

**CLOSING SUBMISSIONS ON BEHALF OF
THE NUNATUKAVUT COMMUNITY COUNCIL INC.
TO
THE COMMISSION OF INQUIRY RESPECTING
THE MUSKRAT FALLS PROJECT
(THE “INQUIRY”)**

AUGUST 9TH, 2019

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EXECUTIVE SUMMARY

Based on the documentary and testamentary evidence presented to the Inquiry, NunatuKavut Community Council suggests that the Commissioner make the following findings of fact. These findings are listed here for convenience, along with their location within the final submissions.

- 1st NunatuKavut Inuit have an ongoing relationship with the lands and waters of the Churchill River and Lake Melville, including those downstream from the Muskrat Falls Project. NCC further submits that NunatuKavut Inuit had, and continues to have, a clear interest in the Project's impacts on the land, water, ice, animals, plants and people in the Upper Lake Melville area. 6
- 2nd Early engagement with all Indigenous peoples that would be impacted by the Muskrat Falls Project, and specifically NCC, was a necessary precondition to the Project's successful development. The Commissioner should further find that any delay in this engagement posed a risk to Project cost and schedule. 10
- 3rd The Province was capable of providing early, sustained and respectful engagement with Indigenous peoples. Further, the Commissioner should find that the Province did not afford NCC such a level of engagement. 13
- 4th The Province's stated justification for limiting engagement with NCC on the Muskrat Falls Project was based on an incorrect understanding of the law governing the duty to consult and accommodate, and was unreasonable in the circumstances of the Project. 15
- 5th The JRP report identified gaps in Nalcor's information regarding current land use by NCC members, as well as the potential impacts of methylmercury bioaccumulation downstream from the Project. Further, the Commissioner should find that Nalcor was required to collect additional data in order to bring a reasonable, prudent and strategic business case to the Province for sanction. 19
- 6th The Province sanctioned the Muskrat Falls Project in the absence of important information regarding NCC land use and methylmercury bioaccumulation. Further, the Commissioner should make a finding that this missing information was reasonably obtainable. 21
- 7th The failure of the Province and Nalcor to properly address, consider and mitigate NCC's concerns, as exemplified by the protests at the Muskrat

Falls Project site which took place between the years 2012 and 2017 played a role in the escalation of the Project's budget and the delay in the Project's schedule. 23

8th Nalcor's decision to seek an injunction was an unreasonable decision with respect to the overall viability of the Project, and had negative consequences for Project cost and schedule. 25

9th While the 2016 protests were based on a number of factors, the issues around potential methylmercury contamination was a significant contributing factor to the rise of protests in 2016 and the public's unrest with respect to the Muskrat Falls Project. 26

10th The Province and Nalcor failed to appropriately respond to methylmercury concerns by delaying the independent oversight work of the IEAC until years after Project construction began. Further, this delay directly contributed to the social and political conditions leading to protests and site disruptions. 28

11th The Province's inability to conduct wetland capping without incurring further Project delay is an example of its failure to reasonably mitigate against potential adverse effects to Indigenous people's rights. 30

12th The Community Development Agreement demonstrates that Nalcor always maintained the ability to engage with NCC on matters of mutual interest. 32

These findings build a factual foundation upon which NunatuKavut Community Council suggests three recommendations that the Commissioner incorporate into the Inquiry's final report. The recommendations are aimed at creating policies and processes that will work to ensure NunatuKavut Community Council does not continue to experience the same problems with future proposed developments.

- a. Within 12 months of the release of the Inquiry's final report, the Province must work collaboratively with NCC to create a policy that will govern the relationship between a project proponent, the Province, and NCC when a project is proposed to be developed within NCC's land claim area. The Province must also ensure that NCC is provided with adequate resources to meaningfully participate in this policy-making process;

- b. When a project is proposed within NCC's land claim area, the Province and Nalcor must mitigate all concerns that NCC raises before a project or development is sanctioned or started, in order to increase certainty in project cost and schedule;
- c. When a project is proposed within NCC's land claim area, the Province and Nalcor must mitigate all concerns that NCC raises before a project or development is sanctioned or started, in order to increase certainty in project cost and schedule.

INTRODUCTION

SUMMARY OF NUNATUKAVUT'S POSITION

1. On December 17, 2012, the Government of Newfoundland and Labrador (the "Province") sanctioned the construction of the Muskrat Falls Generating Station, the Labrador Transmission Assets, and the Labrador-Island Link (collectively, the "Muskrat Falls Project" or the "Project").
2. The decision to sanction the Muskrat Falls Project represented the culmination of decades of work that began in the early 1970s. Shortly after construction began, the Project grew significantly over budget and experienced lengthy scheduling delays. This Inquiry was established in 2017 to inquire into these costs and schedule overruns, among other related matters.

Exhibit P-00008, "A History of the Negotiations to Develop the Hydroelectric Resources of the Churchill River from 1949 to 2007 dated August 16, 2018, by Jason L. Churchill", p. 9.

3. Per the Inquiry's Terms of Reference and the Commissioner's interpretation of those Terms of Reference, the established leadership of Indigenous peoples whose "settled or asserted Aboriginal or treaty rights to areas in Labrador may have been adversely affected by the Muskrat Falls Project" were permitted to participate in the Inquiry with respect to the following issues:
 - a. what consultations occurred between the established leadership of Indigenous peoples and the Province and Nalcor prior to sanction;
 - b. what risk assessments and reports were done as regards the concerns of Indigenous peoples;
 - c. whether these assessments were appropriately and reasonably considered by the Province and Nalcor, and;

- d. whether appropriate measures were taken to mitigate against reasonably potential adverse effects to the settled or asserted rights of Indigenous peoples both at the time of and post-sanction.

Exhibit P-00001, "Commission of Inquiry Respecting the Muskrat Falls Project
– Terms of Reference", s. 5(a), p. 6; Interpretation of the
Terms of Reference for the Muskrat Falls Inquiry, March 14, 2018, p. 18.

4. NunatuKavut Community Council Inc. ("NCC"), as the established leadership of Inuit in south and central Labrador, has participated in the Inquiry as a party with limited standing. In addition, NCC President Todd Russell provided testimony to the Inquiry on September 18, 2018, October 4, 2018, and February 27, 2019.
5. The documentary and testamentary evidence collected by the Inquiry clearly indicates that the Province and Nalcor both took an unduly narrow view of the engagement with NCC, and Indigenous generally, that was required to successfully develop the Project. The Province and Nalcor minimized the scope of their respective roles in accommodating NCC and implementing solutions to NCC's concerns. This failed to foster a relationship between Nalcor, the Province and NCC built on mutual trust and respect.
6. This failure prevented the Province and Nalcor from fully understanding NCC's concerns about the Muskrat Falls Project. Without a willingness to listen to NCC about the issues that needed to be resolved as a precondition to NCC's support of the Project, the Province and Nalcor were unable to properly consider and mitigate the risks to NCC's asserted rights both pre- and post-sanction.
7. Instead, the relationship between Nalcor, the Province and NCC became fractured and marred by litigation, protests, and distrust. This ultimately stressed the budget and schedule of the Muskrat Falls Project and contributed to the factual circumstances underpinning section 4(b) of the Terms of Reference.

