. MHI should work directly with us thereby avoiding a lot of paperwork and we should compress the schedule to a couple of weeks when we have the date. Unless the scope is controlled we will have a repeat performance with the "same" experts with the same opinions.

28. Attached to Paul Harrington's email of April 4, 2012 (Ex. P-01178) are his edits and comments with respect to the draft scope of work. On page 6 the risk analysis review is crossed out and so is the "Strategic Risk Assessment Update Report, and Westney update if available". On page 8 Mr. Harrington makes the following comment with respect to the schedule set out in the draft scope of work:

It is not possible for MHI to review the data in this timeframe – April to May 15, we are still working on the estimate, risk analysis, etc. – this is setting us up to fail and we cannot do that.

29. Later in the day on April 4, 2012, Charles Bown received an email from Brian Crawley entitled "scope" (Ex. P-01236) wherein Brian Crawley states, "Charles . . . I understand Ed was trying to reach you on this. We are still working it but do have major concerns with what has been proposed. Will be in touch. Brian."
30. According to the evidence (Ex. P-1237, p.10) a meeting took place on April 6, 2012. The attendees at this meeting were Edmund Martin, Brian Taylor (the premier's chief of staff), Robert Thompson (the Clerk of the Executive Council), Glenda Power (the

premier's communications officer), Jerome Kennedy (the Minister of Natural Resources), and Charles Bown (the deputy minister of the Department of Natural Resources). Minister Kennedy's note reads, in part as follows, "Will Nalcor have DG3#'s in time for June debate in House?" The note also references a "June 7 cutoff -> risk analysis, contingency back up." There is a further reference to "Premier - * there needs to be deadlines*" and the following passage was circled by Minister Kennedy, "What we need Schedule DG#'s".

31. During cross-examination Jerome Kennedy was questioned about Ex. P-1237 and his note of April 6, 2012. Mr. Kennedy stated the following about the upcoming June debate in the House of Assembly at page 117 of his December 4, 2018 transcript:

*Mr. Kennedy: Yes, certainly, it's a major concern because one, you know, one of the reasons we put forward for not extending the PUB was **getting into the House of Assembly and the timelines of Nalcor.***

32. It is evident based upon the evidence of Jerome Kennedy, both his notes and testimony, that schedule was of paramount importance to the government when it considered the scope of work of Manitoba Hydro International.

33. Jerome Kennedy continued in his evidence to discuss timelines when he stated the following at page 118:

*Mr. Kennedy: It looks to me, Commissioner, from this particular document that there is discussion as to what MHI is going to do. You'll see, again, there's – **the note in capitalized: Premier, there has to be timelines. That could be the message delivered by Mr. Taylor on behalf of the premier because she is not noted as being present.***

34. The testimony of Edmund Martin adds further insight with respect to the meeting of April 6, 2012, and the removal of a strategic risk assessment from Manitoba Hydro International's scope of work. At page 73 of his testimony of December 11, 2018 the following exchange appears between Commission Counsel and Edmund Martin:

Ms. O'Brien: Okay. So we've had lots of evidence around MHI's scope of work. First of all, I'll just ask you straight up: Were you aware that MHI did not do any assessment of strategic risk or schedule risk?

Mr. E. Martin: I couldn't recall that, but I've heard the evidence, since, at the Commission.

Ms. O'Brien: Okay

*Mr. E. Martin: So I'm mixing a few things here, Commissioner. You know, I'm not sure if it was then or now, but my understanding from what is – happened and – recently and what happened then is that there were discussions on that. **I did participate in them. I was bringing forward, I expect, the project team's view about the timing of issues and what could be accomplished within that time frame. And I would've, you know, suggested, you now, schedule to be totally adversely impacted, something had to give, and I would have been representing the project team's view point on that.***

And my understanding is that yielded the risk analysis not being part of the MHI review because it wasn't ready to go. It was my – is what I recollect or have heard over the past testimony, and that's what happened.

35. A review of the foregoing demonstrates that the removal of the strategic risk analysis from Manitoba Hydro International's scope of work was recommended by representatives from the project team at Nalcor Energy, and those concerns were brought forward at the meeting of April 6, 2012, by Edmund Martin. The attendees at the meeting included the Minister of Natural Resources, Jerome Kennedy, and the Premier's Chief of Staff, Brian Taylor.
36. The evidence also establishes that of paramount concern for government was the upcoming House debate in June 2012. The significant concern for Nalcor Energy was the schedule being adversely impacted. These were the two primary considerations which the government and Nalcor Energy considered in its decision to remove a strategic risk assessment from the scope of work. Charles Bown was present at the meeting, but

he did not have the authority in his own right, to change or alter this decision once it had been made by government, especially given the political concerns of the upcoming debate in the House of Assembly, as it is not the role of the public servant to engage in political activity. As Nalcor Energy had the expertise to advise government on the issues of cost, risk, and schedule, the government should have been able to reasonably rely upon the advice of Edmund Martin and his project team that the removal of the strategic risk assessment was not something that would adversely impact the project and the people of the Province. This decision was made with the full knowledge of the Minister of Natural Resources, Jerome Kennedy, and according to Justice Gomery, "*the Deputy Minister is not the person making the decision*".

37. The issue of the removal of liquefied natural gas analysis from Wood Mackenzie's draft report received by government on October 26, 2012 is another issue which was addressed during the inquiry. Relevant to this issue is the relationship that the Minister of Natural Resources, Jerome Kennedy, had with his Deputy Minister, Charles Bown. The following exchange during Jerome Kennedy's cross-examination on December 4, 2018 at page 107 is relevant to the analysis of this issue:

Mr. Fitzgerald: Yesterday in your testimony - and I have a copy of the transcript here - in reference to Charles, Mr. Bown, you said. "Mr. Bown, generally, he knew the way I operated and he generally brought things to my attention, Sir.

I would suggest that the way you operate is that you want to know all the pertinent facts.

Mr. Kennedy: Yes, I want to know the - I can't know everything that's going on - -

Mr. Fitzgerald: No.

Mr. Kennedy: - in every piece of work, but if there is something important going on. What I found with Mr. Bown, he knew the role that he played in terms of what he could - decisions he could make on his own or things he could do or when it crossed over into the boundary where the minister should be made aware, or where the premier should be made aware, or whether it was a political decision that he probably shouldn't be involved in.

Mr. Fitzgerald: And he was aware of – and, Mr. Kennedy, I've never had a run-in with you. He was aware of your temperament and he was aware of your personality, wasn't he?

Mr. Kennedy: Yeah, all you had to do was watch the House of Assembly for a half-hour and you'd become aware of that, Sir. Yeah.

Mr. Fitzgerald: And I would suggest that because he was aware of the way you operated and he – and you knew – according to your evidence yesterday, he knew how you operated, things were brought to your attention because he wanted to make sure he was doing his job properly and you were fully informed to the best of his ability.

Mr. Kennedy: That's my understanding, Sir, yes.

Mr. Fitzgerald: You don't have any evidence of your time working with Mr. Bown, of him going rogue or doing things in appropriate or anything like that?

Mr. Kennedy: Not at all.

