IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Nunatsiavut v. Newfoundland and Labrador (Department of Environment and Conservation)*, 2015 NLTD(G) 1
Date: January 12, 2015
Docket: 201301G3947

BETWEEN:

NUNATSIAVUT GOVERNMENT

APPLICANT

AND:

HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR AS REPRESENTED BY THE MINISTER OF THE DEPARTMENT OF ENVIRONMENT AND CONSERVATION

FIRST RESPONDENT

AND:

NALCOR ENERGY

SECOND RESPONDENT

Before: Justice David B. Orsborn

Place of Hearing: St. John's, Newfoundland and Labrador

Date(s) of Hearing: September 22 and 23, 2014

Summary:

In July 2013, the province of Newfoundland and Labrador issued to Nalcor Energy, pursuant to statute, a Permit to Alter a Body of Water, thus authorizing construction of the dams, powerhouse and related infrastructure for the Muskrat Falls hydroelectric generating facility in Labrador. The Nunatsiavut Government, on behalf of the Inuit people of Labrador, applied to quash the Permit and for related relief, claiming that the province had failed in its duty to consult with the Inuit and to accommodate their concerns with respect to the potential adverse impact of the development – through mercury accumulation in the water – on their treaty fishing rights.

Held:

The application was dismissed. The decision to issue the Permit did not engage an issue of direct interference with fishing rights. The issue of mercury accumulation, including its reduction, measurement, and necessary compensation, was dealt with in an earlier comprehensive environmental assessment review and in the process leading to the province's 2012 Order-in-Council releasing the project from further environmental assessment. The decision to issue the Order-in-Council fully engaged the issue of mercury accumulation and it was this decision that should have been challenged rather than a subsequent regulatory decision relating to the specifics of the construction of the facility.

In any event, in the circumstances there was no duty imposed on the province by common (constitutional) law to consult the Inuit before issuing the Permit. A negotiated Land Claims Agreement constituted a completed code of the province's duty of consultation. The Agreement did not require the province to consult the Inuit before issuing the Permit. Any requirement to consult in respect of the Permit flowed from Aboriginal Consultation Guidelines promulgated by the province. While there was non-compliance with one aspect of these guidelines, it was not such as to warrant a legal remedy.

Appearances:

V. Randell J. Earle, Q.C. Raman Balakrishnan	Appearing on behalf of the Applicant
Rolf Pritchard, Q.C, Justin Mellor	Appearing on behalf of the First Respondent
Maureen Killoran, Q.C. Thomas Gelbman	Appearing on behalf of the Second Respondent

Authorities Cited:

CASES CONSIDERED: Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General), 2012 FC 1520; **Innu of Ekuanitshit v. Canada (Attorney General)**, 2014 FCA 189; **Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)**, 2004 SCC 74, [2004] 3 S.C.R. 550; **Beckman v. Little Salmon/Carmacks First Nation**, 2010 SCR 53, [2010] 3 S.C.R. 103; **Haida Nation v. British Columbia (Minister of Forests)**, 2004 SCC 73, [2004] 3 S.C.R. 511

STATUTES CONSIDERED: *Labrador Inuit Land Claims Agreement Act*, S.N.L. 2004, c. L-3.1; *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c. 27; *Constitution Act, 1982*, s. 34, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *Water Resources Act*, S.N.L. 2002, c. W-4.01

REASONS FOR JUDGMENT

ORSBORN, J.:

INTRODUCTION

[1] This is a case about known constitutional rights and the unknown effect on those rights of environmental alteration caused by the construction of Muskrat Falls, a large hydroelectric development. The Nunatsiavut Government represents

the Inuit of Labrador -an aboriginal people. They fear that their rights – primarily fishing and related consumption – will be harmed by mercury contamination in water downstream of the development.

[2] The project is subject to federal and provincial legislation, including legislation relating to environmental assessment. After a lengthy federal – provincial environmental assessment review including 30 days of public hearings, a Joint Review Panel submitted its report in August 2011. Subsequently, on July 10, 2013, the province issued a Permit to Alter a Body of Water. This Permit authorized the construction of the infrastructure needed to construct the hydroelectric facility including – the intake, powerhouse, spillway, transition dams, rock-fill coffer dams and reservoir stabilization.

[3] Nunatsiavut asserts that in issuing the Permit the province breached its duty to consult with Nunatsiavut and failed to accommodate the rights and interests of the Inuit of Labrador.

[4] The primary relief sought is an order quashing the Permit and an order directing consultation and consideration of certain specific accommodations.

ISSUE AND SUMMARY:

[5] The issue is best stated thus:

1) In issuing the Permit, did the province breach any duty to consult with Nunatsiavut and, further, did it fail in any duty to accommodate the interests of Nunatsiavut? If so, what is the appropriate remedy?

[6] For the reasons that follow, I have concluded that the application should be dismissed. Further, it is not necessary to consider certain aspects of the arguments

presented, including the standard of review and alleged defects in decisions taken before the issuance of the challenged Permit.

[7] To summarize – the issues raised by Nunatsiavut are issues of accommodation rather than consultation. They are not specific legal objections relating to the granting of the Permit, but rather are indicative of long-standing and deeply-rooted dissatisfaction with how the authorities – particularly the province – have addressed and are addressing concerns relating to potential mercury accumulation in waters fished by the Inuit in exercise of their treaty fishing rights.

[8] The potential problem of mercury accumulation in Lake Melville was comprehensively canvassed by the Joint Review Panel, which Panel received a number of submissions from the Inuit. Mercury accumulation was addressed by the province in its response to the Panel Report and formed part of the context of the province's 2012 decision to release the project from environmental assessment.

[9] Any legal challenge based on the insufficiency of consultation or on disagreement with the accommodation, or lack of it, proposed by the province, should have been directed at the 2012 Order-in-Council. While a specific regulatory approval may be subject to review on grounds that relate directly to the approval, such a review does not provide an opportunity to revisit and reargue previous decisions, which decisions form a part of comprehensive and ongoing regulatory regime. To reiterate, any legal challenge based on dissatisfaction with how mercury accumulation was dealt with following the Panel Report should have been brought when the province issued its response to the Report and released the project from environmental assessment pursuant to the 2012 Order-in-Council.

[10] The specific activity authorized by the 2013 Permit does not directly affect Inuit rights. It does nothing more than grant approval for one of the many activities requiring regulatory sanction following and contemplated by the release Order. In the circumstances, the province was under no common (constitutional) law duty to consult and accommodate the Inuit with respect to the Permit. Any right of consultation with respect to the Muskrat Falls project is to be found in the Land Claims Agreement and in the Aboriginal Consultation Guidelines adopted by

the province. The consultation process in the Agreement does not extend to the province's decision to issue the Permit. The Consultation Guidelines are however applicable, and were not fully complied with when the Permit was issued. In the circumstances, no remedy is required.

BACKGROUND

[11] The Muskrat Falls development is one portion of a massive hydroelectric construction project. The other portion, known as Gull Island, awaits. When completed, Muskrat Falls will include two dams, a powerhouse and a reservoir.

[12] It is the eventual flooding of the reservoir that gives rise to the concerns underlying this application. As explained at page 71 of the Joint Review Panel report:

> … reservoir formation leads to the release of methylmercury into the aquatic environment. When soils in reservoir areas are flooded, bacterial breakdown of the vegetation causes methylation, a chemical process that converts inorganic mercury in the soils to methylmercury, a more toxic form. Methylmercury then enters the aquatic ecosystem accumulating in aquatic animals mostly when they feed on organisms with elevated mercury. The concentration of methylmercury increases upward through the food chain (referred to as bioaccumulation) resulting in higher concentrations in predatory fish, in animals such as otters or seals that eat fish, and potentially in humans. Typically, as shown in experience from other reservoirs in boreal regions, mercury levels in fish peak five to 16 years after flooding and then gradually decrease to background levels over 30 or more years. …

[13] Although this application focuses on the issuance of the Permit in July 2013, an understanding of the context of the dispute requires an extended recitation of the background circumstances.

[14] As already noted, the concern of the Inuit is the potential for mercury contamination of waters in which – as of right – they may harvest fish for food and ceremonial purposes.

[15] Unlike many of the court decisions involving claimed Aboriginal interests and the duty to consult and accommodate where potential interests may be adversely affected, the rights in this case are established. They are considered constitutional rights. After years of negotiation, the Inuit, Canada and the province concluded the Labrador Inuit Land Claims Agreement (the "Agreement"). Signed on January 22nd, 2005, it was given the force of law in the province pursuant to the *Labrador Inuit Land Claims Agreement Act*, S.N.L. 2004, chapter L-3.1, with royal assent on December 6th, 2004. The corresponding federal statute, the *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c. 27, received royal assent on June 23rd, 2005. The Agreement is a comprehensive land claims agreement and is recognized as a treaty within the meaning of the *Constitution Act, 1982*.

[16] The Agreement provides for a degree of self-government and recognizes the Nunatsiavut Government as the representative of the Labrador Inuit. The Agreement designates two land areas, each carrying rights of different degree. The Settlement Area – referred to as Nunatsiavut – is an area of approximately of 72,500 square kilometers of land and waters in northern Labrador together with almost 47,000 square kilometres of adjacent tidal waters. Within the Settlement Area, Inuit have specific rights relating to natural resource harvesting, resource management and the environmental assessment of projects and undertakings.

[17] The Settlement Area includes roughly two-thirds of Lake Melville – the lake into which drains the Churchill River. The river drains into the western end of Lake Melville; that portion of the lake included in the Settlement Area is the opposite or eastern, end.

[18] Within the Settlement Area are smaller areas of Inuit-owned land, referred to as Labrador Inuit Land. These lands are owned, administered and controlled by the Inuit. The nature of the environmental assessment of proposed projects depends on whether the project is to be developed on Labrador Inuit Land, outside

Labrador Inuit Land but within the Settlement Area, or outside the Settlement Area but expected to affect land or waters within the Settlement Area. The Muskrat Falls project comes within this last category – a project outside the Settlement Area but which may reasonably be expected to have adverse environmental effects within the Settlement Area.

[19] The Muskrat Falls dam and reservoir lie outside the Settlement Area. But water from the reservoir on the Churchill River will flow into Lake Melville and eventually become part of the waters of Lake Melville that are included in the Settlement Area. It is the potential for mercury contamination of these eastern waters of Lake Melville that is at the heart of this application.

[20] Chapter 11 of the Agreement sets out detailed provisions relating to environmental assessment. These provisions refer to "Project" – defined as

> Any undertaking, project, work or activity proposed to be located or carried out in the Labrador Inuit Settlement Area that requires an Environmental Assessment.

[21] And to "Undertaking" - defined as:

> Any undertaking, project, work or activity proposed to be located or carried out outside the Labrador Inuit Settlement Area that requires an Environmental Assessment under the *Canadian Environmental Assessment Act* or the *Environmental Protection Act*.

[22] The Muskrat Falls development is, for the purpose of the Agreement, an "Undertaking".

[23] The following sections of the Agreement address the role of the province in relation to the environmental assessment of an Undertaking:

> **11.2.8** When an Authority receives a registration document or an application for an Undertaking or an application for a permit, licence or authorization in relation

to an Undertaking and the Undertaking, in the opinion of the Authority, may reasonably be expected to have adverse Environmental Effects in the Labrador Inuit Settlement Area, the Authority shall give timely written notice of the Undertaking and shall provide relevant available information on the Undertaking and the potential adverse Environmental Effects to the Nunatsiavut Government.

…

11.5.11 If, in the opinion of the Provincial Authority, an Undertaking that is subject to the *Environmental Protection Act* may reasonably be expected to have adverse Environmental Effects in the Labrador Inuit Settlement Area or adverse effects on Inuit rights under the Agreement, the Provincial Authority shall, in addition to providing the notice and information required under section 11.2.8:

(a) Consult the Nunatsiavut Government about the Environmental Assessment applicable to the Undertaking;

(b) Consult the Nunatsiavut Government about the possible participation of Inuit and the Nunatsiavut Government in that Environmental Assessment; and

(c) in any event, Consult the Nunatsiavut Government before making any decision or taking any action to allow the Undertaking to proceed.