8. Given this, NCC submits that the Commissioner must reach the following conclusions:
 - a. The Province and Nalcor knew, or ought to have known, that respectful and meaningful engagement with NCC was a key factor in the success of the Muskrat Falls Project;
 - b. The Province and Nalcor failed to achieve any respectful or meaningful engagement with NCC;
 - c. The Province and Nalcor did not reasonably consider or act on NCC's concerns about the Project;
 - d. All of the foregoing contributed, in part, to the cost overruns and schedule delay of the Muskrat Falls Project.

9. NCC further submits that, in light of the suggested findings within these submissions and the above conclusions, the Commissioner should make the following recommendations:
 - a. Within 12 months of the release of the Inquiry's final report, the Province must work collaboratively with NCC to create a policy that will govern the relationship between a project proponent, the Province, and NCC when a project is proposed to be developed within NCC's land claim area. The Province must also ensure that NCC is provided with adequate resources to meaningfully participate in this policy-making process;
 - b. When a project is proposed within NCC's land claim area, the Province and Nalcor must mitigate all concerns that NCC raises before a project or development is sanctioned or started, in order to increase certainty in project cost and schedule;
 - c. the Province and Nalcor must embrace, respect and implement the principle of Free, Prior and Informed Consent ("FPIC"), as articulated in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") and by Calls to Action from the Truth and Reconciliation

Commission of Canada (“TRC”). This means that if NCC’s concerns cannot be reasonably mitigated or compensated, the Province and Nalcor should not proceed with a project or development until a mutually agreeable arrangement can be found.

THE INUIT OF NUNATUKAVUT

10. For hundreds of years before European, Canadian, or Newfoundland governments first claimed sovereignty over the interior of Labrador, Inuit lived, hunted, fished, and harvested on what is currently known as Lake Melville and the Churchill River.
11. That occupation preceded the arrival of European explorers and settlers, survived the assertion of Crown sovereignty, and continued uninterrupted to the present day. Thousands of Inuit live at the mouth of the Churchill River where it flows into Lake Melville, on the lands and waters where Inuit lived for generations and remain today.
12. The Inquiry received evidence that the Inuit presence in Lake Melville and on the Churchill River is broad, extensive and deep. In direct examination, President Russell of NCC explained that the relationship Inuit have with the land, water, animals and plants is both ancient and modern:

“Inuit occupied the coast of Labrador for hundreds and hundreds of years, and the stories of our people also talk about how Inuit occupied Lake Melville – what we called Groswater Bay, the beginning of Lake Melville – coming into Lake Melville proper. And yes, even to what we now refer to as Upper Lake Melville, and our presence was also in the Churchill River – what people call the Churchill River, and into the tributaries, and it extended for great distances. Hundreds of miles, in fact, our people travelled the rivers. Followed sometimes the caribou trails. So our presence has been vast in terms of geographic area. It has been deep in terms of time. And it has been pervasive in terms of our relationship with our traditional lands.”

Transcript, Phase 1, Vol. 2, September 18, 2018, ps. 45-46.

13. This relationship between Inuit and the natural environment was impacted by the arrival of European visitors and settlers beginning in the 18th century, as their presence brought foreign ideals, culture and laws. The arrival of outsiders introduced the commercial trapping industry to central Labrador and prompted changes in travel patterns for many Inuit, among many other dramatic changes to the Inuit way of life. While the imposition of colonial rule created many changes in Labrador, Inuit presence and use in Lake Melville and on the Churchill River remained a constant, and informs current Inuit social, economic and cultural practices.
14. In the 1970s and 1980s, Indigenous people in Labrador began forming political organizations to negotiate with the Crown and advocate for the respect and recognition of their inherent rights. In the Lake Melville area, some Inuit became members of what is now called the Nunatsiavut Government, and some Inuit became members of what is now called NCC. Inuit represented by Nunatsiavut and NCC share a history in Lake Melville and on the Churchill River.
15. The Inquiry received evidence regarding the similarities of experience and history in Upper Lake Melville between Nunatsiavut and NunatuKavut Inuit:

“...[T]here’s a lot of cultural overlap, we would say, between ourselves and Nunatsiavut Inuit. In some cases, we’re the same families. There are some members of families in North West River, for instance, that are members of Nunatsiavut, and there are other members of the family who are members of NunatuKavut. So when you heard that evidence [from Nunatsiavut], that evidence and that information is very much a part of our story, too...”

Transcript, Phase 1, Vol. 2, September 18, 2018, p. 48.

16. The evidence before the Inquiry demonstrates that NunatuKavut Inuit have a deeply rooted and lasting relationship to the lands and waters downstream from the Muskrat Falls Project. This relationship is continuous and enduring, and informs NCC’s response to and relationship with the Muskrat Falls Project. It is impossible to truly understand the impact the Muskrat Falls

Project has had on NunatuKavut Inuit without a contextual understanding of the physical, emotional and spiritual importance of Lake Melville and the Churchill River to Inuit.

17. As explained to the Inquiry by Mr. Russell:

"...there's songs written about our places, there's poetry written about our places, it has inspired carvings. These are the places where, you know, people still go out with their families and camp. There's a very deep connection and the only thing I can say is that in our connection and in our relationship with these lands and waters and ice, that – the developments that are done as they were done, often provide a sense of separation between people and what's important to them in their lives."

Transcript, Phase 1, Vol. 2, September 18, 2018, p. 50.

SUGGESTED FINDING: NunatuKavut Inuit have an ongoing relationship with the lands and waters of the Churchill River and Lake Melville, including those downstream from the Muskrat Falls Project. NCC further submits that NunatuKavut Inuit had, and continues to have, a clear interest in the Project's impacts on the land, water, ice, animals, plants and people in the Upper Lake Melville area.

LIMITATIONS ON MANDATE: INDIGENOUS CONSULTATION

18. The Commissioner's interpretation of the Terms of Reference clarifies that the Inquiry "...will not be determining any claims or treaty rights for any of the Indigenous people as this clearly does not fall within the Commission's mandate." Furthermore, the Commissioner has stated that the Inquiry will not "...assess the correctness of the positions taken by the various parties" with respect to the environmental concerns raised in regards to the Project.

Interpretation of the Terms of Reference for the Muskrat Falls Inquiry,
March 14, 2018, ps. 18, 20.

19. NCC agrees that the Inquiry is not an appropriate forum in which to make a final determination with respect to asserted land claims. In addition, re-litigating the correctness of the results of environmental assessment would

not be an appropriate use of the Inquiry's limited time and resources. The Inquiry's purpose, broadly speaking, is to assess the reasonableness of the factual and strategic foundations upon which the Province sanctioned the Project, and how the Project came to increase in cost and schedule.

20. The Inquiry's mandate also bears on the Commissioner's ability to consider the Crown's duty to consult and accommodate. The lack of consultations undertaken by the Province and Nalcor are clearly relevant to the Inquiry. However, this does not mean that the Commissioner need assess or comment on the Crown's constitutional duty to consult and accommodate.
21. The legal test for the Crown's duty to consult and accommodate is focused on whether the Crown's conduct vis-à-vis Indigenous peoples met constitutional minimum requirements. This is simply too narrow an analytical lens through which to assess the reasonableness of the Province and Nalcor's relationship with NCC over the life of the Project. It would lead the Inquiry astray from the Terms of Reference, and it would re-litigate discrete legal matters that have already been subject to numerous court proceedings.