Mr. Fitzgerald: It'd be quite the contrary wouldn't it?

Mr. Kennedy: It would be the opposite, yeah.

Mr. Fitzgerald: And there's no evidence in his time working with you that he exceeded any authority, is it?

Mr. Kennedy: Not at all. No.

38. The evidence also indicates that during the preparation of the Wood Mackenzie report and the analysis of liquefied natural gas that the Premier, Kathy Dunderdale, and her Chief of Staff, Brian Taylor, were being provided with updates regarding this issue. Of note, Exhibit P-01269 is an email dated September 1, 2012, wherein the Minister of Natural Resources, Jerome Kennedy, provides a detailed update which addresses concerns that Wood Mackenzie had with Ziff's capital cost estimate of the regasification facility and the impact it would have on the costs of liquefied natural gas. This email was sent to the Premier, her chief of staff, Robert Thompson, the Clerk of the Executive

Council, Ed Williams a political advisor, and Lynn Hammond, a communications professional who worked in the Premier's office.

39. Charles Bown in his testimony indicated that he was directed to have the portion of the Wood MacKenzie paper that addressed liquefied natural gas removed as the government wanted the focus to be on the pipeline issue. Mr. Bown is clear that he took direction from the Minister and that "*Minister Kennedy was all over these papers on natural gas because it was particularly a strong interest of his. I would not have made a change in any of these reports.*" (Transcript of Charles Bown – December 5, 2018, p.76)

40. The issue of who directed the removal of the liquefied natural gas analysis from the Wood MacKenzie report was addressed directly by Charles Bown in his testimony of December 5, 2018 at page 76:

Mr. Learmonth: Did you ever discuss this with Mr. Kennedy?

Mr. Bown: I took my direction from Minister Kennedy very clearly.

Mr. Learmonth: Very clearly – what were the words?

Mr. Bown: We're not going to release that report.

41. In terms of context it should also be noted that according to the evidence of Charles Bown on December 5, 2018 at p.76 he had no issue with releasing the entire Wood MacKenzie Report. The following exchange between Commission Counsel and Charles Bown reads as follows:

Mr. Learmonth: Do you see the problem with this? With not releasing the full report?

Mr. Bown: I was fine with the previous two versions of the report.

Mr. Learmonth: So the – you were fine with releasing the full Wood MacKenzie report that dealt with both the pipeline and the LNG?

Mr. Bown: I didn't think that the points that they raised were so bad as to change the decision on whether Muskrat Falls was the least-cost choice.

42. In light of the foregoing, given the manner in which Charles Bown operated, his years of experience in the public service, the manner in which Minister Jerome Kennedy operated, that fact that the Premier and her staff were both being briefed on the liquefied natural gas issue, and the evidence of Charles Bown that the Minister directed the removal of the liquefied natural gas analysis from the Wood Mackenzie report, the evidence is that Charles Bown acted upon the direction of his superiors in requesting that liquefied natural gas be removed from the Wood Mackenzie report. Charles Bown's evidence is that he had no objection to the release of the full report, however the decision was made by government to focus only on the pipeline option. As noted by Justice Gomery, "*fulfillment of authorities that have been assigned to the Deputy Minister*" is a responsibility of the deputy minister and once government decided to focus upon the pipeline option Charles Bown fulfilled his role by carrying out the instructions of his Minister. The accountability for that decision rests with the government of the day and not the Deputy Minister according to the principles of a Parliamentary democracy and according to Justice Gomery, "*This concept corresponds to what has already been said concerning ministerial responsibility and the obligation of the Minister to work with the Deputy Minister and to give direction to him or her concerning the development of policy and implementation. These matters are not left to the entire discretion of the Deputy Minister.*"

43. A significant amount of time was spent at the inquiry focussing on the issue of who was aware at financial close that there was an increase in the capital cost of the project from 6.2 Billion dollars to 6.531 Billion dollars. The evidence of both Charles Bown and Julia Mullaley is clear that they had no recollection of the capital cost increase at the time of financial close.

44. Charles Bown gave evidence with respect to the capital cost increase from 6.2 Billion dollars to 6.531 Billion dollars at the time of financial close. His evidence is that he cannot recall being made aware of that figure. There is also no documentation before the

Commission that confirms that Charles Bown received an update regarding the capital cost increase at the time of financial close. The following exchange between Commission counsel and Charles Bown on May 15, 2019 at page 13 is relevant to this issue:

Mr. Learmonth: Now, if you'd been told of that fact, based on your practices as a senior civil servant, if you had been informed of that fact before financial close, what, if anything would you have done with that information?

Mr. Bown: That information would've been made known to the minister and the premier.

Mr. Learmonth: Yeah.

Mr. Bown: But if, I'd just like to pull in the context around that – if there was a change –

Mr. Learmonth: Yeah.

Mr. Bown: - and I was reviewing my materials before Phase 1 and here, for Phase 2 as well, there is a steady and regular pattern that whenever there is a change in the project of any magnitude, that there is a presentation deck that's prepared, that the premier is briefed, and that I've seen copies of those decks before they go to ensure that they're complete, or to either facilitate them getting to the premier's office. And that's what I was expecting, that's what I was looking for here.

There was no presentation deck that was prepared to brief the premier or the minister.

45. Charles Bown's evidence continues in his May 15, 2018 testimony at page 18 and confirms that had he known about the increase in capital cost he would have told his minister:

Mr. Learmonth: But is there any doubt in your mind that if you had known this information you would've reported it to your minister, Derrick Dalley?.

Mr. Bown: Yes.

Mr. Learmonth: There's no doubt in your mind?

Mr. Bown: No doubt in my mind.

46. Charles Bown continues in his May 15, 2019 testimony and states that “No, its nothing in my records that would indicate – I was never provided with tables, deck, email, nothing with 6.5 in it – “

47. Charles Bown is a career non-political public servant who at the time of financial close was an “at pleasure” employee serving as the deputy minister of Natural Resources. The idea that if he had knowledge of a 300 million dollar capital cost increase at financial close and that he would not report it to his Minister or to Cabinet defies logic and common sense. There is no way a career public servant would sit on that information and risk discipline and termination. While given his position, he should have been made aware of the capital cost increase, he can only act upon the information he is provided by Nalcor Energy and other public officials. Having not been provided with the information he could not advise his Minister Derrick Dalley, who also has no recollection of the capital cost increase to 6.531 Billion dollars at financial close.

48. The following exchange on page 8 of Julia Mullaley’s May 29, 2019 transcript between Commission Counsel and Julia Mullaley is relevant to this issue:

Mr. Learmonth: Did you know that there was an actual increase in the budget from the Muskrat Falls Project from \$6.2 billion, which is the DG3 number, to 6.531 at the time of financial close?

Ms. Mullaley: So, no, I have no personal recollection, at all, of knowing the number at any time around the financial close area. I, you know, I definitely became aware of the number, but when I search everything I can in my memory banks, it was more in the March, April time frame, it was around budget discussions.