[24] These provisions should be contrasted with those relating to the federal environmental assessment process:

11.6.1 If, in the opinion of a federal authority, a Project or an Undertaking that is subject to the *Canadian Environmental Assessment Act* may reasonably be expected to have adverse Environmental Effects in the Labrador Inuit Settlement Area or adverse effects on Inuit rights under the Agreement, the Authority shall, in addition to providing the notice and information required under sections 11.2.7 and 11.2.8, ensure that the Nunatsiavut Government:

(a) is Consulted about the Environment Effects of the Project or Undertaking;

(b) is Consulted about the best way to achieve meaningful participation of Inuit in the Environmental Assessment; and

(c) receives the report generated as a result of the Environmental Assessment including, where applicable, the rationale, conclusions, and recommendations of the official, mediator or review Panel that carried out the Environmental Assessment.

11.6.2 A federal Authority shall Consult the Nunatsiavut Government before taking any action that would allow a Project or Undertaking referred to in section 11.6.1 to proceed or making a decision to issue a permit, licence, funding, or other authorization in relation to the Project or Undertaking.

11.6.3 If Canada refers a Project or Undertaking referred to in section 11.6.1 to a review Panel under the *Canadian Environmental Assessment Act:*

(a) in the case of a Project, at least one member of the review Panel shall be a nominee of the Nunatsiavut Government; and

(b) in the case of an Undertaking, the members of the review Panel shall be selected from a list that includes candidates nominated by the Nunatsiavut Government.

[25] "Consult" is defined – section 1.1.1:

"Consult" means to provide:

(a) to the Person being consulted, notice of a matter to be decided in sufficient form and detail to allow that Person to prepare its views on the matter;

(b) a reasonable period of time in which the Person being consulted may prepare its views on the matter, and an opportunity to present its views to the Person obliged to consult; and

(c) full and fair consideration by the Person obliged to consult of any views presented.

[26] Chapter 13 of the Agreement deals with fisheries. Section 13.4.1 sets out the rights which, according to Nunatsiavut, may be adversely affected by the Muskrat Falls development:

13.4.1 Inuit have the right to Harvest in accordance with this chapter, at all times of the year and throughout the Labrador Inuit Settlement Area, any species or stock of Fish or Aquatic Plant for which no Inuit Domestic Harvest Level is established up to the quantity needed for their food, social and ceremonial purposes.

[27] These are the provisions of the Agreement that most directly relate to the application before the court. I leave for the moment whether there are additional rights to consultation that may arise outside the Agreement. (The Agreement is accompanied by an Implementation Plan – I will briefly comment on this later.)

[28] The Inuit of Labrador, through the Nunatsiavut Government, have, from the outset, been closely involved in the environmental assessment of the Muskrat Falls project. The following history is taken largely from the parties' written submissions. The facts are not in dispute.

[29] In November 2006 Nalcor (at the time, Newfoundland and Labrador Hydro), as proponent, registered the project with the federal (Canadian Environmental Assessment Agency) and provincial (Department of Environment and Conversation) environmental assessment agencies. As registered, the project involves the construction and operation of two hydro-electric generating stations on the lower section of the Churchill River with a combined capacity of 3,074 megawatts. Muskrat Falls will have a capacity of 824 megawatts, including two dams, a power house and a 60 kilometre long reservoir. The Gull Island generating station will have a capacity of 2,250 megawatts, a dam and a 232 kilometre long reservoir. It is contemplated that the project will proceed in two phases, with the construction of Muskrat Falls to proceed first.

[30] Three days after receiving the registration from Nalcor, the province wrote to Nunatsiavut to advise that the project had been registered. A copy of the registration document was provided together with the request that Nunatsiavut provide any comments. No comments were received from Nunatsiavut on the registration document.

[31] The registration of the project triggered the need to establish a Joint Federal-Provincial Review Panel ("JRP") in order to meet the environmental assessment requirements of both federal and provincial jurisdictions. An environmental assessment is a planning tool intended to promote informed decision-making by ensuring that the environmental effects of major projects are considered early in the planning process, before a project is formally approved and allowed to proceed

further. Environmental assessment involves both information-gathering and decision-making components; early identification and evaluation of the potential environmental consequences of a proposed project and decision-making that reconciles the benefits of the proposed project with environmental protection and preservation. The conclusions of the environmental assessment provide an informed basis for subsequent regulatory decision-making as various permits are sought.

[32] Before formally establishing the Joint Review Panel, the province and the federal government invited Nunatsiavut to provide input into the scope and content of the proposed environmental assessment.

[33] Draft Environmental Impact Statement ("EIS") guidelines were provided to Nunatsiavut in September 2007; Nunatsiavut provided comments on these draft guidelines. The federal and provincial authorities made various revisions; the final EIS guidelines were issued to Nalcor in July 2008. These guidelines were intended to guide Nalcor in its preparation of the Environmental Impact Statement, which statement in turn was to provide the Joint Review Panel and interested parties with the information required to conduct the environmental assessment.

[34] In order to meet what they considered to be their obligations to consult the Inuit, the federal and provincial governments jointly developed an environmental assessment consultation plan – "Proposed Process for Meeting Lower Churchill Environmental Assessment Obligations arising from the Labrador Inuit Land Claims Agreement". This plan, provided to Nunatsiavut in May 2008, broke down the environmental assessment process into its constituent parts and indicated how it was proposed that Nunatsiavut would be consulted at each stage of the process. Nunatsiavut did not express any concerns with or objections to this plan.

[35] In May 2008, the authorities requested that Nunatsiavut propose three nominees for consideration as possible members of the Joint Review Panel. Nunatsiavut responded on July 4th nominating Dr. Keith Chaulk. Dr. Chaulk was appointed to the Joint Review Panel on January 8, 2009. (After a year, Dr. Chaulk

resigned from the Panel because he wished to return to his duties as Director of Memorial University's Labrador Institute.)

[36] In June, the federal and provincial authorities wrote to Nunatsiavut seeking its input and comment on a draft Joint Panel Agreement and draft Terms of Reference for the Joint Review Panel. Nunatsiavut did not comment on either the draft Agreement or the draft Terms of Reference.

[37] In February 2009, Nalcor submitted its Environmental Impact Statement to the Panel for review. It contained over 10,000 pages of information, including baseline studies, biophysical and socioeconomic component studies, an overview of the aboriginal consultation undertaking, detailed consideration of the anticipated environmental effects of the project and a socioeconomic assessment, including the likely effects of the project on land and resource use.

[38] From March 2009 until April 2010, the Panel conducted an information gathering process including public consultation and the opportunity for interested parties to provide comments.

[39] As a result of its own review of the EIS and after considering the comments and questions from the public and others, the Panel asked Nalcor to provide additional information; in response to this request, over 5,000 pages of additional information regarding the environmental effects of the project were gathered, reviewed and considered. Nunatsiavut submitted to the Panel a detailed evaluation of the adequacy of the Environmental Impact Statement and made information requests with respect to the potential for downstream impacts of methylmercury in Lake Melville. In response, the Panel requested Nalcor to provide "a full assessment of the movement of methylmercury engendered by project activities, into Goose-Bay and beyond in all forms … and indicate its ultimate fate and the significance of these methylmercury impacts". Further, the Panel asked Nalcor to undertake a cost-benefit analysis of partial versus full clearing of the reservoir area. The degree of clearing is relevant to the amount of methylmercury that may be released as vegetation is flooded and subsequently decomposes.

[40] As this additional information was received by the Panel, it invited comments from Nunatsiavut and others.

[41] By January 2011, the Panel concluded that it had sufficient information to allow it to begin public hearings. These hearings occurred over 30 days between March 3 and April 15, 2011 in six different communities. Also, videoconference hearings were held in the Inuit communities of Nain, Rigolet and Cartwright.

[42] Nunatsiavut received limited funding to assist it in reviewing the Environmental Impact Statement and in participating in the Panel hearings. (There was later funding of $21,000 provided to assist Nunatsiavut in analyzing and commenting on the final Panel Report).

[43] Nunatsiavut made approximately 30 separate submissions to the Panel, with these submissions ranging from environmental to socio-economic to health impacts of the project.

[44] In its report, at page 87, the Panel referred to the submissions of Nunatsiavut and the related submissions of Fisheries and Oceans Canada:

> Fisheries and Oceans Canada released a research paper showing that mercury effects from the Churchill Falls project could be seen in several estuarine species (rainbow smelt, tomcod, sea trout) in the waters of Lake Melville over 300 kilometres away from the Smallwood Reservoir. It expressed concern about the absence of downstream sampling of primary producers and macrobenthos because of their potential to bioaccumulate mercury. Fisheries and Oceans Canada therefore recommended that Nalcor develop a comprehensive program to monitor spatial and temporal changes in mercury in fish within the reservoirs and downstream including at Goose Bay following reservoir creation. The frequency and timing of sampling should support a clear assessment of the magnitude and timing of these changes, and inform determinations of risks to human health and implementation of related fisheries management measures. More baseline data should be collected on mercury levels in estuarine fish downstream of Muskrat Falls and in Goose Bay in advance of inundation.

> The Nunatsiavut Government stated that methylmercury would travel downstream in zooplankton and would ultimately accumulate in seals in Lake Melville via smelt. It criticized Nalcor's methylmercury modelling and its conclusions with regard to levels of increased concentrations in fish and seals in Lake Melville, noting that sea-run brook trout can travel between fresh water and Lake Melville. The Nunatsiavut Government concluded that, before definitive conclusions could be reached on any trends in downstream methylmercury levels or their measurable effects, Nalcor should collect more data on suspended solids and fish and seal movements, and conduct a better analysis of mercury. Traditional knowledge showed that seals were present in the main stem of the river as well as Goose Bay and Lake Melville.

[45] On April 15, 2011, the Panel announced that the hearings were complete, that the record was closed and that it would now proceed to review the information gathered and prepare its report. The report was released on August 25, 2011. It concluded that, overall, the project was likely to cause significant adverse environmental effects even considering the proposed mitigation measures, commitments made by Nalcor during the review, and the Panel's recommendations.

[46] The Panel provided 83 recommendations, including recommendations directed to the downstream effects of the project. The following recommendations are relevant to the possible mitigation of those effects and, to the extent that they cannot be mitigated, their monitoring and measures to compensate the effect of contamination:

> **RECOMMENDATION 4.5 – Full clearing of the Muskrat Falls reservoir**
>
> The Panel recommends that, if the Project is approved, Nalcor be required to apply its 'full clearing' reservoir preparation option to the Muskrat Falls reservoir.
>
> …
>
> **RECOMMENDATION 6.7 – Assessment of downstream effects**
>
> The Panel recommends that, if the Project is approved and before Nalcor is permitted to begin impoundment, Fisheries and Oceans Canada require Nalcor to carry out a comprehensive assessment of downstream effects including:

- identifying all possible pathways for mercury throughout the food web, and incorporating lessons learned from the Churchill Falls project;

- baseline mercury data collection in water, sediments and biota, (revised modelling taking into account additional pathways, and particularly mercury accumulation in the benthos) to predict the fate of mercury in the downstream environment;

- quantification of the likely changes to the estuarine environment associated with reduction of sediment and nutrient inputs and temperature changes; and

- identification of any additional mitigation or adaptive management measures.

The results of this assessment should be reviewed by Fisheries and Oceans Canada and by an independent third-party expert or experts, and the revised predictions and review comments discussed at a forum to include participation by Aboriginal groups and stakeholders, in order to provide advice to Fisheries and Oceans Canada on next steps.