P-00268, "Indigenous Consultation regarding the Lower Churchill Hydroelectric Generation (LCP), Labrador Island Transmission Link (LITL), and Maritime Link Projects", ps. 2-3.

22. The Commissioner must instead focus on a broad, holistic review of the relationship between the Province, Nalcor, and NCC. Instead of reviewing the Crown's actions to determine if they pass constitutional muster, the Commissioner must review the history of engagement between the parties to determine whether the steps the Province and Nalcor took were reasonable, prudent, and strategic. Ultimately, the Commissioner's role is not to rule on the constitutional validity of consultation with respect to the Muskrat Falls Project. Rather, it is to determine whether the lack of consultation and engagement contributed to cost overrun and schedule delay.

23. Accordingly, while the Inquiry has limitations on the scope of its work, the Province and Nalcor's engagement with NCC, and the consequences of that engagement, are crucial elements of the Commissioner's Terms of Reference. These elements are broader in focus than the constitutional duty to consult and accommodate, and must not be assessed too narrowly or relegated to an auxiliary issue.
24. It is the reasonableness of this engagement and its resulting impact on project cost and schedule, and not its constitutional validity, that is a reviewable issue for the Commissioner.

PHASE I

SANCTION OF THE MUSKRAT FALLS PROJECT

25. For the Inquiry's purposes, the Commissioner divided the Project into three distinct evidentiary phases. Phase I concerns the lead up to the decision to sanction the Muskrat Falls Project, including the business case developed by Nalcor and presented to the Province, the Joint Review Panel hearings and the Project's ultimate release from environmental assessment.
26. The Phase I time period also saw the Province and Nalcor begin engaging and consulting with Indigenous peoples in Labrador and Quebec whose asserted or established rights would be potentially impacted by the Project. The vast majority of this engagement was undertaken prior to Project sanction and funnelled through the environmental assessment process created by the Government of Canada and the Province.
27. Accordingly, the Commissioner must carefully review the Province's early consultation and engagement efforts, as well as the environmental assessment process, in order to properly give effect to the mandate set out in sections 4(5)(v) and 5(a) of the Terms of Reference. A review of the evidence before the Inquiry will illustrate that, despite an awareness of the utility in

engaging with Indigenous peoples early in the lifespan of the Project, the Province and Nalcor failed to create a respectful or meaningful dialogue with NCC.

BENEFITS OF EARLY INDIGENOUS ENGAGEMENT

28. Decades before the Supreme Court of Canada fully developed and clarified the legal concept of the duty to consult and accommodate in the early 2000s, the Province was aware that engagement with Indigenous peoples would be key to the viability of any hydroelectric generation project on the Churchill River. A 1980 environmental assessment on the potential of future hydroelectric projects on the Churchill River identified engagement with Indigenous peoples and mitigation of their concerns as vital preconditions to any successful development.

P-00020, "Proposal to the Shareholders Lower Churchill Development Corporation (1980)", p. 40-44.

29. Dr. Bent Flyvbjerg's expert witness testimony before the Inquiry also illustrated that early engagement with Indigenous peoples (and other interested parties) is understood as a key contributing factor to the overall success of a megaproject. When questioned about the issue by Commission counsel, Dr. Flyvbjerg indicated:

"So we've generally found that it does make sense to involve all stakeholders as early as possible. And that's actually what we see; that is what good project organizations are doing. Because it's like with the biases: if you don't do it, it's going to come back to haunt you. It's not like these stakeholders will go away peacefully and say: Okay, we weren't taken into account, we accept that and then we'll go home and do something else. That's not what happens. And it's much more expensive to take these things into account if you have to do it later on in the process. So that's the rationale for doing it earlier."

Transcript, Phase I, Vol. 1, September 17, 2018, p. 22.

30. The rationale behind this concept of early engagement is simple. In cases where megaprojects are planned and developed on Indigenous lands, those

Indigenous peoples have a relationship to the lands that pre-dates the project and will continue to exist once the project is constructed. Indigenous peoples' concerns and issues with a project will not disappear, and are virtually certain to grow if left unaddressed. As Dr. Flyvbjerg noted, delaying engagement with Indigenous peoples and mitigation of their concerns will have negative impacts on the cost and schedule of a project.

31. Through the evidence presented to this Inquiry, it has become clear that the Province had a partial understanding of the utility of early engagement. The Province had a clear desire to seek the social license of one Indigenous group, Innu Nation, in the Project area through consultation, mitigation and accommodation. However, the political will to engage did not extend to NCC in the years leading up to the environmental assessment process. Ultimately, both the Province and Nalcor failed to create a working relationship with NCC, a flaw in the Project's implementation that would have cost and schedule impacts post-sanction.

SUGGESTED FINDING: Early engagement with all Indigenous peoples that would be impacted by the Muskrat Falls Project, and specifically NCC, was a necessary precondition to the Project's successful development. The Commissioner should further find that any delay in this engagement posed a risk to Project cost and schedule.

DISCREPANCIES IN INDIGENOUS ENGAGEMENT

32. The evidence before the Inquiry clearly shows that different Indigenous organizations received different levels of engagement with respect to the Muskrat Falls Project. However, the Province asserted through the *viva voce* evidence presented to the Inquiry that the engagement provided to each Indigenous peoples was of the same calibre. Under cross-examination by counsel for NCC, Aubrey Gover, deputy minister for Indigenous Affairs, described the content of the Province's consultation efforts with Indigenous peoples as follows:

“The simplest thing to do is say, you know what, our honour is involved here with Indigenous people and their assertions of rights over their traditional lands or their settled rights over traditional lands, so let’s treat everybody the same. That way those with the severest impacts and the strongest claims get the consultation they deserve, and those with the weakest impacts and the weakest claims get more than they deserve, but no one is prejudiced by the process.

Those who are entitled to a Cadillac got it. Those who were entitled to a Lada got a Cadillac. But everyone got a car to drive.”

Transcript, Phase I, Vol. 10, October 3, 2018, p. 46.

33. Even a cursory review of the actions the Province and Nalcor took to engage with each Indigenous peoples demonstrates that Mr. Gover’s assertion is simply false. Mr. Gover’s testimony is directly contradicted by the Province’s own internal documents, which conceptualize Innu Nation as occupying the “highest tier” of consultation, with all other “Aboriginal stakeholders” a tier below.

P-00295, “Briefing Note – Cabinet Secretariat”, p. 1.

34. The allocation of environmental assessment funding, provided to Indigenous peoples to facilitate participation in the environmental assessment process, also illustrates discrepancies in the level of engagement offered to different Indigenous groups. A \$1 million total in participant funding (with \$500,000 from the Canadian Environmental Assessment Agency (CEAA) and another \$500,000 from the Province) was inequitably distributed, with grants as low as \$9,165 and as high as \$533,968. NCC received \$133,000 of the participant funding.

P-00268, p. 5.

35. Further, consultation between Newfoundland and Labrador Hydro and Innu Nation began in the late 1990s, when the idea to develop the hydroelectric potential of the Lower Churchill was in its infancy. Years of effort to consult and accommodate Labrador Innu would eventually lead to the ratification of

Tshash Petapen Agreement, of which an Impacts and Benefits Agreement (IBA) for the Muskrat Falls Project was a key component.