49. Julia Mullaley continued in her testimony of May 29, 2019 at page 8 to confirm that she conducted an extensive record search to determine if the capital cost increase at financial close went to Cabinet. In relation to this issue she stated the following:

Ms. Mullaley: - as you know, I asked for permission if I could go over and look at Cabinet records. Again, I was very familiar with the Cabinet process. I knew what Cabinet records would look like. I knew we had specific sections in the Cabinet paper called financial considerations. I knew their Cabinet Secretariat analysis. The gist of it is

I felt I wanted to satisfy myself that it just wasn't something I couldn't remember.

So I did do that, and I sat down again with legal counsel from government and we went through the screen, we went through all the MC's - I'll open the Cabinet papers, we looked everywhere right from, really, starting in October when some of the first papers were coming in, right through to the end of November.

So that's what we had looked at and there was nothing. There was absolutely no number of the 6.5 anywhere in any presentations and there were a number of presentations and, you know, including the CEO Stan - Ed Martin, sorry, was there as well doing presentations. So none of the presentations, none of the information had anything to do with that.

So, I also when through my emails. I asked request to get access to my emails. I did go through my emails and there was nothing there. The other thing I would say is as of late as, I think the note was dated December 2-29, there was a note that went into Cabinet Secretariat taking about this specific COREA provision. You know, because it was a late change in the agreements and some of the language had to get changed.

And even in that note, it did not have any reference to the 6.5. So I guess, through all of that, I could not find any, I guess from my point of view, refuting evidence to what I could recall. So I guess to answer - it's a long answer question, but I guess my point is that I have no personal recollection of it whatsoever and I can't find anything in any document which would just, to me, again be very unusual.

50. A review of Julia Mullaley's evidence demonstrates that she was not aware of the capital cost increase to 6.531 Billion dollars at the time of financial close. It would also appear that Cabinet was unaware of this increase given the absence of any reference to this figure in any Cabinet presentation. A public servant can only act upon the information that he or she receives. If Julia Mullaley had received this information at the time it

would have likely appeared in a Cabinet presentation, other documentation within Cabinet Secretariat, or within Julia Mullaley's email. The idea that if the Clerk of the Executive Council was aware of a 300 million capital cost increase for the Muskrat Falls Project and that this information would not have been passed on to the Premier is nonsensical.

51. Julia Mullaley also advised that in her opinion the increase in the capital cost at financial close should have been brought forward to Cabinet. According to Julia Mullaley's evidence as part of due diligence for financial close, a team which included senior public servants had been established to assist with financial close. In her role as Clerk of the Executive Council, Julia Mullaley facilitated advancing the required presentations and cabinet papers to cabinet to approve required policy decisions and approvals at financial close. The evidence establishes that Thomas Marshall, the Minister of Finance, tasked officials on or about October 18, 2013 with contacting Nalcor Energy to be provided with the most recent update on expected total project costs at financial close. (Ex. P-02022) On November 1, 2013 the government was provided with a breakdown that showed projects costs were 6.2 Billion dollars. (Ex. P-02024) Subsequently, on November 14, 2014 a joint submission was made to Cabinet by the Minister of Finance and the Minister of Natural Resources (Ex. P-02680) seeking approval of the equity support agreements. The evidence further establishes that as of December 2, 2013 an update was provided respecting the COREA account and contingent equity funding of cost overruns. There is no reference in any of these presentations of an increase in the capital costs from 6.2 Billion to 6.531 Billion. (Ex. P- 03940)

52. If departmental and/or Nalcor officials had been aware of a capital cost increase this should have been reported up the line to Cabinet. (Transcript of Julia Mullaley dated May 29, 2019 at pages 8 and 21). If there were increases in capital costs there was ample opportunity for officials to clearly communicate this to Cabinet in a wholesome manner, such as Nalcor Energy's Request for Financing Update Presentation to Cabinet on October 9, 2013. (Ex. P-02664) or the Lower Churchill Project Updated dated November

14, 2013 (Ex. P-02534). That is the process that should have been followed with respect to this issue.

53. According to the evidence, the first time that the capital cost increase was disclosed to the public was in the Oversight Committee, report of July 2014. (Ex. P-2051, p. 13). On page 15 of her May 29, 2019 testimony Julia Mullaley stated the following:

And for the Oversight Committee, actually, then we realized the number had never actually been public before. So you'll see, in the presentation I gave to Cabinet, I actually asked for permission to release that publicly as part of the direction. And that's what we did. So right now, to answer your question, it was factual information; we well knew it at this point, and we thought it was very important to put it out publicly.

54. Upon Julia Mullaley becoming aware of the capital cost increase during the 2014 budget process/early stages of the Oversight Committee she recommended release of the figure publicly and permission was granted by government. Public release of the 6.5 Billion capital cost increase was included in the Oversight Committee report of July 2014. Julia Mullaley's conduct is consistent with ensuring transparency and accountability in government while at the same time demonstrates that she fulfilled her role as a public servant in providing sound advice and recommendations to her superiors.
55. Julia Mullaley was the Clerk of the Executive Council from August 2013 to September 2016. Prior to time becoming Clerk of the Executive Council she held the position of deputy clerk and various other senior positions in the public service. As a result of being the Clerk of the Executive Council, her primary role specific to the Muskrat Falls Project, was as Chair of the Muskrat Falls Oversight Committee.
56. Julia Mullaley's involvement with the issue of oversight for the Muskrat Falls Project began when she was deputy clerk in 2011. In 2012, Julia Mullaley was involved in recommending and issuing a Minute in Council requiring the establishment of an Oversight Committee for the Project. (2012-0240). Julia Mullaley subsequently left her position as Deputy Clerk and when she returned as Clerk of the Executive Council she

followed- up on the oversight issue. She stated the following in her May 29, 2019 testimony at page 23:

Ms. Mullaley: - cause' when I came back in 2013 as clerk – cause I had drafted that minute, actually, back in 2012. So when I came back in, I recalled that I had drafted that, and I – we drafted it at the time because that is when the project was going to be exempted by the PUB, and we felt there had to be some mechanism put in to review the reasonability of the cost and schedule – the time and costs, in particular, I guess.

So yeah – but when I came back as clerk, I was aware of that, and I knew the intent behind it. So I met with Charles [Bown] and Donna[Brewer], and we started to develop this protocol at that time.

57. The awareness by Julia Mullaley that an oversight protocol was necessary as the project was going to be exempted from Public Utilities Board oversight was prudent and reasonable advice at the time. Her conduct is in keeping with the roles and responsibilities of deputy ministers as identified by Justice Gomery in providing “*sound advice on policy development and implementation.*” Furthermore, when Julia Mullaley returned as Clerk of the Executive Council in August 2013, she followed up on the status of the proposed oversight protocol which at the time had not sufficiently advanced; she thus tasked officials in both the Department of Natural Resources and the Department of Finance to move the matter forward. This is consistent with effective department management designed to address the intended objective of the oversight process.
58. Ultimately, the oversight protocol that Julia Mullaley prepared in 2012 took the form of the Oversight Committee. Exhibit P-02691 is entitled “Muskrat Falls Cost Accountability and Project Oversight – Presentation to Cabinet, March 13, 2014”. This presentation formed the basis of a Cabinet Directive whereby approval was given for the creation of an oversight committee related to the Muskrat Falls Project.
59. The Oversight Committee included the Clerk as the Executive Council as Chair, as well as numerous deputy ministers, including the Deputy Minister of Natural Resources, Charles Bown. Inherent in the creation of the committee was a recommendation by these

senior officials that outside expertise would be needed for the committee to fulfill its mandate. During her testimony on May 29, 2019 at page 23, Ms. Mullaley stated the following with respect to the expertise of the Oversight Committee and the need to retain Ernst & Young:

Mr. Learmonth: Okay. So I take it there was a need recognized to have outside external advice from an expert firm like EY. Is that correct?