…

RECOMMENDATION 13.9 – Possible requirement for consumption advisories in Goose Bay or Lake Melville

The Panel recommends that, if the Project is approved and the outcome of the downstream mercury assessment (Recommendation 6.7) indicates that consumption advisories would be required for Goose Bay or Lake Melville, Nalcor enter into negotiations prior to impoundment with the parties representing – as appropriate – Goose Bay and Lake Melville resource users. Depending on where the consumption advisories would apply, these could include Aboriginal groups, the Town of Happy Valley-Goose Bay, Mud Lake Improvement Committee, the Town of North West River and the community of Rigolet. The purpose of the negotiations would be to reach agreement regarding further mitigation where possible and compensation measures, including financial redress if necessary. This recommendation would also apply later in the process if the downstream mercury assessment indicated that advisories were not likely, but monitoring subsequently required their application.

RECOMMENDATION 13.10 – Consumption advisory implementation

The Panel recommends that, if the Project is approved and fish and seal monitoring indicates that consumption advisories are required, Nalcor:

- follow Health Canada guidelines regarding the establishment of human mercury hazard quotient levels and fish consumption advisories;

- consult with Aboriginal Affairs and Northern Development Canada regarding best practices for the communication of advisories;

- consult with Aboriginal groups and affected communities regarding an effective approach to the communication and implementation of consumption advisories that ensures that affected communities have an understanding of the quantities and types of fish that can be consumed safely and the health benefits of including fish in one's diet;

- ensure that notifications of the consumption advisories are placed at regular intervals in easily visible locations along the shorelines of affected water bodies;

- ensure that consumption advisories are updated as necessary to reflect any changes detected in mercury levels in fish or seal; and

- provide publicly accessible, up-to-date and accurate information through the internet, radio, newspapers and other means regarding the health risks of mercury and the status of the advisories.

[47] The Report itself, together with the federal government's response to the Report, was unsuccessfully challenged (not by Nunatsiavut) through a Federal Court judicial review – See **Grand Riverkeeper**, **Labrador Inc. v. Canada (Attorney General),** 2012 FC 1520.

[48] On August 31st, 2011, Nunatsiavut wrote to the province giving its preliminary comments on the Report and requesting a meeting. In September, Nunatsiavut and federal and provincial officials met and on November 11, 2011, Nunatsiavut wrote to the authorities providing a detailed response to the Report.

[49] Nunatsiavut endorsed the Panel's recommendations for full clearing of the reservoir, the carrying out of a new and comprehensive assessment of downstream effects, and the requirement that Nalcor enter into negotiations with affected parties regarding further mitigation of potential environmental effects.

[50] Nunatsiavut proposed terms for the recommended assessment, and in particular suggested that it could done through a program led by the Inuit and

designed to understand the Lake Melville system, establish baseline conditions and develop appropriate and reliable predictors in the downstream environment. This information would then be used as the basis for the development of a monitoring program of the downstream effects of the project.

[51] Included in its response were three specific recommendations:

> **INUIT INVOLVEMENT IN THE WAY FORWARD**
>
> …
>
> It is also clear that the Nunatsiavut Government is not just another stakeholder. Inuit are much more than this – we are a Government representing a constitutionally protected Land Claims Agreement. The proposed Project will impact Inuit and Inuit Rights as established in this Agreement and, as a result, Nalcor, the Province of Newfoundland and Labrador and the Government of Canada have a moral and legal obligation to ensure Inuit are included in the process to protect their Rights.
>
> At a high level, Inuit have three major recommendations that will help to mitigate impacts on Inuit and Inuit Rights and allow Inuit to constructively contribute to the Lower Churchill process going forward. These are, by far, the most important recommendations related to Inuit Rights and they flow directly from the determinations of the Panel Report.
>
> **1) Inuit representation on management structure**
>
> As more than just a stakeholder, and given the high likelihood of significant adverse impacts on Inuit and Inuit Rights, **Inuit have a fundamental right to participate as part of a high level management mechanism for he proposed Lower Churchill Hydroelectric Development. This management mechanism should consist of the Nunatsiavut Government, the Innu Nation, the Province of Newfoundland and Labrador and the Government of Canada.** All other groups who participated in the environmental assessment are groups (not Governments), and should have a role to play, but not at the highest level. Once established, the four participants in this management mechanism should collaboratively determine the role of the management mechanism and responsibilities within it. It is extremely important that the management mechanism has direct representation from all of the Governments and that all representatives are willing and constructive.
>
> [Bold in original]

…

2) Inuit Rights, Inuit research – baseline studies and monitoring

Given the Panel's concurrence with the meaningful concerns that Inuit have and the Panel's pronouncement of potential significant adverse effects on Inuit, we would like to make it clear that Inuit would like to immediately and constructively address Inuit concerns and impacts to our Rights. Inuit have a right to conduct and lead baseline research and monitoring into a broad suite of potential impacts that the development of the Lower Churchill project would specifically have on Inuit and Inuit Rights. There is a moral and legal obligation on the part of Nalcor as well as the Federal and Provincial Government's to provide the resources necessary to allow this to happen through the development of increased Inuit capacity, as it relates to the proposed Lower Churchill project. **We are requesting that Nalcor, the Provincial Government and the Federal Government combine to provide a minimum of $200,000 per year, beginning in fiscal year 2012-13 and continuing for the construction phase of the project (i.e. to reservoir inundation), to the Nunatsiavut Government for this program specifically designed to establish baseline conditions directly related to Inuit Rights.** The duration and amount of the financial contribution to the ongoing monitoring program subsequent to the construction phase would be negotiated and agreed upon prior to the end of the construction phase.

[Bold in original]

…

3) Compensation related to impacts on Inuit and Inuit Rights as a result of the Lower Churchill development

Nalcor has predicted that there will be no significant impacts on Inuit, their Rights or the downstream environment. The Panel clearly did not agree with their predictions. Therefore, **a version of the following framework language (to be finalized through negotiation) should be included as a condition of the permit(s) associated with the development of the Lower Churchill project to ensure that Inuit have a mechanism to be compensated, should impacts … arise.** [Followed by language addressing compensation].

[Bold in original]

[52] In January 2012, representatives of Nunatsiavut met with the Premier of the province and others. James Lyall, President of the Nunatsiavut Government wrote to the province's Minister of National Resources on January 16th setting out the mitigation measures sought by the Inuit. The letter concluded:

…

> The Panel, through their report, has heard and agreed with our concerns about downstream impacts. We thank you for the opportunity to meet with you in person to discuss our concerns and proposed mitigative solutions. We believe we are offering reasonable and constructive ways to move forward and we are requesting that the Province respond specifically to our proposed mitigative measures prior to a public announcement on the Panel Report and possible sanction of the project. The Nunatsiavut Government is sincerely hopeful that, together with the Province, we can work out solutions to impacts on Inuit Rights as a result of the proposed project, rather than dealing with these impacts through alternative means.

[53] On March 15th, 2012, the province and the federal government issued their responses to the Joint Review Panel Report. These responses indicated that the project should proceed. Nunatsiavut was not given prior notice of these decisions.

[54] I set out below the specific responses of the provincial government to the recommendations reproduced earlier.

Recommendation 4.5 – Full clearing of Muskrat Falls reservoir

[55] The province responded as follows:

> The Government of Newfoundland and Labrador agrees with the principle of maximizing the utilization of the forestry resource. With limited opportunities to use the resource, and the likely insignificant reductions in mercury levels associated with full versus partial clearing, the Government supports partial harvesting of the flood zone. If an economic opportunity to use the resource materializes, consideration will be given to harvesting additional fibre.

Recommendation 6.7 – Assessment of downstream effects

[56] The province did not comment on this recommendation, asserting that the recommendation was a matter solely within the purview of the federal department of Fisheries and Oceans. The Government of Canada responded as follows:

> The Government of Canada agrees with the intent of this recommendation and notes it is directed to Fisheries and Oceans Canada. As a condition of a subsection 35(2) authorization under the *Fisheries Act*, and prior to impoundment, Fisheries and Oceans Canada will require Nalcor to collect additional baseline data on bioaccumulation of methylmercury in fish and on fish habitat downstream of Muskrat Falls.
>
> Fisheries and Oceans Canada will require Nalcor to conduct a comprehensive multi-year program to monitor and report on bioaccumulation of methylmercury in fish (including seals) within their reservoirs and downstream, including the Goose-Bay/Lake Melville area. Fisheries and Oceans Canada will also require that Nalcor carry out multi-year post-project monitoring and reporting downstream into Lake Melville on a variety of parameters including nutrients, primary production, fish habitat utilization and sediment transport in order to assess changes in downstream fish habitat.

Recommendation 13.9 – Possible requirement for consumption advisories in Goose Bay or Lake Melville

[57] The province responded:

> The Government of Newfoundland and Labrador accepts the intent of this recommendation. If consumption advisories are required as a result of the downstream mercy assessment, then Nalcor should consult with downstream resource users on further mitigation measures, including the potential for compensation.

Recommendation 13.10 – Consumption advisory implementation

[58] The province responded as follows:

> The Government of Newfoundland and Labrador accepts the intent of this recommendation. The Government will work with Nalcor to ensure that consultation with relevant Aboriginal organizations as appropriate will take place to ensure that effective and culturally appropriate communication protocols are established to get consumption advisories to those who need them in a timely fashion.

[59] The federal response, like the provincial response, included reasons for the government's conclusion that the significant and adverse environmental effects of the project are justified by the project benefit. The federal response also stated; at page 5:

> …
>
> In considering whether the significant adverse environmental effects of the Project could be justified in the circumstances, the Government of Canada accounted for:
>
> - The potential adverse effects of the Project and the commitments that have been made by the federal government related to the recommendations provided in the Panel Report, and those made by Nalcor in their Environmental Impact Statement and during the panel hearings. The Government of Canada will require certain mitigation measures, environmental effects monitoring and adaptive management be undertaken by Nalcor, as well as require additional studies on downstream effects. This will be done through inclusion of the requirements in federal authorizations and approvals. The commitments that Nalcor and the provincial Government have made will also be included in a provincial authorizing regulation. Ensuring these commitments are carried out minimizes the negative effects of the Project and reduces the risks associated with the uncertainty about the success of mitigation measures.

[60] The same day it released its response to the Joint Panel Report, the province issued the *Lower Churchill Hydro Electric Project Undertaking Order*, OC 2012-

061 ("Order"), formally releasing the project from environmental assessment. The release was subject to a number of conditions, including a requirement that Nalcor prepare and abide by the requirements of environmental effects monitoring plans for all phases of the project, and submit those plans to the appropriate authority before commencing an activity that could affect, amongst other things, water quality and methylmercury accumulation.

[61] In the federal jurisdiction, an order of the Governor-in-Council adopted on March 12, 2012 similarly released the project from environmental assessment and approved the federal government's response to the Joint Review Panel Report which response, subject to conditions, allowed the project to proceed. This order and decision was challenged in the Federal Court by the Innu of Ekuanitshit. The application was dismissed at first instance and on August 22, 2014, the Federal Court dismissed an appeal. - See **Council of the Innu of Ekuanitshit v. Canada (Attorney General)**, 2014 FCA 189.

[62] The **Ekuanitshit** decision does not directly relate to the issue before me in that no established rights were involved and much of the application was considered to be premature. I do note however that, as a matter of administrative law, the reasonableness of the federal authorization of the project was considered – in particular, that aspect of the authorization that was founded on the conclusion that the environmental effects described in the Panel Report were justifiable given the positive economic effects of the project. Speaking for the court, Justice Boivin noted that the economic benefits of the project included the benefits expected to flow from the larger Gull Island portion of the project. However, Justice Boivin pointed out that the only portion of the project presently under active construction is the smaller Muskrat Falls portion. Justice Boivin said this:

> **54** I share the appellant's view that the abandonment of the Gull Island plant, if this were proven to be true, would raise serious questions about the validity of the environmental assessment and the impugned decisions. The Project authorized by the Governor in Council and responsible authorities following the balancing exercise imposed by section 37 of the *CEAA* included the Muskrat Falls plant as well as the Gull Island plant. I would note that this authorization was not a blank cheque for Nalcor to postpone the construction of the Gull Island plant indefinitely. If Nalcor were to forego construction of the larger of the two plants assessed (Gull Island), or if there was an unreasonable delay in its construction,

> the balancing exercise carried out for one of the Report's findings would be necessarily compromised.