P-00271, "Indigenous Consultation Report – Muskrat Falls Project", p. 4;
P-00031, "GNL News Release dated September 26, 2008, re Innu Nation and Province Reach Historic Agreement, p. 1.

36. Conversely, consultation with the other Indigenous peoples whose rights would be impacted by the Muskrat Falls Project did not begin until 2008 at the earliest. Nalcor did not begin to consult with NCC until 2009, nearly two and a half years after the Muskrat Falls Project had already been registered for environmental assessment. Nalcor was also unwilling to negotiate an IBA or any alternative form of benefit agreement with NCC.

P-00271, ps. 13, 15-16.

37. When pressed about the near decade-long discrepancy between the beginning of consultations with Innu Nation and the beginning of consultations with other Indigenous peoples, Gilbert Bennett, Nalcor Executive Vice-President for power development, could not provide an explanation. Under cross-examination by counsel for NCC, Mr. Bennett did offer up the following:

"So it was generally understood by members of the project team, who ultimately preceded me at that time and representatives of government, that if anything was going to happen with the Lower Churchill there needed to be engagement with the Labrador Innu...as we get into the environmental assessment process, our approach is to now reach out and – with the other – all of the other Indigenous groups to carry out consultation activities in accordance with the [Environmental Impact Statement] Guidelines, which we're now – 'cause we're now into that process."

Transcript, Phase I, Vol. 49, November 29, 2018, p. 21.

38. To be clear, NCC does not take the position that Innu Nation received too much consultation, or should have been engaged any less or at a later time. It is encouraging that the Province and Nalcor understood how important a good relationship with Innu Nation would be for the viability of the Muskrat

Falls Project, and that great strides were taken to ensure Innu Nation's concerns were considered and respected before Project sanction and construction.

39. What NCC does submit is that the evidence above demonstrates that Mr. Gover's assertion did not accurately characterize the Province's engagement with Indigenous peoples. NCC did not receive a level of engagement from Nalcor or the Province that began early, was sustained for years and was respectful of NCC's concerns. However, the evidence of the Province's engagement with Innu Nation shows that the Province was capable of providing this level of engagement to Indigenous peoples if it wished.

SUGGESTED FINDING: The Province was capable of providing early, sustained and respectful engagement with Indigenous peoples. Further, the Commissioner should find that the Province did not afford NCC such a level of engagement.

EARLY NCC REQUESTS FOR CROWN ENGAGEMENT

40. While consultation with Nalcor did not begin until 2009, NCC had nevertheless attempted to engage the Province in consultation efforts on the Muskrat Falls Project since the early 2000's. One such example occurred in October of 2005, over a year before the Muskrat Falls Project was registered for environmental assessment, when NCC delivered a letter to then-Premier Danny Williams outlining a proposed framework for NCC-Crown consultation. This nine-step guideline was intended to apply both to the Muskrat Falls Project as well as to all future resource development projects located within NCC's land claim area.

P-00288, "Letter dated October 31, 2005 from Chris Montague to Hon. Danny Williams re Lower Churchill hydroelectric development", p. 4.

41. Premier Williams responded to NCC's letter, and rejected the proposed consultation framework by stating that the proposal would "go far beyond any legal precedence or any current or past practice our Government has

undertaken with respect to the Innu Nation or Labrador Inuit Association.” In light of this, and “[g]iven the status of [NCC]”, the proposal was characterized as unrealistic.

P-00289, “Letter dated November 10, 2005 from Danny Williams, Q.C. to Chris Montague re Proposed Lower Churchill hydro development”, p. 2.

42. This exchange between NCC leadership and the Province is indicative of the relationship between the two parties leading up to the sanctioning of the Muskrat Falls Project. NCC’s initial efforts to engage the Province on areas of mutual interest and concern were stymied by the Province’s unwillingness to consult NCC on the basis of its asserted land rights. NCC was not simply ignored in the years leading up to the environmental assessment process: it was intentionally rebuffed in its efforts to alert the Province and Nalcor to its concerns and meaningfully participate in resolving those concerns.
43. These limits placed on NCC’s involvement continued as the Province delegated its remaining consultation efforts to Nalcor through the environmental assessment process. Numerous briefing notes prepared by the Province illustrate that the Province’s intention was to minimize NCC’s involvement in the environmental assessment process as much as possible.
44. In a 2007 draft “Engagement Strategy” for the Province, the Province claims that “there has not been a direct request by any of the Aboriginal groups for a negotiated consultation agreement or protocol”, which is contradicted by the evidence before the Commissioner in this Inquiry. The strategy goes on to recommend that NCC’s involvement in the environmental assessment process be limited to the role of a mere ‘interested party’, and not as an Indigenous people.

P-00290, “GNL Briefing Note re Lower Churchill Engagement Strategy with Aboriginal Groups”, p. 3 and 7.

45. The justification for limiting NCC's involvement in the environmental assessment process came from the Province's "longstanding policy of consulting only with aboriginal groups that have land claims that have been accepted for negotiation...". The Province maintained this policy years after the Supreme Court of Canada in *Haida Nation v. British Columbia*, 2004 SCC 73 clarified that the duty to consult and accommodate cannot be limited to those land claims the Crown has accepted for negotiation.

P-00292, "Memorandum to Executive Council re Consultation with the Labrador Metis Nation and the Quebec Innu on the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project", p. 2.

46. In *Haida Nation*, the Supreme Court of Canada indicated that the duty to consult and accommodate is necessary because the Crown must act honourably in negotiating outstanding Aboriginal claims and rights, and cannot be seen to engage in "sharp dealing". The Province's stance, inconsistent with the legal principles of the duty to consult and accommodate, prevented NCC from receiving proper engagement on the Muskrat Falls Project for years.
47. Though NCC's early efforts to engage with the Province and Nalcor were met with rejection, once the Muskrat Falls Project entered into the environmental assessment phase, the Province and Nalcor could no longer ignore all Indigenous peoples whose rights were impacted by the Project.

SUGGESTED FINDING: The Province's stated justification for limiting engagement with NCC on the Muskrat Falls Project was based on an incorrect understanding of the law governing the duty to consult and accommodate, and was unreasonable in the circumstances of the Project.

THE JOINT REVIEW PANEL

48. On November 30, 2006, Newfoundland and Labrador Hydro submitted a project registration document to both the federal and provincial governments. A project registration document is a tool used by both levels of government to

determine what level of environmental regulation and oversight is required before a particular natural resource project may proceed.

49. In this case, the federal and provincial governments each determined that an environmental assessment and an environmental impact statement were required, respectively. In order to streamline these concurrent federal and provincial regulatory responsibilities, both governments agreed to establish a Joint Review Panel (“JRP”) to assess the purpose and rationale for the Muskrat Falls Project as well as its environmental and socio-economic impacts.

P-00041, “Report of the Joint Review Panel dated August 2011”, p. 11.

50. NCC was afforded an opportunity to participate in the JRP process, which included information gathering and public hearings. Pursuant to its Terms of Reference, the JRP was mandated to include information related to current land use by, and concerns of, Indigenous people in the Muskrat Falls Project area. Importantly, the JRP was prohibited from assessing the strength or validity of any outstanding land claims, the scope or content of the Crown’s duty to consult and accommodate, or whether the Crown had fulfilled that duty.