Ms. Mullaley: Yeah, I mean, we all felt that, sure.

I mean, I don't think anybody would say, sitting on the Oversight Committee as officials, that we had that type of expertise.

60. Julia Mullaley continued in her testimony on May 23, 2019 at page 28 to discuss the need to have Ernst and Young assisting the Oversight Committee:

Ms. Mullaley: That was key. That was a very key pin and that was a discussion I had with then – Premier Marshall at the time, that if we were going to do this Oversight Committee we needed this type of resource. And they were very – it was very difficult budget times back then, but they felt that that was correct as well and they gave us a budget.

61. The recognition of the Oversight Committee, which included Julia Mullaley and Charles Bown, that external expertise was necessary to oversee the Muskrat Falls Project, and its subsequent recommendation that Ernst & Young be retained, was sound advice on policy development and implementation. It is also a recognition by public officials that as Nalcor Energy did have in-house expertise, in order for the Oversight Committee to fulfill its' role it would require similar expertise to assist it as it moved forward in carrying out its' mandate.

62. Early in the oversight process, Ernst & Young was engaged to assist the Committee in developing reporting protocols from Nalcor Energy – what information would be required to effectively monitor project costs, schedule and risks. (Ex. P-2051 at pp.6/7). The reporting protocol recommended by Ernst & Young was accepted by the Committee

and was formally outlined in the Shareholders Letter to Nalcor Energy, which was signed by the Premier and Minister of Natural Resources in July 2014. (Ex. P-2051 at p. 40)

63. In addition to hiring Ernst & Young as an external consultant early in the oversight process to provide expert advice to the Oversight Committee, the Committee took additional steps to increase its oversight capacity including: (Ex. P-2051 at pp.11/12)

- The Committee worked with the Federal Government, Nalcor, and MWH (the independent engineer) to establish a formal arrangement to provide the Committee access to all materials and activities undertaken by the independent engineer. This process also enabled the oversight committee members to attend site visits and attend meetings with the Independent Engineer.
- The Committee requested that that in addition to the annual audit of Nalcor's financial statements, the Committee requested Nalcor to direct its independent external auditor to conduct additional auditing procedures with respect to the validity to the costs charged to the project.
- The Committee requested that Nalcor direct its independent External Auditor to prepare combined annual financial statements for the Project, separate from Nalcor's annual financial statements.
- The Committee also gained an understanding of Nalcor's Internal Audit assurance framework. Nalcor advised this framework has been developed consistent with best practices as developed by the Institute of Internal Auditors (IAA). In June, 2013, the Institute of Internal Auditors reviewed Nalcor's internal audit activities and confirmed that these activities generally conform to the Standards and Definition of Internal Audit as published by the IAA. "Generally conforms" is the top rating and means that an internal audit activity has a charter, policies, and processes that are judged by the IAA to be in compliance with the Standards.
- The Committee also reviewed the Internal Audit Plan for the two-year period 2014 and 2015 for the project and worked with Nalcor Energy to prioritize areas for review, including a review of Project controls and procedures for risk management.

64. Once the Oversight Committee started to receive required data from Nalcor Energy in the fall of 2014, the Committee identified the need to engage Ernst & Young to ensure the reports being generated by Nalcor Energy and used by the Oversight Committee to report on cost and schedule progress to the public were reliable. (Transcript of Julia Mullaley dated May 29, 2019 at p.44) When this planned audit was discussed with Nalcor Energy

in December 2014, it was met with significant resistance by Nalcor Energy's CEO Edmund Martin. (Transcript of Julia Mullaley dated May 29, 2019 at p.26)

65. The actions of Julia Mullaley in insisting that Ernst & Young be permitted to assist the oversight committee is demonstrated by the position she advocated to her superiors when Nalcor Energy CEO Edmund Martin wanted the Oversight Committee to rely upon Nalcor's internal audit, and was adverse to Ernst & Young completing this work and discussed his position with the Premier's Office. On page 27 of her May 29, 2019 testimony the following exchange appears:

Mr. Learmonth: Yeah. Okay.

Ms. Mullaley: And very concerned and he felt that if he wanted something done, we – you know, their internal audit department can do it. And so he was asking me, Joe [Joe Browne – Premier Paul Davis' Chief of Staff], Joe was saying, like, is that practical, is that something we can accommodate, is it? And I said, not on, there's no way, I'm not doing it. I cannot be a chair of this committee – we, you know – doing this. This is critical work for our committee, its critical work for you as a government. We need to get in there and we need Ernst & Young, not – we cannot do this with internal audit.

66. The actions of Julia Mullaley in her communications with the Premier's Chief of Staff, Joseph Browne, and strong recommendation that Ernst & Young be permitted to do its work, is an example of a public servant providing sound advice and recommendations to government. This advice was subsequently accepted by the government and Ernst & Young was able to fulfill its mandate.

67. The issue of the delay in the release of Ernst & Young's report on project controls for cost and schedule before the November 30, 2015 election was also addressed during the inquiry. This report identified some significant concerns with respect to the completeness and accuracy of project cost and schedule status, particularly around quantification of risks in cost and schedule forecast. The Oversight Committee in its role advised Cabinet of the results of the review and recommended release of this report. During Julia Mullaley's testimony on May 30, 2019 at page 39 she confirmed that Cabinet approved

the release of the report prior to the election, but a decision was subsequently made by Premier Paul Davis to accept Edmund Martin's advice not to release the report due to commercial sensitivity reasons. The following exchange with counsel for the Consumer Advocate, John Hogan, confirms this to be the case:

*Ms. Mullaley: - originally, and there was the full report that Cabinet was given – the full report. And that was the report that was intended to be released with our September oversight report. **So it did get approval by Cabinet, but I guess what happened afterwards there was concern expressed.***

*So myself and Ed [Martin] and the premier, and I think the chief of staff, met outside the Cabinet room while we were breaking on another issue; we just met. And that was when the discussion happened that there's a – **from Ed that was (inaudible) significant concern from a commercial sensitivity and Astaldi and the possible impact.***

Mr. Hogan: Well, just one second.

Ms. Mullaley: Yeah

Mr. Hogan: So it was communicated to Mr. Martin that Cabinet is going to release this?

Ms. Mullaley: Oh, Ed knew.

Mr. Hogan: Yeah

Ms. Mullaley: Ed was aware –

Mr. Hogan: Okay.

Ms. Mullaley: - yes.

Mr. Hogan: And then Mr. Martin (inaudible) and then you –

Ms. Mullaley: Yes, so he stepped out – we stepped out of Cabinet Room, on the sidelines –

Mr. Hogan: Okay.