[63] The federal and provincial decisions to release the project from environmental assessment signaled the end of the environmental process and established the framework and conditions under which the various construction-related activities would proceed. The release Orders allowed Nalcor to proceed with the project and to start the process of obtaining the numerous regulatory approvals that would be required for the various phases and aspects of the project, including the Permit which is the subject of this application.

[64] Nunatsiavut did not challenge either the provincial release Order, the corresponding federal order, or any of the prior decisions, responses or reports on grounds of unreasonableness, failure to consult, failure to accommodate, or otherwise.

[65] However, Nunatsiavut has applied in Federal Court for judicial review of the federal July 2013 decision to issue to Nalcor Authorization no. 13-01-005 DFO File 3960-11. This authorization is, to my understanding, one of a number of specific federal approvals that will be required as the project proceeds. The litigation is ongoing.

[66] Perhaps mindful of sections 11.2.8 and 11.5.11 of the Land Claims Agreement, in March 2012 the province sent to a number of Aboriginal groups and governments, including Nunatsiavut, proposed Aboriginal Consultation Guidelines for regulatory approval applications.

[67] Nunatsiavut provided no comments or criticisms on the draft guidelines and has, since they were issued, participated in the consultation process for various approvals.

[68] On May 30, 2012, the province formally issued the Aboriginal Consultation Guidelines setting out the province's intentions with respect to the consultation considered necessary as approvals for the various permits would be submitted. They provide templates for use by Nalcor and departments of the provincial government and set a 30-day period within which Aboriginal peoples may provide their views on permit and approval applications. The Guidelines in part:

> **Overview**
>
> These Aboriginal Consultation Guidelines (the "Guidelines") will assist the Proponent, Nalcor Energy, and provincial regulatory departments and agencies (the "Departments") discharge any duty to consult that the Province may owe to the Aboriginal governments and organizations identified in Appendix I before issuing regulatory approvals for the Lower Churchill Hydroelectric Generation Project (the "Generation Project").
>
> …
>
> All steps identified in the Guidelines should be followed for each Application received for a regulatory approval. When the Proponent or a Department, in consultation with IGAA [Intergovernmental and Aboriginal Affairs Secretariat], deems an Application to be *ancillary* to an Application on which the Proponent and the Department has already consulted under the Guidelines, all Aboriginal governments / organizations identified in Appendix I should be notified upon issuance of the ancillary regulatory approval.
>
> …
>
> **Step 1**
>
> Aboriginal consultation on an Application will begin when the Proponent sends the formal Application (including background/supporting information or documentation sufficient for a Department to begin its own review, analysis and processing of the Application) to all Aboriginal governments / organizations, inviting them to review the Application and submit any comments to the appropriate Department within a defined timeframe.
>
> …
>
> **Selection of Timeframes**
>
> …

- A 30 day timeframe has been applied to all Applications identified in Nalcor Energy's Environmental Impact Statement as potentially required for the Generation Project.

…

Step 2

Once the Application and associated template email is assembled, sent to all Aboriginal governments / organization and copied to the Department and IGAA, the Department should commence its internal review and analysis of the Application.

Notes for Step 2

…

- **If the Department receives comments on an Application from an Aboriginal government / organization(s), the Department must review the comments and reconsider its initial analysis of the Application in light of those comments (see Step 5).** The Department is encouraged to contact IGAA to coordinate both the review of comments received from an Aboriginal government / organization(s), and preparation of a response.

[Bold in original]

[69] Step 5 sets out the process to be followed when comments are received:

Step 5

Where comments are received from an Aboriginal government / organization, the responsible Department should give full and fair consideration to the comments in its review of the Application. Within thirty (30) days of receipt of such comments the Department should provide the Aboriginal government / organization with full and fair consideration of the comments, in writing. Upon issuing its written response to the comments by email, the Department should also indicate that within seven (7) days of receipt of the Department's response, the Aboriginal government or organization may request a conference call to discuss the Department's response.

Notes for Step 5

- The Department should contact IGAA if it receives any comments related to any Application or regulatory approval, before or after the timeframe for comments has ended, even if the correspondence indicates that the Aboriginal government or organization supports or has no concerns with the Application or regulatory approval.

- If any comments are received on an Application at any time before the Department is ready to issue the associated regulatory approval, the Department should not issue the regulatory approval without first consulting IGAA (Intergovernmental and Aboriginal Affairs Secretariat).

[70] Notwithstanding the release Order, Nunatsiavut continued to express its concerns about potential downstream effects and the monitoring of those effects. In November 2012, representatives of Nunatsiavut met with the province and provided a technical presentation which included some preliminary results on Nunatsiavut's own Lake Melville research project.

[71] And in January 2013, representatives of Nunatsiavut met with the Minister of Natural Resources to provide a full briefing on its research and assessment work involving the downstream environment, particularly in Lake Melville; they also met with Nalcor representatives to receive a technical briefing on Nalcor's proposed Environmental Effects Monitoring Program.

[72] In February, Nunatsiavut wrote to the province seeking $500,000 funding to support its 2013-14 research and monitoring work. The province refused, noting that the Joint Review Panel had not recommended an independent research program. The province went on to note that the present real time water monitoring in Lake Melville – including eight recent samples – did not show results above the detection limit of 0.0001 milligrams/litre of methylmercury. The province encouraged Nunatsiavut to share the results of its research activities as the permitting phase of the project proceeded and asked Nunatsiavut to accept membership on a liaison committee which would be a forum for the sharing of information and data on such matters as downstream impacts and methylmercury accumulation.

[73] This history provides the context and sets the stage for Nalcor's application for the Permit.

[74] On March 8, 2013, Nalcor applied to the province for a Permit to Alter a Body of Water pursuant to the *Water Resources Act*. As required, Nalcor forwarded the application and supporting technical information to all Aboriginal groups, including Nunatsiavut. Thirty days were given for review and comment. In April, the province asked Nalcor for more information, primarily directed to dam design. This information was provided on May 2nd. This additional information was not forwarded to Nunatsiavut.

[75] The province received no comments from Nunatsiavut within the 30-day period and on June 19, almost three months after the application was sent out, the province advised that the time for submitting comments was closed and that the province intended to proceed with issuing the Permit.

[76] But on June 21, Nunatsiavut sent an email to the province:

> As you must be aware, the Nunatsiavut Government has MAJOR concerns with respect to the Muskrat Falls development, including this particular regulatory approval. We are in the process of preparing yet another letter to the Province with respect to this, including downstream impacts. We respectfully request that the Province does not proceed to issue any applicable regulatory approval related to downstream impacts until receiving this letter, which will be sent by mid next week at the latest. Please let us know that this is possible. (Emphasis in original)

[77] The province replied, indicating that it would delay its decision on the Permit application and asking that the Nunatsiavut Government provide its specific concerns in writing by June 28th.

[78] I set out in full the comments provided by Nunatsiavut on June 28th:

Thank you for providing us the opportunity to review Nalcor's application for Permit Number -00348. During our review, we have determined that there is a high likelihood of significant impacts on Labrador Inuit and the Labrador Inuit Settlement Area if this permit is issued and the project proceeds in its current proposed form. The Nunatsiavut Government is specifically concerned about the high likelihood of downstream impacts as a result of dam construction and subsequent flooding of a reservoir, we see downstream impacts and construction of the dam as inextricably linked.

Throughout the Environmental Assessment ("EA") and post-EA process, Nalcor has not provided meaningful baseline measurements or conducted sufficient research to characterize the downstream environment that will be impacted by this project and the building of a dam, especially in Lake Melville. As stated in the Panel Report, a major gap in the work done by Nalcor prior to Panel Hearings was a decision to place their study boundary at the mouth of the river and therefore not carry out baseline sampling in Lake Melville (approximately two-thirds of Lake Melville is Labrador Inuit Settlement Area). It was in part because of this that the Panel concluded that Nalcor's assertion that there would be no measurable effect on levels of mercury in Goose Bay and Lake Melville had not been substantiated. The Panel was also "not convinced that all effects beyond the mouth of the river would be "non-measurable" as defined by Nalcor (within natural variability). The Panel stated "the need for a precautionary approach, particularly because no feasible adaptive management measures have been identified to reverse either long-term adverse ecological changes or mercury contamination of renewable resources". The independent Review Panel for the EA concluded that Nalcor's predictions regarding downstream impacts were unacceptable, resulting in Panel Report recommendation 6.7 – Assessment of Downstream Effects, as follows:

The Panel recommends that, if the Project is approved and ***before Nalcor is permitted to begin impoundment****, Fisheries and Oceans Canada requires Nalcor to carry out a comprehensive assessment of downstream effects including:*

- *Identifying all possible pathways for mercury throughout the food web, and incorporating lessons learned from the Churchill Falls project;*
- *Baseline mercury data collection in water, sediments and biota (revised modeling taking into account additional pathways, and particularly mercury accumulation in the benthos) to predict the fate of mercury in the downstream environment;*
- *Quantification of the likely changes to the estuarine environment associated with reduction of sediment and nutrient inputs and temperature changes; and*
- *Identification of any additional mitigation or adaptive management measures.*

We recognize that this is a recommendation that was directed to Fisheries and Oceans Canada. However, a precursor to flooding and the critical piece of infrastructure that enables flooding is the dam. Once in operation, the dam

completely alters the riverine environment and is directly linked to the downstream environment and downstream impacts, including within Lake Melville and Labrador Inuit Settlement Area. Therefore, permit issuance related to dam construction must take into account potential downstream impacts related to flooding.

The Nunatsiavut Government notes that, despite a few token fish and ringed seal samples collected by Nalcor since the Panel Hearings, a comprehensive assessment of downstream effects into Lake Melville has still not been completed nor is planned. The Nunatsiavut Government also notes that the real-time water quality monitoring stations currently operational in the downstream environment do not sufficiently monitor indicators of concern to Inuit as a result of Muskrat Falls and dam construction.

The Province is aware that the Nunatsiavut Government, with its limited capacity, is conducting a research program to better understand and predict downstream impacts as a result of Muskrat Falls. The first phase of this work included the collection of baseline total mercury and methylmercury concentrations in water and sediments of Lake Melville. Samples were collected at multiple stations that exhibited varying degrees of influence from freshwater inputs and tidal waters. This was important for understanding baseline levels of mercury in the ecosystem that are likely to be affected by future changes. Preliminary data clearly show the influence of freshwater mercury discharges in the downstream environment, particularly in the surface waters of Lake Melville. These results suggest that any change in inputs from the lower Churchill River as a result of dam construction and flooding is likely to be reflected throughout the system as a whole (i.e. all of Lake Melville, including Labrador Inuit Settlement Area) rather than just the upstream environment. In addition, there are relatively low levels of methylmercury in the water column and sediments throughout the system, which indicates that any future increase in external inputs from rivers due to hydroelectric development and dam construction is likely to result in a relatively greater change in biological concentrations than if internal production rates were already high. In summary, initial results from this work validate and elevate our concerns. As a consequence, the Nunatsiavut Government takes the position that the Province should account for our preliminary research and accommodate our concerns while considering permit issuance.

In summary, the Nunatsiavut Government is stating the following in relation to Nalcor's application for Permit Number -00348:

- A comprehensive baseline report on mercury in water, sediments and biota that also identifies all possible pathways for mercury throughout the food web downstream from the project, including throughout Lake Melville, is needed in order to provide basic foundational knowledge of the environment. That knowledge is essential for the prediction of downstream impacts as a result of dam construction, flooding and the formulation of a meaningful plan for the

protection of Inuit Rights and Health and for consultation respecting the plan. The fish and ringed seal samples currently being collected by Nalcor and the real-time water quality monitoring stations do not constitute a comprehensive study, including predictions, related to the downstream environment.

- Preliminary results from our research program validate and elevate our concerns with respect to downstream impacts as a result of dam construction and flooding.