P-00271, “Nalcor Energy – Indigenous Consultation Report – Muskrat Falls Project dated August 21, 2018”, Appendix G, p. 293.

51. As stated above (see paragraph 34), NCC was only allocated \$133,000 to participate in the JRP process, which included responding to the environmental impact statement, participating in the JRP hearings, and collecting information and conducting studies on NCC members’ current land use patterns in the Project area. NCC received a further \$60,000 to participate in the environmental assessment of the Labrador Island Transmission Link.

52. Ultimately, the JRP published a final report that concluded the Muskrat Falls Project would have significant adverse environmental impacts on the aquatic and terrestrial environment surrounding the Muskrat Falls Project, on the heritage and culture of the area, and on land and resource use (in the event consumption advisories were issued). In response, both the federal and provincial governments determined the benefits of the Muskrat Falls Project outweighed the risks identified in the JRP and released the project from environmental assessment.

P-00041, p. 12; P-00050, "Government of Canada Response to the Report of the Joint Federal-Provincial Review Panel for Nalcor's Lower Churchill Generation Project in Newfoundland and Labrador"; P-00051, "Government of Newfoundland and Labrador's Response to the Report of the Joint Review Panel for Nalcor's Lower Churchill Generation Project".

NCC'S PARTICIPATION IN THE JRP

53. NCC's participation in the JRP process was hindered by a number of factors, including the inadequate funding provided by CEAA and the Province, as well as NCC's decision to seek an injunction prohibiting the JRP process from continuing until outstanding concerns were addressed. Perhaps most importantly, NCC was unable to fully participate in the JRP process due to the Province's policy of ignoring NCC's requests for engagement and minimizing NCC's participation in the Project development leading up to the JRP. Simply put, NCC was so far behind in the process when the JRP started that it became practically impossible to "catch up".
54. The Province's history of inadequate engagement prior to the JRP process was a concern raised by multiple Indigenous groups, including NCC, to the JRP itself. This led to a suggestion from the Panel members that "governments would be well advised to make every effort to meaningfully engage with Aboriginal communities before a Project decision is made, with a view to repairing strained relationships and develop relationships based on trust."

P-00041, p. 278.

55. Despite the foregoing, NCC was nevertheless able to raise a significant number of issues for the JRP's consideration. Some of the issues raised by NCC with respect to the Muskrat Falls Project included:

- a. the potential increase in suspended solids and sediments in the river;
- b. the need for electricity generated by the Project to be available to NunatuKavut's coastal communities;
- c. the future pressures on affordable housing in Upper Lake Melville;
- d. the lack of information related to Indigenous participation in monitoring;
- e. the loss of traditional trap lines and hunting, fishing and harvesting areas;
- f. the potential increase in methylmercury levels;
- g. the impact on caribou.

P-00041, ps. 102, 242, 262, 290' P-00271, ps. 57, 68.

56. Despite these efforts, the most striking findings about NCC and its members in the JRP report concern information the Panel members did not know and were unable to determine prior to the report's release. The JRP's final report stated that "[b]ased on the information on current land and resource use...there are uncertainties regarding the extent and locations of current land and resource use by the Inuit-Metis in the Project area." As well, the Panel concluded that "...it was still uncertain whether methylmercury would bioaccumulate in fish and seal to levels that would require consumption advisories, especially considering the lack of baseline information."

P-00041, p. 202, 21.

57. NCC submits that the uncertainties with respect to current land use and bioaccumulation of methylmercury undercut the Province's response to the JRP's report, and its ultimate conclusion that the benefits of the Project outweighed the identified impacts. The Panel members identified significant gaps in the evidentiary record submitted to the JRP; gaps in information

regarding the current use of the Churchill River but also the potential future impacts on Lake Melville and the Churchill River. Despite these uncertainties, the JRP still determined that the Muskrat Falls Project would have significant adverse impacts on the Project area.

58. NCC submits that it was incumbent on the Province and Nalcor to take stock of the evidentiary uncertainties identified by the JRP, and perform additional work to ensure all relevant information was known before the Province decided to approve Project sanction. Proceeding to sanction and construction without better understanding the positive or negative impacts this missing information could bear on the Muskrat Falls Project constituted an unreasonable risk.

SUGGESTED FINDING: The JRP report identified gaps in Nalcor's information regarding current land use by NCC members, as well as the potential impacts of methylmercury bioaccumulation downstream from the Project. Further, the Commissioner should find that Nalcor was required to collect additional data in order to bring a reasonable, prudent and strategic business case to the Province for sanction.

CROWN RESPONSE TO JRP REPORT

59. The JRP and its report made important findings of fact regarding both the potential benefits and adverse impacts of the Muskrat Falls Project. However, it is critical to note that the JRP had no statutory authority to release the Project from environmental assessment or otherwise approve the Project. The JRP's report was delivered to the federal and provincial governments for review. Each government could approve or reject the Muskrat Falls Project, based on the factors outlined in their respective environmental legislation.

P-00041, p. 11.

60. Despite the fact that the JRP's conclusions were made in the absence of a complete or fulsome record of current land use by NCC members or downstream methylmercury bioaccumulation, the Province and the

Government of Canada ultimately determined that the benefits of the Muskrat Falls Project outweighed the detrimental impacts, and released the Project from environmental assessment.

61. The Province did not undertake any additional work to bridge the gaps in information that Nalcor had collected. Indeed, the Province's formal, written response to the JRP was limited and merely focused on the list of recommendations appended to the report.
62. The testamentary evidence offered by Charles Bown, the Province's Deputy Minister of Natural Resources, was that the Province's public response to the JRP report was a focused, prescribed process that would have ignored any findings in the report that did not form the basis of a specific recommendation.

Transcript, Phase 1, Vol. 54, December 7, 2018, p. 67.

63. The JRP's recommendations were divided amongst the Province's staff within the Ministry of Environment and sent to the relevant Ministry or Department who would be in the best position to draft a response. Once drafted, the Ministry or Department would deliver its draft responses back to the Ministry of Environment, who ultimately compiled the responses into a cohesive document for Cabinet review.

Transcript, Phase 1, Vol. 54, December 7, 2018, p. 65.

64. Accordingly, the multiple references to uncertainties with respect to NCC members' land use in the JRP report went unanswered by the Province. In addition, the Province did not respond to the JRP's finding that a lack of baseline information regarding methylmercury bioaccumulation underpinned Nalcor's assumptions regarding projected methylmercury increases. As these specific gaps in data did not form the basis of a JRP recommendation, the Province's process for responding to the JRP report was to refrain from forwarding these findings to a Ministry or Department for review.

65. In releasing the Muskrat Falls Project from environmental assessment based on the information available at the time, the Province lost an opportunity to make a truly informed decision on Project sanction. It is clear that the Province could never reach complete certainty about the potential impacts of the Project's construction. The information lacking from the JRP's report, however, was not impossible to obtain. The careful and strategic course of action would have been to delay Project sanction until more information could be gathered about crucial issues to NCC and its members.