Ms. Mullaley: - of the Cabinet room to talk about the fact, you know the risks in releasing the EY report, yes. And as I've said

before, I mean, it was a discussion around the commercial sensitivity and discussions with Astaldi and it could have a big impact on project costs.

So, you know, from the perspective I guess, there's a concern expressed and felt that, you know, that we had to do something to take that into consideration and that's where we decided to split into two reports.

Mr. Hogan: Okay. And the decision was ultimately by who not to release it at that point in time – at all?

Ms. Mullaley: Well, it would have been the Premier.

68. As the Oversight Committee was a committee that reported directly to Cabinet, in bringing the report forward to Cabinet recommending approval for release, the committee fulfilled its mandate. The decision by the Premier to accept the advice of Edmund Martin that the release of the report was commercially sensitive and could impact the Astaldi issues was a decision based on information provided by the Province's energy experts.
69. Furthermore, it should be noted that despite being directed not to release the Ernst & Young report, the Oversight Committee, with the approval of Cabinet, did issue a report in September 2015 that did highlight some serious issues with the project. (Ex. P-02014) At the time the Oversight Committee observed that "Contract execution risk at the Muskrat Falls Generating Facility remains high", that "Schedule pressures continue to be experienced at the Muskrat Falls Generating Facility's Powerhouse & Intake", that "Project Milestone Dates for Muskrat Falls Generating Facility are currently under review", and that "Critical Path to First Power for December 2017 is under review". This is the last report that was issued by the Oversight Committee before the election cycle began for the November 30, 2015 election. However, it must be noted that the Oversight Committee did highlight issues surrounding cost and schedule in its last report before the election. This is an example of the public servants balancing the issues of commercial sensitivity and transparency in an effort to inform upon cost and schedule issues.

70. During the inquiry the issue arose as why the Oversight Committee did not immediately instruct Ernst & Young to conduct a full review of the Muskrat Falls Project. This issue is an example of where hindsight could impact the fairness of the inquiry's findings and therefore it is necessary to recognize the context within which the Oversight Committee was operating at the time to determine if its conduct was reasonable. The following exchange between Commissioner Counsel, Barry Learmonth, Q.C. and Julia Mullaley on pages 43-44 of Julia Mullaley's testimony is relevant to this issue:

Mr. Learmonth: Yeah. But why – at this point I'll ask you the question: rather than deal with this staged review – in other words, the first one we won't count, but this one, which was a review of the processes and stuff like that, and the second one was the real report.

Ms. Mullaley: Yeah.

Mr. Learmonth: Why not – if government is interested – and I realize you have to take your direction from Cabinet on this. I'm not suggesting it's your decision. But if Cabinet really wants to get to the bottom of this, why wouldn't Cabinet move in 2015 by forgetting about this – what I'll call an intermediate step – and say look, go and do the job? Why this intermediate step.

Ms. Mullaley: Yeah. I hear that, and I guess, again, I have to couch it with knowing all the information we know today, we should have had them in a lot earlier.

Mr. Learmonth: Mh – hmmm.

Ms. Mullaley: That's – again, I got to bring you back to the context of where we were at the time.

Mr. Learmonth: Right.

Ms. Mullaley: So we had just been appointed in April. We had just done a piece of work – the first order of business was to – so again, I should say there was no concept from government that that base, that 6.99 that was there now – nobody had a concept that the base was flawed right? So there's no reason or belief to bring in someone at that junction to do a full cost review. It was felt that had just been done. This is only a couple of months later, right? So there was no rationale or reason or compelling reason to bring anybody in right away.

We were focussed on what kind of reports do we need? What kind of depth do we need? What should we be doing? That was a very quick, you now, aspect in – up to July. We got those. We started getting the data in the fall – early fall.

By the time we actually had all the data and all the reports coming in, it was early fall. We still had no reason to believe anything was off kilter here. We -

Mr. Learmonth: Yeah.

Ms. Mullaley: - knew Astaldi was slow. We saw that, right. We started seeing some – we were concerned we weren't seeing the manufacturing reports coming in. But there was no stop-the-bus moment, this thing is falling apart. That wasn't happening at that time.

So, the next thing we wanna know is, look, we are coming out with a report, we're taking those numbers from Nalcor and we're relaying them to the public. We want to know the output from those reports is accurate. That's what we asked them to go and do, not a full-blown cost and schedule review. We wanted to understand the metrics we were monitoring. Were they good metrics? That was the job.

So it was very methodical, I would say, and reasonable in my view, at that time, in the environment we were in, right.

Mr. Learmonth: Okay.

Ms. Mullaley: And that was a really critical review.

And when we got that review done, that's when we clearly understood that they were not quantifying the risks. They were not quantifying the risks forward into the forecast. Are – you now, so that where we knew that another review had to be done.

Mr. Learmonth: So would it be fair to say, at this time, that you, as a member of the Oversight Committee, had an honest, but in retrospect, mistaken belief that everything was fine with the project?

Ms. Mullaley: We wouldn't – I don't – wouldn't say fine. But there was no huge glaring – we were very closely monitoring Astaldi at the time and some other risks, but Astaldi was clearly, the –

Mr. Learmonth: Yeah.

Ms. Mullaley: - big risk and was from day one.

Mr. Learmonth: So you believe – you had an honest belief that there was nothing seriously wrong with the way the project was working out? Yeah.

Ms. Mullaley: Yeah. I mean, we – again, you had antennas around Astaldi and what did that mean, but, yeah.

71. As noted by Commissioner Leblanc in the “Interpretation of the Terms of Reference” dated March 14, 2018, *“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.”* With these comments in mind, one must recognize that upon the establishment of the Oversight Committee public officials had an honest belief that the 6.99 Billion dollar baseline figure provided by the Province’s energy expert, Nalcor Energy, was reasonable. The context at the time was that the project had been subjected to numerous external reviews, a review of the Independent Engineer, and the Province was receiving reassurances from Nalcor Energy that risks were being managed and mitigated. It is in this context that it was decided from a due diligence perspective, that the Oversight Committee engage Ernst & Young to develop protocols regarding information required by the Oversight Committee to monitor the project and subsequently to determine if the outputs from the reports provided by Nalcor Energy could be relied upon and reported to the public.

72. The conduct of public officials in conducting staged reviews at the time was reasonable in the circumstances and demonstrates the necessity to be prudent with public funds. A full cost and schedule review is a very expensive undertaking and if it was not necessary at the time it would have been a significant unnecessary expenditure of public funds. Therefore, based upon the information available at the time the phased approach and review of Ernst & Young was reasonable in the circumstances. Additionally, the decision of the new government following the November 30, 2015 election to have Ernst

& Young conduct a full review was based upon the work that Ernst & Young had completed at that time and its decision to engage Ernst & Young to conduct a full review at that time was reasonable given the information it had at the time. This issue should not be judged in hindsight and context cannot be overemphasized.