- The total elimination of increased mercury and methylmercury concentrations downstream may be impossible. However, there are mitigation measures that could reduce the risk or the concentrations of mercury prior to flooding upstream of the dam. The primary measure that can be taken is full clearing of the reservoir area, including trees and the top layer of organic matter. This may be expensive, but it is the only technique the Nunatsiavut Government is aware of that could help reduce methylmercury concentration as a result of dam construction in the reservoir and downstream. We consider this expense reasonable as a condition of dam construction given the risk to Inuit food security, Inuit health and Inuit rights. A first step (but not the only step) towards accommodation of Inuit concerns would be to require full clearing of the reservoir, including the top layer of organic matter.

- Nalcor appears to be saying that if there is mercury contamination of species like seals and fish as a result of dam construction and flooding, then the mitigation will be to issue advisories about contamination of country foods or to prohibit harvesting. The Nunatsiavut Government rejects this approach to mitigation. The Nunatsiavut Government believes that Inuit rights and wellbeing cannot be put at potential risk for economic benefits. Any potential increase in mercury or methylmercury concentrations downstream as a result of dam construction would be a direct violation of Inuit human, treat and individual rights.

- We ask you to issue your regulatory decisions so as to assure the Labrador Inuit that their rights and interests are being fully addressed in a meaningful and substantial way within the terms of your department's Authorization.

I look forward to your positive response and trust that you will not hesitate to contact me if you require any clarification or if you wish to discuss how Labrador Inuit concerns can be addressed.

I sincerely hope that the Province will incorporate the constructive suggestions above in order to align the permit issuance decision with the spirit and intent of the Labrador Inuit Land Claims Agreement and the meaning of Consultation and Accommodation. Please provide a response to our comments as soon as it is reasonably possible to do so.

[79] It is clear that these objections – framed as objections to the Permit and to construction of the dam – relate to issues of mercury contamination that were fully considered by the Joint Review Panel and were addressed by the province – albeit not to Nunatsiavut's satisfaction – before issuing the release Order.

[80] The province replied on July 10 – the letter repeats much of the province's response to the Joint Review Panel Report:

> Thank you for your letter dated June 28, 2013 to me regarding Nalcor Energy's permit application, number NE-LCP-Transmit-000348. Please consider this letter as a response to yours.
>
> Your letter cites the recommendations of the Joint Review Panel (JRP); however, you have not acknowledged the federal and provincial Responses to the JRP. Those Responses, and the conditions of the provincial Release from Environmental Assessment (EA), should also be considered so as to have a complete picture of the actions the proponent and, where appropriate, one or both of the orders of government are committed to take. The views of the Nunatsiavut Government on the JRP Report were received and given full and fair consideration before the Government of Newfoundland and Labrador (Government) finalized its response to the JRP Report. The federal response can be found at: http://ceaa.gc.ca/050/documents/54772/54772E.pdf, while the provincial Response is available at http://www.env.gov.nl.ca/env/env_assessment/projects/Y2010/1305/Response to Panel_Report.pdf.
>
> Your letter notes JRP recommendation 6.7 – assessment of downstream effects. Your letter does acknowledge that this recommendation is directed to Fisheries and Oceans Canada and Nalcor. The Province notes that the federal Response to this JRP recommendation indicates that, "As a condition of a subsection 35(2) authorization under the *Fisheries Act*, and prior to impoundment, Fisheries and Oceans Canada will require Nalcor to collect additional baseline data on bioaccumulation of methyl mercury in fish and on fish habitat downstream of Muskrat Falls." Moreover "Fisheries and Oceans Canada will require Nalcor to conduct a comprehensive multi-year program to monitor and report on bioaccumulation of methyl mercury in fish (including seals) within the reservoirs and downstream, including the Goose Bay/Lake Melville area. Fisheries and Oceans Canada will also require that Nalcor carry out multi-year post-project monitoring and reporting downstream into Lake Melville on a variety of parameters including nutrients, primary production, fish habitat utilization and sediment transport in order to assess changes to downstream fish habitat." The Province's understanding is that these federal requirements will be fulfilled at the appropriate time.

Your letter also refers to the Nunatsiavut Government's preliminary research program to better understand and predict downstream impacts. As noted in a March 25, 2013 letter from the Honourable Thomas Marshall, Minister of Natural Resources, to First Minister Darryl Shiwak, should the Nunatsiavut Government be willing to share the results of this program with the Province, it could be considered during the post-Environmental Assessment (EA) permitting process. Your letter notes that "[p]reliminary results from our research program validate and elevate our concerns with respect to downstream impacts and a result of dam construction and flooding", yet the Province has not received any of these results to date, and cannot agree that a single reference to such concerns or research results, without providing the results of that research (i.e., data and supporting research and analysis) is sufficient evidence of potential adverse impacts that would necessitate varying the contemplated authorization.

Your letter notes that the "fish and ringed seal samples currently being collected by Nalcor and the real-time water quality monitoring stations do not constitute a comprehensive study, including predictions, related to the downstream environment." The Department of Environment and Conservation (ENVC) continues to measure water quantity and water quality on Lake Melville. These water quality samples are analyzed for a full suite of physical and chemical parameters, including mercury. It is to be noted that the ENVC samples and any Nalcor samples are in addition to all other downstream mitigation measures required by the noted response of governments to the JRP's recommendations and in addition to any permit conditions.

Your letter raises the issue of the full clearing of the reservoir area; this was also discussed by the JRP in its recommendation 4.5 – Full clearing of the Muskrat Falls reservoir. You may wish to consider the Province's Response to this recommendation:

> *"Government of Newfoundland and Labrador agrees with the principle of maximizing the utilization of the forest resource. With limited opportunities to use the resource, and the likely insignificant reductions in mercury levels associated with full versus partial clearing, the Government supports partial harvesting of the flood zone. If an economic opportunity to use the resource materializes, consideration will be given to harvesting additional fibre."*

As you may know, the Department of Natural Resources (NR) has been in discussions with the Nunatsiavut Government on wood availability for the northern communities, although this work is still in the planning stage. Moreover, NR is reviewing the applications to the expression of interest for developing timber in Central Labrador, including wood that is produced through development of the Muskrat Falls project.

> With regards to the potential requirement for consumption advisories, this too was addressed in the provincial Response to JRP recommendations 13.9 – possible requirement for consumption advisories in Goose Bay or Lake Melville, and 13.10 – consumption advisory implementation. In response to recommendation 13.9, "[t]he Government of Newfoundland and Labrador accepts the intent of this recommendation. If consumption advisories are required as a result of the downstream mercury assessment, then Nalcor should consult with downstream resource users on further mitigation measures, including the potential for compensation." NL is not yet aware of any documented elevated mercury levels that would necessitate a consumption advisory. Regarding recommendation 13.10, the Government of Newfoundland and Labrador accepts the intent of this recommendation" and "will work with Nalcor to ensure that consultation with relevant Aboriginal organizations as appropriate will take place to ensure that effective and culturally appropriate communication protocols are established to get consumption advisories to those who need them in a timely fashion." We would welcome your views on this matter, but do not agree this warrants a decision to not issue the regulatory authorization in question.
>
> Thank you for bringing your concerns to our attention, but there is no reason to believe the authorization at issue will create unforeseen or unmanageable impacts. Therefore, the regulator will proceed to issue the permit without further notice.

[81] The same day, the province issued the Permit, authorizing:

> … the construction of Powerhouse and Intake, Spillway and Transition Dams, North RCC Dam, Rockfill Dams, Cofferdams, North Spur stabilization and associated activities outlined in the application received on March 25, 2013 required for the Muskrat Falls hydroelectric generation facility.

[82] The Permit relates only to the construction of the dams and related infrastructure, it does not cover impoundment or flooding, of the reservoir. It is valid for five years and is subject to a number of conditions.

[83] After the issuance of the Permit, Nalcor, as required by the 2012 release Order, submitted a number of Environmental Effects Monitoring Plans, including plans relating to methylmercury and aquatic monitoring. The province identified a

number of deficiencies in these plans; revised plans were submitted and were eventually approved.

[84] Nunatsiavut says that the terms and conditions of the Permit do not address its concerns. It says that right from the outset, including its initial Environmental Impact Statement, Nalcor has consistently taken the position that there would be no downstream effects in eastern Lake Melville; the province, argues Nunatsiavut, has been content to rely on Nalcor's views.

[85] Nunatsiavut points to the recommendations of the Panel – to the Panel's conclusion that there would be adverse effects downstream, albeit unquantified, and to its recommendations intended to mitigate the effects and address the measurement uncertainty before flooding or impoundment. Counsel acknowledged that as time passes and the data from the monitoring programs covers a longer span of time, the need to respond to Inuit concerns may become more apparent. However, he went on to emphasize the practical difficulty in doing anything other than respond by way of consumption advisories and compensation as work on the project continues and the infrastructure edges towards completion. Hence, said counsel, the need to act while there is still opportunity for meaningful intervention.

[86] One might question aspects of the province's response to the Panel report. For example, its response to the Panel's recommendation 4.5 for full clearing of the reservoir area is focused on maximizing utilization of the timber that is cleared. It refers to "likely insignificant" reductions in mercury levels associated with full clearing. However, additional clearing would be "considered" if the wood could be marketed. There are, of course, many factors associated with clearing a large area – trucks, material displacement, access and the like. But the response seems somewhat shallow in its focus on economics and does not explain how the Panel's "gains may be small" in mercury levels becomes "likely insignificant".

[87] Given that the accumulation of mercury is a health issue and is directly related to the exercise of established treaty rights, such a quick dismissal of the full

clearing ‘recommendation’ seems, to say the least, surprising. More of this issue in a moment.

[88] Having said that, I am not inclined to an extensive point-by-point consideration of the province’s response to the Panel Report. The time to challenge the response to the Report was in March 2012 when the response was issued and the project formally released from the environmental assessment process, thus establishing the framework in which the project would proceed.

[89] This dispute is more about accommodation than consultation. While an element of consultation may be an issue at the margins, the heart of the matter is the Inuit’s continuing disagreement – and disappointment – with the province’s decision to reject one of the mercury reduction measures (full clearing of the reservoir) recommended by the Joint Review Panel and to less than wholeheartedly ‘accept the intent of’ Panel recommendations relating to monitoring and compensation for losses flowing from any future limitations on the Inuit’s ability to harvest fish because of mercury accumulation.

[90] Counsel for Nunatsiavut put the issue squarely in his open comments – the case, he said, is about the need for Nalcor to spend money in order to know and understand the potential for mercury accumulation in the waters in the Labrador Inuit Settlement Agreement and to reduce and compensate for the level of risk identified.

[91] This is the language of accommodation – one side’s view of what must be done in order to reconcile the interests concerned in a just and honourable manner. Counsel pointed out that the Muskrat Falls project is a long term project – both in its construction and in its eventual operation, not to mention the initial lengthy environmental assessment process and the ongoing need to apply for numerous regulatory permits – both federal and provincial – at various stages of the development. Because, said counsel, the process is long and not ‘linear’, there must be between the Aboriginal peoples concerned and the regulatory authorities a governing ethos that is characterized by good faith reconciliation rather than by a ‘win-lose’ mentality.

[92] However, Court 'supervision' through the litigation process is an unwieldy tool to assess the many and varied decisions that have been and will be made in the course of the development. In particular, given the environmental assessment process that has taken place and the decisions taken by the authorities following that process, I do not accept that disagreement – either procedurally or substantively – with a particular decision can support a litigation challenge well after the decision has been taken and the project has moved on in reliance on that decision.

[93] It follows that I do not accept that what may be referred to as a constitutional right of consultation keeps reappearing every time a regulatory decision must be made or issued where that decision involves a matter which has previously been the subject of an appropriate level of consultation. I hasten to add that whether, in any given circumstance, an agreement may give rise to a right of consultation is a separate issue.

[94] Perhaps this point is best illustrated by reference to the province's decision to reject the Joint Review Panel's recommendation of full clearing of the reservoir in favour of the partial clearing favoured by Nalcor. I offer this extended discussion by way of example only – the same analysis could be applied to the issues surrounding the scientific assessment of the likely accumulation of mercury in Lake Melville.