SUGGESTED FINDING: The Province sanctioned the Muskrat Falls Project in the absence of important information regarding NCC land use and methylmercury bioaccumulation. Further, the Commissioner should make a finding that this missing information was reasonably obtainable.

PHASE II

CONSTRUCTION OF THE MUSKRAT FALLS PROJECT

66. Phase II of the Inquiry concerned the cost overruns and schedule delay that began to affect the Muskrat Falls Project almost immediately following sanction. In addition, the Commissioner reviewed the Project oversight provided by both the Province and Nalcor, to determine its reasonableness.
67. For NCC, Phase II was marked by protests and direct action on the Muskrat Falls Project site. Some protests were directly organized by NCC, whereas others were grassroots actions with which NCC was unaffiliated but in which many individual NCC members participated. The reasons for the protests, which began in 2011 shortly before Project sanction and continued into late 2016, ranged from a lack of progress and process to address NCC's asserted land claim to demands for respect for NunatuKavut Inuit land use and occupancy, stricter methylmercury monitoring and the assessment of "full" reservoir clearing before impoundment.

68. The time period covered by Phase II also saw changes in leadership, both in Nalcor and in the Province. For NCC, its relationship with Nalcor improved, which resulted in the negotiation and signing of a Community Development Agreement (“CDA”) between the parties, governing areas of mutual interest.
69. The community concerns in Labrador regarding methylmercury led to the creation of the Independent Expert Advisory Committee (“IEAC”) in late 2016 to provide independent oversight of Nalcor’s methylmercury monitoring and mitigation efforts. The IEAC carefully reviewed Nalcor’s monitoring and mitigation practices and made two sets of recommendations to the Province on how best to protect human health and safety in the Project area. Unfortunately, the government ignored the IEAC’s important recommendations regarding wetland capping and reservoir clearing until the work could not be done without significant additional schedule delay.
70. This failure to appropriately consider the risk assessments performed regarding NCC’s concerns, and the failure to take proper mitigation steps, is a topic directly within the Commissioner’s interpretation of the Terms of Reference. While the protests themselves do not form part of the Inquiry’s mandate, the site disruptions and work stoppages had a negative impact on Project cost and schedule. The reasonableness with which the Province and Nalcor handled the protests, as well as the grievances that led to the protests, are relevant to the Inquiry’s mandate as well.

THE COST AND SCHEDULE IMPACT OF PROTESTS

71. In Nalcor’s post-sanction briefing note created for the Inquiry, “Extreme and Unexpected Strategic Risk Events” are purported to account for \$2.1 billion of the Muskrat Falls Project’s projected \$3.9 billion cost increase in 2017. The briefing note lists negativity, protests, and anti-Muskrat sentiments as extreme or unexpected strategic risk events that contributed in part to the \$2.1 billion increase.

72. Protests are also identified in the same briefing note as one of the "main drivers" impacting the increase in cost from \$7.5 billion to \$10.1 billion. Nalcor's records indicate that protests and site disruptions interrupted the Project schedule for a total of 73 hours over 26 days between 2012 and 2017.

P-01769, ps. 18, 61.

73. To be clear, NCC has not independently verified the assertion that protests and "anti-Muskrat sentiments" contributed to a \$2.1 billion increase in the Muskrat Falls Project cost. NCC does not claim that the protests between 2012 and 2016 caused a significant proportion of the \$2.1 billion in Project cost increases identified by Nalcor.

74. To the extent that protests at the Muskrat Falls site contributed to the increase in costs for the Muskrat Falls Project, the attribution for the cost increase clearly falls to Nalcor and its inaction on issues of pressing importance for NCC, among other groups. NCC provided the Province and Nalcor ample opportunities to reach a resolution to outstanding issues prior to the Project's construction. It was the Province and Nalcor who decided to delay consideration of those issues until midway through Project construction and after multiple protests, causing cost increase and schedule delay.

75. The cost increase brought about by protests, which demanded the Province and Nalcor perform solely needed work on the Project, is another example of the failed business strategy employed by the Province and Nalcor with respect to the Project.

SUGGESTED FINDING: The failure of the Province and Nalcor to properly address, consider and mitigate NCC's concerns, as exemplified by the protests at the Muskrat Falls Project site which took place between the years 2012 and 2017 played a role in the escalation of the Project's budget and the delay in the Project's schedule.

EARLY PROTESTS AT MUSKRAT FALLS SITE

76. In October of 2012, approximately six weeks before Project sanction, NCC organized an information picket at the intersection of the Trans-Labrador Highway and an access road leading to the Muskrat Falls Project site. On October 10, 2012, NCC participants slowed traffic approaching the Project site for 12 hours in an attempt to draw attention to the lack of progress on NCC's asserted land claim and the Project's unmitigated impacts on NCC's asserted rights. NCC was successful in persuading five vehicles from proceeding to the site.

P-02079, "Supreme Court of Newfoundland and Labrador Citation dated December 3, 2014 between NunatuKavut Community Council Inc., Todd Russell and Persons Unknown and Nalcor Energy", p. 2.

77. In response, Nalcor applied for and received a broad *ex parte* injunction the following day preventing NCC and its members from blocking the access road or approaching the Muskrat Falls Project site. This interlocutory injunction was subsequently modified before Nalcor was eventually granted a permanent injunction that remained in place until the Newfoundland and Labrador Court of Appeal overturned the order granting the injunction in 2014.

P-02079, ps. 2-3.

78. Nalcor's legal right to seek an injunction is not a reviewable issue for the Commissioner. In addition, the legal dispute regarding the injunction and its terms has already been heard by the Newfoundland and Labrador Court of Appeal. NCC does not wish to re-litigate the facts underpinning the injunction application, nor the legal justifications Nalcor employed to obtain the injunction.
79. The use of an injunction to prohibit NCC and its members from protesting at or near the Project site is indicative of the flawed approach Nalcor took to responding to legitimate concerns from Indigenous peoples. The question is

not whether Nalcor was legally entitled to act as it did. The question for the Commissioner is whether Nalcor ought to have acted as it did.

80. Nalcor's actions did not advance a resolution to the outstanding issues raised by the protests. Quite the opposite, Nalcor instead worsened the situation by using the court system to remove NCC's ability to legitimately protest at the site. Rather than address the underlying issues, Nalcor attempted to heavily-handedly force NCC to stop its direct action.
81. After Nalcor successfully applied for its injunction, NCC and its members continued to protest near the Muskrat Falls Project site. In April of 2013, eight NCC members, including President Russell, were arrested and charged with obstructing a peace officer after continuing to picket the access road leading to the Project site.

P-02076, "CBC news article dated April 6, 2013, re Russell, NunatuKavut members arrested near Muskrat Falls", p. 2.

82. The decision to work against NCC instead of attempting to consider and act on NCC's concerns was a failure to reasonably and prudently plan the post-sanction construction phase of the Project. In the years following the Court of Appeal decision overturning Nalcor's injunction, protests would grow in size and severity until the Province and Nalcor were forced to consider and ultimately act on Indigenous peoples' concerns.

SUGGESTED FINDING: Nalcor's decision to seek an injunction was an unreasonable decision with respect to the overall viability of the Project, and had negative consequences for Project cost and schedule.