73. The issue of when the government first became aware that the capital cost of the project had risen from 6.99 Billion dollars to 7.65 Billion dollars was also addressed during the inquiry. The evidence of Julia Mullaley, which was corroborated by Edmund Martin, demonstrates that government first became aware of that issue on June 22, 2015. The following testimony of Julia Mullaley on May 29, 2019 at page 55 is relevant:

Mr. Learmonth: Now, there's a - I just want you - before we get into this meeting. There was a reference in one of the documents we received - that's in the book and we'll (inaudible) - from James Meaney, suggesting that in a March 2015 meeting Mr. Martin and those present - or Mr. Martin mentioned to some degree there was gonna be an increase of 7.5 or 7.6. And I think we discussed this at your interview - -

Ms. Mullaley: We did.

Mr. Learmonth: - and the purpose of the meeting was to deal with distribution assets.

Ms. Mullaley: Yeah, so when I saw it in the document, again, it was just - because - and I'll tell you why I remember this again. I remembered the meeting - I very clearly remember the meeting in June of 2015 and I remember leading up to that meeting we were really pushing - 'cause we knew from based on what we say, where the contracts were, we knew that, you know, it was not possible not to have another rebaselining, and we were pushing on numbers. That was June and I remember it was around a holiday actually, and I knew it was the latter part of June.

We met down in - and I found the date - I called Craig Martin actually because I - of course, I don't have my calendar anymore from back then. And I said: Craig, can you look into your calendar anymore from back then. And I said, Craig, can you look into your calendar and see if there's a date in towards the end of June? Can you recall that meeting? And he recalls it and Charles recalls it. So Minister Wiseman at the time, who was Finance, and Minister Dalley, who was Natural Resources, and

myself and Craig and Charles met – because it was a holiday, and –

Mr. Learmonth: This was in March, right?

Ms. Mullaley: No, this was June. That's what I'm saying.

Mr. Learmonth: June.

Ms. Mullaley: - that's why I know that March was not right.

Mr. Learmonth: Okay.

Ms. Mullaley: The June one, we met with them, and we had been meeting for a few days to try to get a sense of where this budget was going. That was the first time they formally sat down with government, what that day on June 22, '15, and brought us through what looked like a potential 7.65. It was still – even in June, this was like, hot off the press concept; we're still working through a few things; were not quite sure if that's, you know, settling there, but this is so - - and it really is depending on Astaldi's performance for the summer. So, you know, we're gonna know – over the summer months we're really gonna know where this is going to go.

That was June 22. So when I saw a note back in March saying that they told government 7.5, I said: That didn't happen. No way. Like (inaudible). So I – what I did then is I can't – I don't understand that. So then I went to find Derrick Sturge's note to try to find a matching date, and I found one. And the title of it is distribution assets. And then I remember that meeting very clearly. It was a totally different topic in government.

And – but there I could see – and there was a presentation for distribution assets, but I could see some comments around the project. And so what I recall on that is again, it would've been in for a totally different meeting, but every time you come it – it doesn't matter what you're coming in on, you're talking about the project. So when they came in, we had some discussion around the projects. I remember hearing discussion around the pressures and all this stuff. But there – in my recollection, again, there was never: Oh, by the way, our project is 7.5 now.

74. Julia Mullaley continued in her May 26, 2019 testimony on page 56 to confirm when government was made aware of the 7.65 Billion dollar increase:

Mr. Learmonth: Okay. At what point did you know about 7.65?

Ms. Mullaley: The meeting was on June 22.

75. The testimony of Edmund Martin on June 14, 2019 at pages 51 and 52 supports Julia Mullaley's recollection of when government first became aware of the capital cost increase to 7.65 Billion dollars:

Mr. Fitzgerald: It was June 22, 2015. It was Craig Martin's calendar. That's the evidence we had before the Tribunal.

And the evidence also is that at that meeting you advised those officials that there are issues with Astaldi, the number might be going up to 7.5, 7.6; however, we need to see what's going to happen with the concrete pour and the concrete productivity over the summer before I can say: take this number to – you know, to Cabinet.

It wasn't a firm number at that time – the number was 6.99 – but your evidence – or, sorry, your presentation to them, generally, was there's issues here with Astaldi, we need to see how it goes over the summer. Do you recall this at all?

Mr. E. Martin: I don't recall the exact meeting, but I can recall saying those – that type of thing you know.

Mr. Fitzgerald: It kind of fits with that time period, too, I would suggest.

Mr. E. Martin: It does. It does yes.

76. Mr. Edmund Martin continued in his June 14, 2019 testimony at page 52 to provide confirmation of Julia Mullaley's recollection:

Mr. E. Martin: But I think your characterization of the June meeting would be reasonable.

Mr. Fitzgerald: It kind of fits the equation.

Mr. E. Martin: It certainly does, yes.

77. In light of the foregoing, it appears that contrary to the chronology provided by James Meaney in Exhibit P-2412, the government first became aware of a possible capital cost increase of 7.65 Billion dollars on June 22, 2015. Even at this time, this estimate was still subject to Astaldi performance over the summer of 2015.
78. The evidence before the Commission also establishes that upon the change in government following the November 30, 2015 election Julia Mullaley prepared documentation and attended meetings to assist the incoming government with the transition. (Ex. P-03838). This is an example of the non-political nature of a public servant assisting government during a period of transition.
79. During Julia Mullaley's testimony a letter she prepared dated January 25, 2016 to Premier Dwight Ball was reviewed. (Ex. P-03874). According to this letter "on Monday, January 18, 2016 Nalcor advised Government that they were entering into discussions with Astaldi with the objective of negotiating a solution to issues raised by Astaldi with respect to cost and solvency." Given the seriousness of this issue at the time Julia Mullaley advised the Premier as follows:

As discussed over the last several days, there has been no independent analysis of the information provided by Nalcor and the level of information provided is not sufficient to render an informed decision. Given the significant policy and financial implications of this decision, a much deeper understanding of the issue and the due diligence undertaken by Nalcor in reaching its recommendation is required to ensure there is strong evidence to inform a decision by Cabinet and accountability of any decision to the public. However, government is challenged to have independent analysis completed in a limited timeframe and this issue is further complicated by a lack of internal capacity to undertake this analysis given the highly technical nature and complexity of this issue.

It is therefore recommended that:

- *Government consider immediately engaging the necessary expertise (to be identified) to complete an initial assessment of the issues including in particular, validating the urgency of the issue, the conclusion that there are concerns with the solvency of Astaldi*

and the related risks to the project. Further validation will also be required to assess the options and related legal and financial risks to provide a recommendation on how to move forward to manage the project and mitigate risk.

- *Further consideration be given to how this independent assessment would integrate with the current review being undertaken by EY on Project cost and schedule risks, of which Astaldi is included (this assumes that EY is not the expertise envisioned above).*
- *Internal legal counsel in Justice and Public Safety familiar with the various contracts and terms of the Federal Loan Guarantee (and related agreements) be immediately engaged to assess any potential impact on the project be considered and deliberate thought be given to an interim replacement to be prepared to move quickly if the need arises.*

80. The January 25, 2016 letter of Julia Mullaley demonstrates an awareness of the seriousness of the issues surrounding Astaldi and provides a clear recommendation to the Premier as to what options should be considered before a decision is made. The letter demonstrates that a clear and structured process is necessary for addressing the Astaldi issue and that external expertise is required to assist the government. The recommendations in this letter are in line with the comments of Justice Gomery in that the responsibility of a deputy minister is to provide “*sound advice on policy development and implementation.*”

81. As the role of public servants such as Julia Mullaley and Charles Bown is to provide sound advice and recommendations to Ministers on policy development and implementation, the failure of Nalcor Energy officials to provide accurate, timely, and fulsome financial information to government inhibited the ability of all public servants, including those on the Oversight Committee, to perform their duties to the best of their abilities.