[95] It is helpful to set out what the Joint Review Panel said about reservoir preparation – at page 45 of its report:

> In reaching its conclusions on alternative means of reservoir preparation, the Panel considered the following factors to be particularly relevant:
>
> - The two alternative means of reservoir preparation considered in detail by Nalcor, 'partial clearing' and 'full clearing';
> - Nalcor's assessment of partial and full clearing;
> - The different views of many participants regarding the amount of clearing that should be done, harvesting methods and Nalcor's cost benefit analysis;

- Natural Resources Canada's position that more in-depth analysis is required of different options, including soil removal, to reduce the uptake of methylmercury;

- Environment Canada's position that the methodology used by Nalcor to calculate greenhouse gas emissions is appropriate, that the greenhouse gas emissions from either option is small, and that the preferred option of disposal of slash (mulching) and its implications for methylmercury production is acceptable (Environment Canada's view is related in Chapter 5);

- The provincial Department of Natural Resources involvement in approving detailed harvesting plans and monitoring operations; its statement at the hearing that it considers this to be a reservoir clearing operation as opposed to a forestry operation under the provisions of the Forest Management Plan for the area;

- Confusion surrounding the terminology used by Nalcor at various stages of the assessment and because Nalcor's approach to reservoir preparation changed so much during the assessment process;

- The fact that Nalcor's assessment, for the most part, considered the two reservoirs together with respect to harvesting methods and constraints, operating measures, and cost benefit analysis; and

- The need to address the differing views on the use of timber salvaged from reservoir preparation activities.

In an effort to summarize and clarify the different options discussed, the Panel notes that Nalcor evaluated several options for reservoir preparation, namely, minimal clearing, partial clearing and full clearing. Nalcor's 'partial clearing' alternative involves clearing trees in only the ice and stick-up zones around the perimeter of the reservoirs and only in areas in those zones that are within Nalcor's pre-defined safety, environmental and economic operating constraints; otherwise, the trees are left standing. Nalcor's 'full clearing' alternative involves, in addition to 'partial clearing', also clearing wood in the flood zone but again only in areas in that zone that meet the same operating criteria as for 'partial clearing'. Contrary to what has been often stated, Nalcor's 'full clearing' does not mean removing all the trees. Recognizing this, Innu Nation's presentation at the hearing suggested using the term 'proper clearing'. In terms of actual clearing activity, 'proper clearing' and Nalcor's 'full clearing' are the same.

The Panel also notes that in both Nalcor options ('partial' and 'full'), only trees defined as merchantable timber would be cut. Mechanical harvesters would cut the trees and remove the limbs and tops. The de-limbed trunks would be moved

to roadside by mechanical forwarders and from there by truck to the nearest storage site located above the flood line. Tree tops, limbs, and other vegetation in the area (non-merchantable timber) would be mechanically mulched. The mulch would remain on location in the area to be eventually flooded.

Further, Nalcor's stated objective for its current reservoir preparation plan is to reduce the amount of trash and debris that could affect operation of the turbines after impoundment. In respect to that objective, since the main source of trash and debris is the ice and stick up zones, it is Nalcor's assessment that there is no difference in the 'full' and 'partial' clearing options and only little difference between the two in terms of navigation, mercury produced, or greenhouse gas emissions. However, by Nalcor's assessment, there are huge differences in costs in that in addition to extra harvesting activity the additional time required for 'full clearing' would result in delay of the Project construction schedule, thereby incurring a large penalty estimated by Nalcor to be at least $200 million. Consequently, Nalcor's preferred option is 'partial clearing'.

The Panel heard from many participants who disagreed with Nalcor's assessment and preferred reservoir preparation option. Many though that technologies such as the use of manual harvesting with chain saws and by cable logging would enable more areas to be cleared and greater volumes to be harvested than projected by Nalcor. Some recommended clearing, to the extent possible, of all trees in the reservoir for the economic benefits of utilizing the salvaged wood, while others for the reasons of reducing methylmercury and the generation of greenhouse gas emissions. The Panel also heard a number of participants question Nalcor's cost benefit analysis, particularly with respect to the value attributed to salvaged wood and the penalty attributed to construction schedule delay.

The Panel notes that Nalcor's harvesting approach that utilizes mechanical harvesters, forwarders and mulchers is reasonable for a forestry operation of this size and nature.

The Panel also notes, as further discussed in Chapter 5, the more trees cleared, the more benefits accrue in terms of reducing methylmercury accumulation and greenhouse gas emissions, though gains may be small. The Panel also notes that Natural Resources in Canada recommended that Nalcor study the removal of soils in the drawdown area to reduce the production of methylmercury in flooded terrain. This is discussed in Chapter 6.

Nalcor's assessment of these matters as well as its cost benefits analysis considered the two reservoirs together. However, it is clear that the Muskrat Falls reservoir is specific to the Muskrat Falls generating facility in that it is the only reservoir for that part of the Project. Similarly, the Gull Island reservoir is specific to the Gull Island generating facility. It is also clear that the two

reservoirs are significantly different in terms of size, volumes and density of wood, steepness of slopes, distance from Happy Valley-Goose Bay, and timing.

[96] The Panel had before it information to the effect that removing soil and organic material to a depth of 0.25 metres in the reservoir area – full clearing – would require removal of approximately 10 million cubic metres of material with a mass of approximately 25 million tons. One million truck trips – and a network of roads – would be needed to transport the material to a vast disposal site.

[97] In the Executive Summary, the Panel said this:

Fate of Mercury in the Reservoirs

There was general agreement that Nalcor's predictions for the amount of methylmercury that would be released, and how it would concentrate through the different levels of the food web in the reservoirs, were reasonable. The Panel heard no evidence that suggested that the health of the fish themselves would be harmed by the mercury in their bodies. Nalcor's position was that there was no feasible way to substantially reduce the formation of mercury in the reservoirs and that any risks to people who might eat the fish could be handled through consumption advisories. Natural Resources Canada challenged this, and recommended that Nalcor consider removing both vegetation and part of the soil layer around the new shorelines of the reservoirs. The Panel recognized that there were still many questions about this proposed mitigation measure but agreed that hydroelectric developers have a responsibility to find ways to reduce mercury at source if at all possible, and recommended that Natural Resources Canada and Nalcor collaborate to pilot test this approach.

Effects Downstream of Muskrat Falls

Based on studies in Lake Melville carried out for an earlier version of the Project and the fact that, unlike some other hydroelectric projects, the Project would not reduce the amount of water flowing downstream from Muskrat Falls, Nalcor had concluded that the Project would not have effects on the downstream environment past the mouth of the Churchill River and consequently did not extend the Assessment area beyond this point. This was challenged by a number of participants, and particularly the Nunatsiavut Government. The possibility of mercury moving downstream in sufficient quantities to contaminate fish and seal, and eventually require consumption advisories, was a particular concern. Participants also questioned whether subtle changes in suspended solids, nutrients

or water temperature might, over the long-term, change the productivity of the river's estuary.

Fisheries and Oceans Canada presented some recently released research showing that mercury from the Churchill Falls project was measured in several fish species in Lake Melville over 300 km away, but Nalcor maintained that mercury and other Project effects would be "not measurable" and within natural variability.

The Panel acknowledged that it is difficult to accurately predict downstream effects because there are very few long-term ecological studies of hydroelectric projects in northern environments. However, this underscores the need for a precautionary approach, particularly because Nalcor did not identify any feasible way to reverse either long-term adverse ecological changes or mercury contamination in the ecosystem.

The Panel concluded that Nalcor did not carry out a full assessment of the fate of mercury in the downstream environment, including the potential pathways that could lead to mercury bioaccumulation in seal and the potential for cumulative effects of the Project together with the effects of other sources of mercury. The Panel also concluded that downstream effects would likely be observed in Goose Bay over the long term, caused by changes in sediment, nutrient supply and water temperatures. Therefore, the Panel recommended that Nalcor carry out a comprehensive assessment, with third-party review, of downstream effects before impoundment begins. The Panel also noted that, while Nalcor has committed to make its monitoring data public, often lessons learned from environmental effects monitoring of large projects are obscured because the results are not fully analyzed and remain difficult to access in the "gray literature". Therefore the Panel recommended that Nalcor undertake to publish what it learns about possible long-term downstream effects.

Monitoring, Follow-up, Adaptive Management

Nalcor committed to carry out an extensive aquatic monitoring program to verify its predictions and identify whether adaptive management would be needed. The Panel concluded that effective monitoring would be challenging because of the need for good baseline data, enough resources to support the needed level of effort over many years, and setting appropriate thresholds to trigger further action. The Panel recommended involving Aboriginal groups, stakeholders and independent experts in designing the program.

[Underlining added]

[98] The Panel concluded was that it was both technically and economically feasible to carry out full clearing of the Muskrat Falls reservoir and it so recommended in recommendation 4.5 reproduced earlier.

[99] In chapter 9 of the Report, dealing with specifically with the effect of the project on the use of the land and resources by the Aboriginals for traditional purposes, the Panel said this:

> Labrador Inuit
>
> Inuit who presented to the Panel emphasized the effects that they believed the Project would have on their traditional land and resource use activities taking place downstream of the Assessment area, including in Lake Melville and on land and water within the Labrador Inuit Settlement Area and as identified in Schedule 12-E of the *Labrador Inuit Land Claim Agreement*. The Panel notes in particular that concerns associated with the possibility for the Project to lead to methylmercury contamination in the downstream environment is a direct reflection of the importance attributed by Inuit participants to harvesting activities in that area for the continuation of their traditional lifestyle.
>
> As indicated in Chapter 6, the Panel cannot conclude with complete certainty what the downstream ecological effects of the Project would be beyond the mouth of the Churchill River. In particular, with respect to mercury, the Panel concluded that Nalcor's assertion that there would be no measurable effect on levels of mercury had not been substantiated for the Goose Bay estuary and Lake Melville, two important Inuit harvesting areas for fish and seal that have never been subject to consumption advisories in the past.
>
> The Panel concluded that there is a chance that consumption advisories for fish and seal might be required in Lake Melville. The Panel considers that if consumption advisories are required in Lake Melville, this would likely have a marked effect on the acceptability and attraction of Goose Bay and Lake Melville as harvesting locations for fish and seal. Even if no advisories are required, the Panel notes that reduced confidence in the safety of fish or seal meat would have a negative effect on traditional harvesting activities, especially as the recent decline of the George River caribou herd may cause residents to rely more heavily on seal meat as a source of protein. Fishing and seal harvesting activities could be displaced or reduced. This in turn could reduce the value and enjoyment of cabins on the shores of Lake Melville. Recommendation 6.7 addresses the importance of improving the reliability of predictions regarding the transport and fate of methylmercury in Goose Bay and Lake Melville prior to impoundment taking place.
>
> [Underlining added]

[100] The Panel Report was released on August 25, 2011.

[101] The Nunatsiavut Government issued a press release on August 29:

August 29, 2011
For Immediate Release

Nunatsiavut Government pleased with Panel recommendations on proposed Lower Churchill project

The report of the independent Panel that conducted the environmental assessment of the proposed Lower Churchill hydro development provides a solid and unbiased starting point that recognizes potential significant adverse effects on Labrador Inuit, says Nunatsiavut's Minister of Lands and Natural Resources, Glen Sheppard.

"As a result of this report, we are looking forward to no longer being excluded from the table and being an integral part of the Lower Churchill discussions with the Government of Newfoundland and Labrador and Nalcor," says Minister Sheppard.

The Nunatsiavut Government spent considerable time participating in the environmental assessment process in order to assert its views that the project would have potential negative impacts on Labrador Inuit and their environment, culture and way of life – especially Inuit living in the Upper Lake Melville area and Rigolet, Minister Sheppard noted.

"We made some 30 separate submissions to the Panel, many of which involved collaboration with scientific and Inuit experts. The proponent, Nalcor, did not consider that Inuit would be affected by its project. We are pleased to see that the Panel found many of our concerns to be valid and agreed with many of our recommendations."