THE INDEPENDENT EXPERT ADVISORY COMMITTEE

83. Like NCC, the Nunatsiavut Government raised the issue of methylmercury bioaccumulation and its potential impacts on human health during the Joint Review Panel process. Given the uncertainties regarding the methylmercury findings in the JRP report, Nunatsiavut commissioned a series of studies in

the years following the Project's release from environmental assessment regarding the potential increase in methylmercury levels near the Project.

84. NCC was aware of the work Nunatsiavut was conducting, and publicly supported Nunatsiavut's efforts. NCC took the position that in light of the uncertainty and ambiguity in the scientific record with respect to the potential increase in methylmercury, full reservoir clearing and expert, independent oversight and monitoring were needed before the reservoir was impounded and the Muskrat Falls Project was completed.

P-02089, "NunatuKavut Press Release dated April 20, 2016, re New Scientific Report Finds Muskrat Falls Project an Environmental Disaster in the Making; Will Significantly and Adversely Harm Human Health and Well-being", p. 1.

85. The questions raised by these studies about the potential increase in methylmercury, and whether it posed a threat to human health and safety, were a contributing factor in the rise of a series of protests in 2016 in Happy Valley-Goose Bay and at the Muskrat Falls Project site. These protests, which included site disruptions and hunger strikes, slowed Project construction and prevented workers from accessing the Project site. Although these protests were not organized by any established Indigenous organization or leadership, the growing discontent with the Province's response to the protests led the leaders of all three Indigenous groups in Labrador to come together and participate in a large rally in Happy Valley-Goose Bay in June of 2016.

Transcript, Phase II, Vol. 9, February 27, 2019, p. 87.

SUGGESTED FINDING: While the 2016 protests were based on a number of factors, the issues around potential methylmercury contamination was a significant contributing factor to the rise of protests in 2016 and the public's unrest with respect to the Muskrat Falls Project.

86. The Province eventually responded to the calls for methylmercury monitoring and reservoir clearing by convening a meeting in St. John's with the leaders of NCC, Innu Nation, and Nunatsiavut. At this meeting, the parties unanimously agreed to establish the IEAC with a mandate to independently

review the monitoring, mitigation and management of methylmercury levels downstream from the Muskrat Falls Project, as well as to recommend any action to the Province that may further mitigate the impacts of the Muskrat Falls Project on downstream residents.

P-01694, "Independent Expert Advisory Committee – Terms of Reference – Version Date: March 24, 2017", p. 1.

87. The IEAC was comprised of an Independent Chair, an Oversight Committee and an Independent Expert Committee. Members of the Oversight Committee included NCC, Nunatsiavut, Innu Nation, the affected municipalities, the provincial and federal governments, and Nalcor. The Independent Expert Committee consisted of six scientific experts and three Indigenous knowledge experts (one appointed each from NCC, Innu Nation, and Nunatsiavut). The IEAC conducted expert reviews of the methylmercury monitoring Nalcor had undertaken to date to determine whether Nalcor's mitigation and monitoring adequate. In addition, the IEAC reviewed the work Nalcor had previously done with respect to the management and mitigation of methylmercury levels to determine what downstream impact the Project may have on human health.
88. The IEAC released its first set of recommendations on September 22, 2017 and on April 10, 2018 the IEAC submitted its second and final recommendations to the Province. The IEAC made four final recommendations:
 - a. A public information campaign to reiterate that country food and water are safe;
 - b. An independent, community-based body to oversee the design and implementation of a monitoring program for the Muskrat Falls project and provide information relevant to the protection of human health;
 - c. Negotiation of an Impact Security Fund between the Province, Nalcor, Indigenous groups and the local population;

d. Targeted soil removal in combination with wetland capping.

P-04174, "Email dated May 31, 2018, 4:58:45 PM from Erin Shea to Andrew Parsons re FYI - KMs - IEAC Final Recommendations", p. 1.

89. The first three recommendations received consensus approval from the IEAC members. However, Innu Nation's recommendation with respect to the fourth recommendation was to proceed solely with wetland capping. It is clear that the IEAC did an admirable job of reviewing a significant amount of information in a politically sensitive environment and with enormous time constraints. The work of the IEAC members, particularly the Indigenous knowledge experts, is to be commended.
90. However, it is equally clear from the evidence before the Inquiry that the work of the IEAC should have been performed years prior to the IEAC's inception. Uncertainties in the methylmercury baseline data were identified through the Joint Review Panel process seven years before the IEAC would submit its recommendations to the Province. As indicated earlier, the prudent course of action would have been for the Province and Nalcor to best attempt to eliminate these uncertainties prior to sanction and construction.
91. Instead, the Province and Nalcor waited until years of protests significantly added to the Project cost and schedule before creating an oversight body to do work that ought to have been done years prior. This led to a truncated timeline within which the Province was required to accept or reject the IEAC's recommendations, some of which involved significant expenditures of public money.

SUGGESTED FINDING: The Province and Nalcor failed to appropriately respond to methylmercury concerns by delaying the independent oversight work of the IEAC until years after Project construction began. Further, this delay directly contributed to the social and political conditions leading to protests and site disruptions.

DELAY IN RESPONDING TO IEAC RECOMMENDATIONS

92. When the IEAC sent its final set of recommendations to the Province for review in early 2018, the Project schedule contemplated that Nalcor would begin reservoir impoundment in August 2019. Accordingly, the Province had over a year to approve or reject the recommendation with respect to wetland soil capping, which would need to be completed prior to full reservoir impoundment.
93. Through the documents entered into evidence at the Inquiry, we know that the Province was preparing to accept the IEAC recommendation to conduct wetland soil capping as early as November 2018. In addition, Nalcor began to apply for the requisite provincial permits and authorizations to perform the wetland capping in advance of the Province's order (approximately July 2018).

P-04184, GNL presentation dated November 6, 2018, re Technical Briefing: IEAC's Methylmercury Recommendations, p. 14.

94. However, the direct evidence of Premier Dwight Ball indicated that in January of 2019, the Province became aware that the window within which wetland capping could be done without impacting the Project schedule had passed. The only feasible manner in which to complete wetland soil capping after January 2019 would involve further delaying the Muskrat Falls Project schedule with obvious significant implications on scheduling and costs.

Transcript, Phase II, Vol. 66, July 4, 2019, p. 76.

95. The Province failed to communicate this, or any decision with respect to wetland soil capping, to NCC or any other Indigenous group (or apparently anyone else) for months after the window for wetland capping had closed. It is concerning that confirmation that the Province would reject the recommendation of the IEAC and not proceed with wetland capping came through the Inquiry process itself.

96. The Province failed to order independent expert oversight early enough in the Project's timeline to give the Province the time required to make an informed decision on issues of critical importance. This failure created a difficult choice for the Province: either proceed with reasonable mitigation of methylmercury concerns or further delay the Project timeline. This conundrum was not inevitable; it was the direct result of the Province's failure to engage with Indigenous peoples, consider their concerns and take mitigating steps early in the Project's development.

SUGGESTED FINDING: The Province's inability to conduct wetland capping without incurring further Project delay is an example of its failure to reasonably mitigate against potential adverse effects to Indigenous people's rights.

COMMUNITY DEVELOPMENT AGREEMENT

97. As stated above, the 2015 provincial election resulted in a change of leadership with Premier Dwight Ball and the NL Liberal party coming into power. Shortly thereafter, Edmund Martin resigned as Nalcor CEO and was replaced by Stan Marshall. This time period marked a significant shift in the operation, management and oversight of the Muskrat Falls Project overall.
98. Engagement with Indigenous peoples improved as well. Under cross-examination, Mr. Marshall admitted that when he took over as CEO, relationships between Nalcor and the Indigenous groups in Labrador appeared strained. Mr. Marshall brought new senior leadership to the government and Aboriginal relations portfolio within Nalcor, and summarized his philosophy with respect to engagement as follows:

"...we [incoming Nalcor leadership] had a view of the – a company like Nalcor or anybody in the utility business it's very long-term assets. We're going to be around for a long period of time and, clearly, the Aboriginal community, they're going to be around for a long period of time.

So, at some point in time, you got to sit down and say: Okay, we need to have a good and healthy relationship here. It's going to benefit us both. Maybe we can't – and I remember, specifically, having this conversation with Todd Russell, you know, that

sometimes there's very little you can do in the short term, but you got to start on the path.

And I was very much – I didn't think that we could make a lot of progress in short term, but I thought that we at least – at least we should start. And it turns out that, yes, we did make a lot of progress in short term and – but it's based on mutual respect and trust. It has to be.”

Transcript, Phase II, Vol. 65, July 3, 2019, p. 35.

99. For NCC, this good faith attempt at progress with Nalcor resulted in a 2017 Community Development Agreement, which provides NCC with \$8 million over six years to invest in community initiatives and infrastructure. While not an IBA or compensation agreement, the Community Development Agreement is an important milestone in the relationship between Nalcor and NCC. Under direct examination, President Russell described the Agreement as forward-looking, and one that creates the foundations for a potential relationship based on respect and trust.

Transcript, Phase II, Vol. 9, February 27, 2019, p. 83.

100. The Community Development Agreement is an apt illustration of the type of relationship Nalcor and NCC could have started developing in the early 2000s, before the Project began developing in earnest. The Community Development Agreement does not settle NCC's asserted land claims, nor does it involve the express approval of the provincial or federal governments. It was not predicated on the federal government's "acceptance" of NCC's land claim. No material factors changed between the beginning of the Muskrat Falls Project and the signing of the Community Development Agreement that made the impossible possible.
101. The Community Development Agreement demonstrates that the only thing preventing Nalcor, the Province and NCC from cooperating in a mutually beneficial manner for years was the lack of political will to engage with NCC as Indigenous peoples. Once the perspectives of leadership within the

Province and Nalcor shifted, engagement with NCC stopped being a potential burden and became a potential opportunity.

SUGGESTED FINDING: The Community Development Agreement demonstrates that Nalcor always maintained the ability to engage with NCC on matters of mutual interest.

CONCLUSION

102. The Inuit of NunatuKavut have an unmistakable connection to the lands and waters of Lake Melville and the Churchill River, one that existed long before the Muskrat Falls Project and will continue to exist long after its construction is complete.
103. The Province and Nalcor were aware of this connection when they began to develop the Muskrat Falls Project. The Province and Nalcor further knew, or ought to have known, that engaging with NCC early with respect to the Project would be both a constitutional duty as well as good business practice.
104. However, the Province and Nalcor deliberately declined to engage with NCC in an early, sustained, and respectful manner. Instead, the Province and Nalcor obfuscated its duties owed to NCC, delayed engagement for years, and attempted to minimize NCC's participation in the Project's development.
105. These tactics were a key failure on the part of the Province and Nalcor, and ultimately created stresses on the Project's budget and schedule. Due to the direct actions of the Province and Nalcor, NCC's issues and concerns could not be dealt with early on in the Project's construction. Instead, these issues and concerns had to be considered and mitigated while the Project was being built.
106. The fact that NCC's issues and concerns were dealt with during Project construction led to protests (which led to schedule delays), additional costs and short timeframes within which to conduct studies or perform work.

107. This was not an unforeseeable conclusion. NCC made it clear from the outset that its concerns would be dealt with one way or another. the Province and Nalcor chose to deal with NCC's concerns in a way that increased Project cost and schedule.
108. To ensure this pattern is not repeated if future megaprojects are contemplated, NCC's recommendations must be taken into account by the Commissioner and ultimately be included in the Inquiry's final report. Otherwise, the problems that plagued the Muskrat Falls Project will continue to impair the relationship between Nalcor, the Province, and NCC.
109. NCC's first recommendation is that within 12 months of the release of the Inquiry's final report, the Province must work collaboratively with NCC to create a policy that will govern the relationship between a project proponent, the Province, and NCC when a project is proposed to be developed within NCC's land claim area. Importantly, the recommendation also clarifies that the Province must also ensure that NCC is provided with adequate resources to meaningfully participate in this policy-making process.
110. This recommendation is aimed at preventing the Province from delaying engagement with NCC on future projects. It is clear that NCC and the Province must re-set their relationship, and NCC must be seen as a critical partner and decision-making body with respect to any future development within NCC's land claim area. A policy or agreement between the Province and NCC will also both parties to understand their relationship better, and help the Province avoid replicating the mistakes of its engagement with NCC on the Muskrat Falls Project.
111. NCC's second recommendation is that when a project is proposed within NCC's land claim area, the Province and Nalcor must mitigate all concerns that NCC raises before a project or development is sanctioned or started, in order to increase certainty in project cost and schedule. This recommendation

aims to avoid the mistakes of the Muskrat Falls Project, where important work like the IEAC and its review of methylmercury monitoring was delayed for years.

112. Mitigation and monitoring should be completed before a project or development begins, so that the cost and schedule estimates are as certain and concrete as can be possible. If the Province and Nalcor continue to consider and mitigate the important issues that NCC raises after construction of a project has already begun, cost overruns and schedule delays will continue when the Province and Nalcor must inevitably mitigate NCC's concerns partway through construction, when the cost and schedule implications are more significant.
113. Lastly, NCC recommends that the Province and Nalcor must respect and implement the principle of Free, Prior and Informed Consent ("FPIC"), as articulated in UNDRIP and the TRC's calls to action. Critically, if NCC's concerns cannot be reasonably mitigated or compensated, the Province and Nalcor must not proceed with a project or development until a mutually agreeable arrangement can be found.
114. In order to avoid perpetuating the mistakes of the Muskrat Falls Project, the Province and Nalcor must finally learn that NCC has a vital, non-negotiable contribution to make in determining whether a project proposed on NCC lands is in the public interest. A project cannot successfully proceed within NCC's land claim area without NCC's free, prior and informed consent.
115. The Province and Nalcor must heed the Truth and Reconciliation Commission's call to action demanding the free, prior and informed consent of Indigenous peoples before economic development occurs on their lands. The Province and Nalcor must also listen to the United Nation's Declaration on the Rights of Indigenous Peoples, which cements the free, prior and informed consent of Indigenous peoples as a key prerequisite to state action.

116. Without these recommendations, NCC is concerned that the Province and Nalcor may continue to maintain the same flawed relationship with NCC that marked engagement on the Muskrat Falls Project. The Inquiry's final report is an important opportunity to ensure that the foundation is set for a new relationship that will create the possibility of successful economic development that benefits NCC as well as the Province.

All of which is respectfully submitted, this 9th day of August, 2019.

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