82. With respect to the accuracy of information being provided by Nalcor officials, Julia Mullaley’s evidence of May 29, 2019 at pages 16-17 highlights the importance of this

issue. Her evidence also demonstrates that the Oversight Committee had concerns and were proactively seeking information from Nalcor officials:

Mr. Learmonth: Why did this information anger you?

Ms. Mullaley: Well, because, I mean, you're - a minute ago your talking about 6.5, but when I saw that in July - that this was actually looking at \$7 billion - I can't imagine, as a public servant, here, knowing that information and not bringing that in. And this was July. So, you know, you still had - you were still - I mean, you were pushing hard for financial close, but you still had time to come in and have the - a real discussion around the merits of this, the challenges around this. And this is where some real solid analysis should have happened, I believe.

I know it's all in hindsight, but for knowing that someone actually knew that number was there and not come in - let alone 6.5, it was 7 billion. That that didn't come in and get discussed and debated, that is not right.

So it did upset me. And I'd say to you - as I walked through that chart that you have there, the other thing I would say is that as an Oversight Committee and as premiers and ministers in the board room when updates on these projects would happen, you know, I think we certainly had a sense of a lot of the risks that were happening and particularly around Astaldi. We were having lots of discussions, and we talked time and time again about how those risks were translating into cost and schedules. And we were always told that, look, we're mitigating - we're mitigating; we're addressing it. Yes, there's pressure. It's still in control. The schedule is on control. The cost is in control.

So, I say that because these are not only Oversight Committee, but these are questions being asked by Cabinet ministers and premiers of the day. And it's being said that it's still under control when I can look at the numbers and know there is a different set of numbers there. That's what angers me, I guess, is that I feel this - almost second set of numbers are there that no one ever knew about. And - but those questions were being asked, but they weren't honestly being answered. So I guess that's why I would say I was angered from the perspective of I felt that that was not honesty and people were not being told information that they should've been told for that purpose and pointedly being asked about ---

83. It was imperative that public servants and government officials received accurate and timely information from Nalcor Energy when they sought updates regarding the status of the project so the government could engage in informed debate to allow evidence based policy decisions to occur. A Deputy Minister can only provide sound advice on policy development and implementation to a Minister when he or she is being provided with the full picture of costs, risks, and schedule. The Oversight Committee established a process to meet at least monthly and required the most senior project officials at Nalcor Energy, namely Gilbert Bennett, and Paul Harrington, to attend these meetings and provide an update on project costs, schedule and risks. Despite questions being asked by government officials, including the Oversight Committee, this information on cost, schedule, and risks was not forthcoming. The conduct of Julia Mullaley and Charles Bown in seeking this information was reasonable in the circumstances and was in line with their duties of proactively attempting to obtain as much information as they could about the project to inform Cabinet.

84. Additionally, Julia Mullaley, in her role as Chair of the Oversight Committee provided quarterly reports to Cabinet on the status of the project. As part of this due diligence process she also required the CEO of Nalcor Energy, Edmund Martin, to provide an update on the project to Cabinet on a quarterly basis at a minimum. Charles Bown was also present at these updates. This was designed to provide an opportunity for Nalcor Energy to provide complete and accurate information to the government without any concern for commercial sensitivities.

85. In describing the communications from Nalcor Energy regarding the July – September 2013 Final Forecast Cost Figures, Julia Mullaley stated the following of May 29, 2019 on page 18:

Ms. Mullaley: I would characterize them as not honest and not open, obviously, because the numbers that were there being carried in this report are different that what was being reported to Cabinet. And I can't understand how that can happen. Like, that's just – that is- I just, I can't understand that concept. That not a concept that should happen.

*And you know, and again I just get back to it wasn't that, you know, they were coming in. But people were concerned. **Ministers were concerned. The premier was concerned. There were concerns around this project and, you know, escalating concerns all along the way. So I guess what I'm saying is these are people who are point-blank asking questions about the risks and how they are translating into costs and schedules and how's it going to impact that? Yes, there's pressures but we're going to mitigate, we're not – you know, we're holding the line, there's nothing to change yet. That's pretty significant.***

Mr. Learnmonth: Yeah.

But based on this information, is it going too far to say that in these meetings the Cabinet members were conned:?

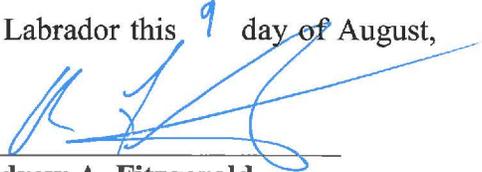
Ms. Mullaley: I guess the – to me the information was not honest. Like, you know if you knew that it was 7.5 but you're in there doing a re-baselining at 6.99 – that is not being honest with government.

86. In evaluating the reasonableness of the actions of public officials throughout the development of the Muskrat Falls Project the context of the forum in which public officials were operating must be kept at the forefront for a fair assessment to take place. It is clear from the evidence of Julia Mullaley that the Oversight Committee, cabinet ministers, and premiers were concerned about the project and were asking officials from Nalcor Energy about the status of the matter as it related to cost, schedule and risk. The evidence of Julia Mullaley confirms that the Oversight Committee, ministers, and premiers were being proactive and inquisitorial with respect to Nalcor Energy officials and were requesting information on schedule, cost, and risks. Public officials were seeking timely information from Nalcor Energy and were being diligent in requesting updated information. There were many opportunities for Edmund Martin or other Nalcor officials who met regularly with Charles Bown, Julia Mullaley, and the Oversight Committee to provide this information. The public officials fulfilled their duty by proactively requesting information regarding quantification and impact of risks on project costs and schedule from Nalcor Energy, the entity with the expertise who was tasked with developing the project.