For example, the Panel concluded that Nalcor did not carry out a full assessment of the fate of mercury in the downstream environment, including potential pathways that could lead to mercury bioaccumulation in seal and fish and the potential for cumulative effects of the project along with effects of other sources of mercury.

"This statement from the Panel differs significantly from Nalcor's assertions throughout the environmental assessment process that they were certain that there would be no measurable downstream effects from the project," the Minister said.

The Panel also recognized the dietary and cultural importance of fishing and seal hunting in Goose Bay and Lake Melville, including the Labrador Inuit Settlement Area, concluding that there would be significant adverse effects on the pursuit of

> traditional activities by Labrador Inuit, including the harvesting of country foods, should consumption advisories be required.
>
> The Nunatsiavut Government is also pleased to see several other recommendations, including those surrounding low-income housing, aquatic monitoring, George River caribou, land and resource use, training, infrastructure, communication, environmental management and human health, the Minister said.
>
> "It is quite clear that this proposed project poses significant risks on Labrador Inuit, on traditional harvesting and fishing," said the Minister. "Unless these deficiencies can be addressed, the project should not go ahead."

[102] In its formal response to the Panel recommendations, Nunatsiavut said this of recommendation 4.5: – "In agreement – Panel recommendation should be more specific with the fate of the wood."

[103] Once the province had issued its response to the recommendations of the Joint Review Panel and issued the release Order, it would reasonably be expected that further environmental protection plans and environmental effects monitoring programs – from a provincial perspective – would reflect the views of the province as set out in that response and Order. Compliance with the conditions of the Order would be an ongoing process as approvals for the many and varied activities would be sought. In other words, the response, the Order and its conditions laid out the 'rules of the game', as it were, under which the development would proceed.

[104] With respect to the issue of full or partial clearing of the reservoir, the province's response settled and decided the matter. Nothing further was required.

[105] It was at this point that any challenge to the reservoir clearing decision – or to any other aspect of the release Order or its conditions - should have been taken, whether on grounds of failure to consult or to accommodate (either common law or contractual) or for unreasonableness of the decision itself.

[106] I do not accept that, in the circumstances of a development being built over many years, the law contemplates that decisions may effectively remain open for

challenge long after they have been taken and the development has moved forward on the basis of such decisions.

[107] The law is clear that accommodation of Aboriginal interests does not require agreement - **Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)**, 2004 SCC 74, [2004] 3 S.C.R. 550; **Beckman v. Little Salmon/Carmacks First Nation**, 2010 SCR 53, [2010] 3 S.C.R. 103

[108] Having said that, the law also requires that the consultation and accommodation process be infused with respect and with honourable dealing. This is of course easier to state than to apply to any given circumstance.

[109] The issue of full clearing versus partial clearing – and I continue to refer to this issue simply to illustrate the need for a timely challenge – is not simple. Many factors are involved. Further, it should be borne in mind that the Muskrat Falls reservoir area itself is not within the Labrador Inuit Settlement Area. The potential effect on Inuit treaty rights is an unquantified 'downstream effect' – following impoundment - in the waters of eastern Lake Melville.

[110] But it is not difficult to understand Inuit frustration with the province's response to recommendation 4.5. The Joint Review Panel, after hearing much evidence and many points of view, offered a considered recommendation. The Inuit considered, understandably, the Joint Review Panel process and its report and recommendations to be integral to the consultation and accommodation expected and required. Much effort was put into the submissions to the Panel.

[111] The province's response to recommendation 4.5 is close to a summary rejection of the Panel's recommendation. The response, which adopts Nalcor's preferred position, focuses on the lack of opportunity to use the cleared timber. Counsel for Nunatsiavut argued that the province's reference to "likely insignificant" reduction in mercury levels - compared to the Panel Report's "gains may be small" – demonstrates a less than considered response. I do not agree that the wording used by the province supports such a characterization. All involved

are grappling with the unknown effect of the project on the waters in the Settlement Area; such evidence as there was before the Panel pointed only to a 'possibility' of a level of mercury accumulation that would require consumption advisories. To conclude that full clearing would reduce or eliminate the potential for consumption advisories would be speculative at best. A difference in language between "gains may be small" and "likely insignificant" is, in and of itself and in this context, a non-issue.

[112] But having said that, the brevity and economic focus of the province's response on a health-related issue that potentially affects established constitutional rights may reasonably suggest to some insufficient concern and respect for reconciliation and for the accommodation of Inuit interests.

[113] As already noted, the Innu of Ekuanitshit challenged the federal response to the Joint Review Panel in Federal Court in 2012. If Nunatsiavut wished to take issue with the province's response and the resulting regulatory "road map" for the project – either on grounds relating to consultation, accommodation, or the reasonableness of the response – it should have done so at the time. The Inuit's areas of concern were fully engaged as part of the context of formal approval of the project. I am not prepared, in the context of a proceeding brought in August 2013 to challenge a July 2013 Permit, to revisit issues already the subject of extensive consultation and already addressed in both the response to the Panel and the release Order in March 2012.

[114] As counsel for Nunatsiavut said, this is an ongoing process, but disagreements over a particular decision cannot be raised at every subsequent step of the process. The notion of collateral attack does not fit comfortably with accommodation and reconciliation of Aboriginal interests; but in the circumstances of this case, allowing issues relating directly to the response to the Joint Review Panel and the 2012 release Order to support a challenge to a later and separate issuance of a regulatory permit would be unfair. Accordingly I express no opinion on whether the province's response to the Joint Review Panel Report or the release Order itself suffered from any legal defect relating to consultation, accommodation or unreasonableness.

[115] I am prepared to look only at issues relating to the application for issuance of the Permit, a question to which I now turn.

[116] The Permit was issued by the province on July 10, 2013. Given under the *Water Resources Act*, S.N.L. 2002, c. W-4.01, it addressed the diversion of the river to allow for construction of the dam and associated facilities. The Permit is valid for five years.

[117] Specifically, it authorizes

> … the construction of Powerhouse and Intake, Spillway and Transition Dams, North RCC Dam, Rockfill Dams, Cofferdams, North Spur stabilization and associated activities outlined in the application received on March 25, 2013 required for the Muskrat Falls hydroelectric generation facility. …

[118] It was subject to a number of conditions.

[119] As noted that the Permit relates to diversion of the river for purposes of construction of the dam and power plant. It does not authorize impoundment (filling of the reservoir). Thus, by its terms, the Permit does not authorize activity that directly affects rights of the Inuit. However, of course, the reservoir area will eventually be flooded, which flooding in turn will create the environment for mercury contamination of the water. (I recognize the argument made by Nunatsiavut in its letter of June 28, 2013 to the effect that dam construction and downstream effects are "inextricably linked".)

[120] The Permit is challenged on grounds of inadequate consultation and failure to accommodate the rights and interests of the Inuit. The accommodation requested is:

> … to meaningfully consider incorporation into the Permit of the Applicant's proposed accommodations respecting (i) full clearing of the Muskrat Falls reservoir so as to reduce the amount of methylmercury entering the aquatic

> environment, (ii) the need for a comprehensive and defensible aquatic effects prediction and assessment program that includes the downstream environment of Lake Melville as the foundation for the effects monitoring plan required pursuant to the Permit, and (iii) a framework agreement between Nalcor and the Applicant to provide for mitigation actions, including compensation, if monitoring suggests downstream impacts are occurring in the Labrador Inuit Settlement Area; …

[121] These are the same issues that were raised during the Joint Review Panel process, in the Nunatsiavut response to the Panel Report, and again in its submissions to the province prior to issuance of the 2012 release Order.

[122] As noted earlier, I am not prepared to revisit these issues in the context of a challenge to the Permit.

[123] The content of the 'constitutional' duty to consult – apart from agreement – will vary with the circumstances - **Haida Nation v. British Columbia (Minister of Forests)**, 2004 SCC 73, [2004] 3 S.C.R. 511. Relevant factors include the nature of the right or rights at stake, the action proposed and the potential for interference with the rights in question.

[124] Here, I am not persuaded there is any 'constitutional' duty to consult the Inuit before issuing a regulatory approval that, in and of itself, will not have a direct impact on Inuit rights. This view is of course influenced by the fact that there was significant consultation in the environmental assessment process and further consultation before the province issued the release Order. But a determination of the existence and scope of any such duty engages consideration of the specific consultation provisions in the Land Claims Agreement.

[125] In my view, the terms of the Agreement exclude any additional common (constitutional) law duty to consult with respect to the Permit application. Given the comprehensive nature of the consultation provisions in the Agreement, and the distinctions carefully drawn between the scope of obligations of the federal and provincial governments, I am satisfied that the parties intended to exclude from the provincial duty to consult any additional common or constitutional law duty to

consult with respect to decisions involving specific regulatory permits in the context of an already approved undertaking. In other words, unlike the situation in **Little Salmon**, *supra*, in respect of such permits the field of consultation has been occupied, so to speak, by the agreement of the parties. There is no additional duty to consult imposed by law.

[126] Any requirements to consult on the Permit application flow only from the terms of the Land Claims Agreement and from the Aboriginal Consultation Guidelines promulgated by the province.

[127] For ease of reference, I repeat the relevant provisions on the Land Claims Agreement. Section 11.5.11 sets out the basic provincial obligation:

> **11.5.11** If, in the opinion of the Provincial Authority, an Undertaking that is subject to the *Environmental Protection Act* may reasonably be expected to have adverse Environmental Effects in the Labrador Inuit Settlement Area or adverse effects on Inuit rights under the Agreement, the Provincial Authority shall, in addition to providing the notice and information required under section 11.2.8:
>
> (a) Consult the Nunatsiavut Government about the Environmental Assessment applicable to the Undertaking;
>
> (b) Consult the Nunatsiavut Government about the possible participation of Inuit and the Nunatsiavut Government in that Environmental Assessment; and
>
> (c) in any event, Consult the Nunatsiavut Government before making any decision or taking any action to allow the Undertaking to proceed.

[128] This must be read in conjunction with section 11.2.8 and 11.2.9(a):

> **11.2.8** When an Authority receives a registration document or an application for an Undertaking or an application for a permit, licence or authorization in relation to an Undertaking and the Undertaking, in the opinion of the Authority, may reasonably be expected to have adverse Environmental Effects in the Labrador Inuit Settlement Area, the Authority shall give timely written notice of the Undertaking and shall provide relevant available information on the Undertaking and the potential adverse Environmental Effects to the Nunatsiavut Government.

> **11.2.9** After giving or receiving a notice and information required under section 11.2.6, 11.2.7 or 11.2.8, the Nunatsiavut Government and the relevant Authority shall, before making any further determination or taking any further action in relation to the Project or Undertaking, Consult each other about:
>
> **(a)** how their respective Environment Assessment processes are to be applied …

[129] It is useful to contrast section 11.6.2 with respect to the obligation of the federal Government:

> A federal Authority shall Consult the Nunatsiavut Government before taking any action that would allow a Project or Undertaking referred to in section 11.6.1 to proceed or making a decision to issue a permit, licence, funding, or other authorization in relation to the Project or Undertaking.

[130] I must confess to some difficulty in interpreting the combination of sections 11.2.8 and 11.5.11. However, I am inclined to the view that 11.2.8 is intended to address the initiation and structure of the overall environmental assessment process, such as the Joint Review Panel established in this case. Further, given the lack of reference in 11.5.11 to decisions relating to the issuance of a "permit, license, funding or other authorization" in relation to an undertaking (in contrast to section 11.6.2), I do not read section 11.5.11(c) as requiring consultation in respect of the many and varied subsequent regulatory applications. The consultation required in 11.5.11(c) addresses the overriding initial decision to proceed with the undertaking following an environmental assessment – in this case, the release Order.

[131] Of course, should an action be contemplated that would potentially affect Inuit rights – and in the absence of an appropriate level of prior consultation on the issues involved – it would be open to the Inuit to argue that, over and above any level of consultation required by the Agreement, the honour of the Crown required consultation and perhaps accommodation before proceeding with the contemplated action. See, for example, **Little Salmon**, *supra*.

[132] In argument counsel for Nunatsiavut referred to the Implementation Plan of the Land Claims Agreement. This Plan, signed by the signatories to the Land Claims Agreement, sets out detailed mechanisms for implementing various aspects of the Agreement. The establishment of such a plan is contemplated by section 23.2.1 of the Agreement.

[133] Counsel pointed to Activity Sheet 11-9 of the Plan, a table which sets out 11 steps for notification and consultation for projects expected to have adverse environmental effects outside the Settlement Area. The steps cover the environmental process and the decision on whether or not to proceed with the undertaking. Steps 8-10 require the province to provide Nunatsiavut with notice of a preliminary decision to proceed with the undertaking and to allow time for review, response and consideration before making a final decision.

[134] Counsel argued that these steps identify what the parties consider necessary to fulfil the consultation obligations set out in section 11.5.11(c) of the Agreement. He went on to point out that the steps had not been followed by the province before issuing the release Order on May 3rd, 2012; he then argued that since the province's position on the issues raised by Nunatsiavut was the same at the time of the release Order as it was at the time of its response to Nunatsiavut's concern before issuing the Permit in 2013, the decision to issue the Permit was tainted by the same defects applicable to the decision to issue the release Order.

[135] I do not agree that any failure to provide notification of a preliminary decision to issue the release Order has any legal significance, and in particular, has any legal significance relevant to issuance of the Permit. The Implementation Plan – and the Activity Sheets in particular – represent nothing more than worksheets. By its terms, the Plan creates no legal obligations except where specifically identified as such. Section 23.3.3 of the Agreement addresses the inclusion of legal obligations in the Implementation Plan:

> **23.3.3** To the extent the Implementation Plan creates legal obligations it shall stipulate that the performance of those obligations provides a discharge of the related Agreement obligations to the extent set out in the Implementation Plan.

[136] The Agreement goes on to confirm that the Implementation Plan is not part of the Agreement and that it cannot be used to interpret the Agreement.

[137] There are no references in Activity Sheet 11-9 to the effect that the steps set out create legal obligations related to the duty to consult in section 11 of the Agreement.

[138] Accordingly, any non-compliance with steps 8-10 of the Activity Sheet in connection with the issuance of the 2012 Order does not represent a breach of any contractual duty owed by the province to Nunatsiavut. Further, given the specific reference in the Agreement to the Plan and the creation of legal obligations, there is no basis upon which to conclude that the Plan, as worded, created any expectations of obligations binding on the province. It follows that the issuance of the Permit is not affected by compliance or otherwise with the Implementation Plan.

[139] Following the release Order, the province issued Aboriginal Consultation Guidelines. Before issuing these Guidelines, the Inuit and other Aboriginal groups were invited to comment.

[140] The Guidelines cover applications for regulatory approval such as the application for the Permit.

[141] It was argued that the Guidelines are just that – guidelines - and that they do not have the force of law. But however one characterizes them, they reasonably created in the Aboriginal groups expectations of a consultative process for the issuance of approvals, authorizations and permits. This expectation would be confirmed by the reference in the Guidelines to their use as assistance to Nalcor and the province in discharging "any duty to consult" before issuing regulatory approvals. Appended to the Guidelines is contact information for 10 Aboriginal governments, nations or councils.

[142] I do not consider it unreasonable to hold the province to compliance with its own Guidelines when considering issuing a regulatory approval. Any remedy for non-compliance is, of course, a different issue.

[143] I have already set out the steps taken by the province when it received Nalcor's application for the Permit. In the course of its consideration, the province requested additional information relating to engineering data for the dams and spillways. The province received this further information but did not forward it to Nunatsiavut.

[144] Although the failure to provide the additional information may represent technical non-compliance with the guidelines, given the nature of the information and its irrelevance to the Inuit rights to harvest fish in Settlement Area waters, it does not warrant further comment.

[145] The province allowed Nunatsiavut's request for more time to comment on the Permit application. Those comments, when received, repeated Nunatsiavut's concerns about the full clearing of the reservoir and the need for baseline reports of downstream mercury levels.

[146] The province replied on July 10 and issued the Permit the same day.

[147] The reply did not meet the requirements of step 5 of the Guidelines. I repeat them for ease of reference:

> Where comments are received from an Aboriginal government / organization, the responsible Department should give full and fair consideration to the comments in its review of the Application. Within thirty (30) days of receipt of such comments the Department should provide the Aboriginal government / organization with full and fair consideration of the comments, in writing. Upon issuing its written response to the comments by email, the Department should also indicate that within seven (7) days of receipt of the Department's response, the Aboriginal government or organization may request a conference call to discuss the Department's response.

[148] In the province's reply of July 10, there was no reference to the opportunity for Nunatsiavut to request a conference call to discuss the province's response. Counsel argued that the writer simply forgot to put it in the letter. The reference in the reply to "will proceed to issue the Permit without further notice" (see paragraph 80 above) does not suggest any inclination to wait. Counsel also pointed out that Nunatsiavut was, or should have been, well aware of the opportunity to ask for a conference call. That may well be, but it does not excuse the province's failure to adhere to the guidelines.

[149] The absence of a reference to requesting a conference call was the subject of a written response to interrogatories. On behalf of the province, Haseen Khan said this:

> The applicant was not provided with seven days to discuss the response upon receipt of the ENVC July 10, 2013 response due to the fact that while the Applicant is allowed 30 days for comments as per the Aboriginal Consultation Guidelines, the applicant took three months to respond with comments. The official application was received Mar 25, 2013. Comments were due Apr 25, 2013. On June 19, ENVC sent out notice to Aboriginal Groups indicating that the timeframe to provide comments had expired. The Nunatsiavut Government provided official comments on June 28, 2013. Providing a further 7 days was not required as Aboriginal Groups had been given 3 times the required amount of time for consultation already.

[150] The considered response does not suggest that the lack of reference in the July 10 letter was inadvertent.

[151] The province's frustration with the Nunatsiavut response under the Guidelines in understandable. The application for the Permit was sent to Nunatsiavut on March 5th. No comments were received and on June 19th, the province advised Nunatsiavut and others that it would proceed to issue the approval. This got Nunatsiavut's attention and its' representatives requested and were granted an extension until June 28th to provide comments. Comments were provided on that date.

[152] Clearly, Nunatsiavut did not regard the Guidelines as requiring compliance. Respect for the Guidelines and for the consultative process suggests that a response – even an acknowledge of receipt and a request for more time – should have been made within the 30 day period. A first communication 60 days after the 30 day response time had elapsed is not helpful.

[153] But in my view, such non-compliance does not then allow the province to arbitrarily ignore its own Guidelines and assert that Nunatsiavut had had enough time and, in effect, did not deserve a further seven days.

[154] Particularly given the province's agreement to an extension to June 28th, honourable and good faith dealing required continuing adherence to the Guidelines and notification of the availability of a conference call within seven days.

[155] I appreciate of course that the issues likely to be raised on any such call would have been the same issues already dealt with in 2012. But in this context, the honour and good faith of the Crown must be evident at all times. Such good faith dealing does not require the Crown to agree to positions maintained or put forward by the Inuit, and repetition of arguments may become inconvenient, but the fact and perception of arbitrariness must be avoided.

[156] In these circumstances, the province's non-compliance with the Guidelines is not such as to warrant a legal remedy. The failure to refer to the seven day conference call option was on the low end of the non-compliance spectrum, and the issues being raised by Nunatsiavut were not such as to require reconsideration in the context of the Permit application.

SUMMARY AND CONCLUSION

[157] Nunatsiavut believes that, in rejecting certain recommendations of the Joint Review Panel and in allowing the project to proceed, the province failed in its duty

to consult with Nunatsiavut and failed to accommodate the treaty rights of the Inuit, rights that are subject to some level of risk through mercury accumulation.

[158] Despite the urging of counsel, I am not prepared to transfer any concerns related to issuance of the release Order – or the response to the Joint Review Panel report – over to the issuance of the Permit in 2013.

[159] In deciding to release the development from environmental assessment, thus allowing it to proceed, the province had before it, clearly and comprehensively expressed, the various concerns of Nunatsiavut with respect to mercury accumulation, mitigation, monitoring and compensation.

[160] Concerns relating to mercury accumulation and to any potential adverse effect on Inuit rights were clearly necessary and appropriate considerations in the province's deciding to release the project from environmental assessment and in determining what conditions should be attached to such release. But once the release decision was made and the conditions for future regulatory approvals set, thus reflecting the province's view of any accommodation required, those considerations move to the background, in a legal sense. Unless raised by the terms of a specific approval or condition, they do not remain for repeated reconsideration in the context of the various regulatory permits required as the project proceeds. (Of course, to the extent that any activity authorized by a specific permit may have an adverse effect on Inuit rights and raise issues separate and apart from those considered at the time of the release Order, then obligations of consultation and perhaps accommodation may arise).

[161] The 2012 Order-in-Council, with its conditions, was the key that unlocked the door to the start of work on the development. Future activity would be subject to control not through the environmental assessment process, but through the conditions of the Order-in-Council and the other specific regulatory approvals that would be required from time to time.

[162] The issuance of the Permit did not raise issues directly relating to Inuit interests under the Land Claims Agreement. The application of the principles of constitutional law did not, with respect to the Permit, require consultation with the Inuit nor, accordingly, accommodation of their rights under the Land Claims Agreement. The Land Claims Agreement and related documentation constitute a complete code governing consultation. The consultation provisions of the Land Claims Agreement did not apply to the issuance of the provincial Permit. The Consultation Guidelines adopted by the province obliged the province, before issuing the Permit, to take certain steps to consult Aboriginal groups and to provide opportunity for comment and response. In the case of the Permit, these steps were followed with the exception of the failure to provide some additional engineering information and the failure to advise Nunatsiavut of, and provide opportunity for a conference call to discuss the province's response to the Nunatsiavut comments. In the circumstances, no remedy is warranted.

[163] There are no grounds upon which to set aside the issuance of the Permit or to require the province to revisit issues that were fully canvassed up to the time the project was released from environmental assessment in March 2012.

[164] It is difficult to bring into the courtroom a dispute which on its facts addresses one specific issue – here the Permit – but which in reality is grounded in the natural fear flowing from scientific uncertainty over environmental effects and in long-standing disagreements on and disappointments in how the environmental assessment and regulation of the Muskrat Falls project has proceeded to date.

[165] Given the present state of knowledge, the court cannot provide scientific certainty; neither has there been a legal basis established to justify quashing the Permit pending achieving that level of scientific knowledge that would satisfy the Inuit. Further, no legal basis has been established to require the province to impose conditions satisfactory to the Inuit that would address compensation and mitigation schemes. As noted, agreement is not a requirement of reasonable accommodation.

[166] Ongoing and long-standing disagreements over unknown environmental effects and what relief, if any, may be appropriate in the future, are not suited to a formal adjudicative process. While a court can judicially review specific decisions made and assess whether or not a consultation and accommodation process satisfies the requirements of the common law and any relevant agreements, the issues underlying this application are more suited to a forum such as the Joint Review Panel or a commission of inquiry.

[167] But the nature of the issues – including the lack of reliable data on the potential effects of mercury on the fish harvested and consumed by the Inuit – reinforces the need for recognition and acceptance of the reality and value of the Inuit rights in question and the need for a real and ongoing commitment to take all reasonable steps to minimize adverse effects and to establish meaningful measures to address and compensate for such effects should they arise in the future.

[168] The rights held by the Inuit are real. They cannot be ignored. The Inuit invested much time and effort in the Joint Review Panel process and continue to seek to minimize the effects of the project on those rights. There is disagreement over what that effect may be in years hence. But respect and honourable dealing requires the province to look past the continuing disagreement and to at all times in its decision-making carry out a good faith balancing of the rights and interests of the Inuit and the rights and interests of the province.

[169] The application is dismissed. The province and Nalcor are entitled to their column 3 costs, including hearing fees for two counsel.

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DAVID B. ORSBORN
Justice