87. Furthermore, given that the officers of Nalcor Energy were under a legal and statutory duty pursuant to s.203 of the Corporations Act R.S.N.L 1990 c. C-36, to act honestly and in good faith, and were under a duty to exercise the care, diligence, and skill that a reasonable prudent person would exercise in similar circumstances, the actions of public officials in expecting accurate and fulsome information on a timely basis from Nalcor Energy was not unreasonable in the circumstances. There is no issue of commercial sensitivity between Nalcor Energy and Government and the failure of Nalcor Energy to bring forward its projected Final Forecast Costs in July, August, and September 2013 resulted in a significant lost opportunity for the government to review the matter and discuss its options prior to financial close on November 29, 2013.
88. Any system is only as strong as the participants who operate within it. The failure of Nalcor Energy officials to bring forward information is not a reflection on the public service, as it not something that public servants who were dealing regularly with the crown corporation would reasonably expect or anticipate from the professionals at Nalcor Energy, who had a duty to act in the best interests of the corporation, and its sole shareholder, the government and people of Newfoundland and Labrador. Additionally, there were many opportunities for Nalcor Energy to provide clear and accurate answers to the questions they were receiving from the Oversight Committee, ministers, and the Premiers on cost, schedule and risk, and all this information should have been provided during the numerous interactions Nalcor officials had with public servants.
89. The role and responsibilities of Deputy Ministers were noted by Justice Gomery in the “Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities”. It is important when the Commissioner is reviewing the actions of public officials throughout this inquiry that those duties be kept at the forefront and the distinction between those who provide advice and recommendations, and those ministers/premiers who ultimately make the decision, be respected and acknowledged in the analysis. It is also important that reliance on hindsight be avoided when examining the conduct of Julia Mullaley and Charles Bown and a fair assessment must be based upon the context within which they were operating and the knowledge they possessed at

the time. The evidence demonstrates that both Julia Mullaley and Charles Bown provided sound advice and recommendations to ministers and premiers, acted proactively in the establishment of the Oversight Committee and seeking information from Nalcor, and at all times carried out their duties with integrity. When decisions were made by the government they were dutifully implemented by the public service. As noted by Justice Gomery, our system of democracy places accountability with the decision makers and not the public servants who are providing sound advice on policy development and implementation.

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



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TAB A

3.5

Role and Responsibilities of the Deputy Minister

For information and guidance on this topic, the Commission relies on a government publication entitled *Guidance for Deputy Ministers*, last modified on June 20, 2003. It states general principles applicable to the period relevant to the Commission's mandate. It begins by defining the responsibilities of Ministers of the Crown as being collective, in support of the Cabinet team; and individual, for their performance in carrying out the responsibilities of the portfolio assigned to them.¹⁶

The responsibilities of a Deputy Minister are best understood in the context of the support they provide to Ministers. The Deputy Minister is the principal source of support for a Minister in fulfilling his or her collective and individual responsibilities. In particular, the Deputy Minister is responsible for ensuring:

- sound advice on policy development and implementation;
- effective departmental management; and
- fulfillment of authorities that have been assigned to the Deputy Minister or his officials.¹⁷

With respect to the obligation to provide advice to the Minister, the publication describes this obligation in the following paragraph:

The Deputy Minister supports both individual and collective ministerial responsibilities with respect to policy development and implementation. The Deputy Minister is counted on to provide the highest quality of advice on all relevant dimensions of a departmental issue, be they economic, social or administrative. Within the priorities, objectives and standards established by the government, the Deputy Minister must provide advice on the possible impact of initiatives on the public, the department, and the government. Advice must be timely and candid, presented fearlessly, and provide the best

possible policy options based on impartial review of the public good and the declared objectives of the Minister and the government. Advice must challenge, guide and clarify, and generate new possibilities for improving the lives of Canadians. It must also demonstrate policy coherence from the perspective of departmental and portfolio management.¹⁸

In the foregoing extract, emphasis is put upon the importance of the advice to be given to the Minister on policy development and implementation. It must be assumed that the decisions are to be made by the Minister, probably on the basis of the advice received, but that the Deputy Minister is not the person making the decision. This concept corresponds to what has already been said concerning ministerial responsibility and the obligation of the Minister to work with the Deputy Minister and to give direction to him or her concerning the development of policy and its implementation. These matters are not left to the entire discretion of the Deputy Minister.

The relationship of the Deputy Minister with the political employees ("exempt staff") of the Minister's office is the subject of a short paragraph in the publication, which reads:

The Deputy Minister needs to be attentive to maintaining good working relations with the Minister's office in providing complementary support to the Minister. It is important to remember, however, that exempt staff of a Minister do not have the authority to give direction to public servants. When they ask for information or convey a Minister's instructions, it is normally done through the Deputy Minister.¹⁹

In his testimony Mr. Ronald Bilodeau, a former Associate Secretary of the PCO, described the relationship between a Deputy Minister and his or her Minister and stated that the role of the political official is not only to be in charge of political matters, but also to have an awareness of management and administrative matters. The role of a Deputy Minister is to be in charge of management and its administration, and also to be sensitive to the political side. Each must clearly understand his or her role and work together as a partnership.

Mr. Bilodeau went on to say that decisions made in a department are made by the Minister. Sometimes legislation gives specific responsibility to the Deputy Minister, but the final responsibility is that of the Minister. Ministers may exercise some discretion in what they delegate to their Deputy Ministers and what decision-making authority they retain. If there is a disagreement between a Minister and a Deputy Minister, the Minister may contact the Prime Minister, and the Deputy Minister may contact the Clerk of the Privy Council, and the problem would be worked out between them.²⁰

Generally speaking, the Deputy Minister runs his or her department and the Minister should avoid interfering in the day-to-day management of the department, even though the Minister is responsible for it. Nevertheless it is sometimes difficult to prevent the people in the department from communicating directly with their Minister. The Honourable Marcel Massé, who has long experience not only as a politician but also as a senior public servant, says that the appropriate policy to follow is to ensure that the Deputy Minister is immediately informed about any contact between one of his or her subordinates and the Minister, so that the Deputy Minister is always aware of the information that is being conveyed. Without remaining current on such contacts, a Deputy Minister could lose control of his or her department. According to Mr. Massé, Deputy Ministers cannot be held accountable or responsible for decisions in which they had no part.²¹

Ms. Bourgon agreed that a Deputy Minister would have the following obligations in the context of the management of a project or a program:

- to ensure that there was the appropriate structure in place to address the project or program;
- to require that there were appropriate policies in place to administer the program;
- to require and ensure that the program was staffed by apparently competent people; and
- to require and ensure that there was an appropriate risk management scheme in place.

She added that the Deputy Minister must always be assured that the program or project is within the authority of the department, that the managers assigned to it have clear delegated authority and that normal information management systems are in place so that the Deputy Minister can receive feedback on the project.²²

3.6

Treasury Board

The Treasury Board, supported by its Secretariat, functions as the Government's management board, overseeing the operations of the entire federal government. It is created by section 5 of the *Financial Administration Act*²³ (FAA), which provides that the Board shall consist of the Minister of Finance and four other members of Cabinet, and shall be presided over by the President of the Treasury Board, who is also a member of Cabinet.

Section 7 of the *Financial Administration Act* enumerates the areas of jurisdiction of Treasury Board, which include general administrative policy in the public service of Canada; the organization of the public service of Canada; financial management, including estimates, expenditures and procedures; and personnel management.

The role of Treasury Board has been modified over the years. Prior to legislative changes in 1966 resulting from the recommendations of the Glassco Royal Commission,²⁴ it presided over a highly centralized system for authorizing expenditures and a standardized accounting system. The Glassco Commissioners concluded that this operated as a disincentive to effective departmental management and argued, in effect, for a reassertion of ministerial authority through a higher degree of ministerial autonomy. In a post-Glassco environment the mantra became "let the managers manage." However, in 1976 the Auditor General of Canada concluded that financial management and control in the federal government continued to be inadequate. A new Royal Commission was appointed, chaired by Allen Lambert, which noted in its Report in 1979: