

2011 01G 1093

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

TRIAL DIVISION (GENERAL)

BETWEEN:	NUNATUKAVUT COMMUNITY COUNCIL INC.	PLAINTIFF
AND:	NEWFOUNDLAND AND LABRADOR HYDRO-ELECTRIC CORPORATION (NALCOR ENERGY)	FIRST DEFENDANT
AND:	ENERGY CORPORATION OF NEWFOUNDLAND AND LABRADOR	SECOND DEFENDANT
AND:	HER MAJESTY IN THE RIGHT OF NEWFOUNDLAND AND LABRADOR as represented by the Minister of Environment and Conservation, and the Minister of Natural Resources	THIRD DEFENDANT
AND:	ATTORNEY GENERAL OF CANADA on behalf of HER MAJESTY IN THE RIGHT OF CANADA and MINISTER OF INDIAN AND NORTHERN AFFAIRS and MINISTER OF ENVIRONMENT CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY	FOURTH DEFENDANTS
AND:	CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY	FIFTH DEFENDANTS
AND:	LESLEY GRIFFITHS, HERBERT CLARKE, MEINHARD DOELLE, CATHERINE JONG and JAMES IGLOLIORTE, all in their capacity as panel members of a Joint Review Panel established pursuant to the <i>Canadian Environmental Assessment Act</i>	SIXTH DEFENDANTS

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2011 01G 1093
Date of Filing of Document:	March 11, 2011
Name of Party Filing or Person:	First and Second Defendants
Application to which Document being filed relates:	Application of the Plaintiff under Rule 29.04 for an <i>ex parte</i> injunction.
Statement of Purpose in filing:	Affidavit on behalf of First and Second Defendants
Court Sub-File Number, if any:	

AFFIDAVIT

I GILBERT JOHN BENNETT of Mt. Pearl, Newfoundland MAKE OATH AND SAY AS FOLLOWS:

1. I am Vice President, Lower Churchill Project, for the Energy Corporation of Newfoundland and Labrador, Nalcor Energy (“**Nalcor**”).
2. I have personal knowledge of the matters in this affidavit, except where stated to be based on information and belief, in which case I believe the same to be true.
3. This affidavit is filed on behalf of the Newfoundland and Labrador Hydro-electric Corporation (“**Hydro**”) and Nalcor, the first and second Respondents in these proceedings, respectively.¹
4. I have reviewed the following materials filed by the Applicant in these proceedings:
 - (a) the Statement of Claim;
 - (b) the Interlocutory Application (*ex parte*);

¹ The First Defendant was misnamed in the style of cause, and is properly named Newfoundland and Labrador Hydro-electric Corporation; the Second Defendant is properly named Energy Corporation of Newfoundland and Labrador, Nalcor Energy.

- (c) the Affidavit of Christopher Montague dated February 25, 2011;
- (d) the Order of Justice Faour, dated February 25, 2011;
- (e) the Affidavit of Christopher Montague dated March 3, 2011; and
- (f) the Memorandum of Fact and Law.

Overview

5. This affidavit reviews the following:

- (a) Nalcor's extensive engagement in consultation with the Applicant since at least April 2007, and its active encouragement and funding of some of the Applicant's participation in consultation activities;
- (b) The mandate of the Joint Review Panel ("**JRP**"), which demonstrates that the JRP process is intended to be a part of the consultation process with all affected Aboriginal peoples, including the Applicant, with respect to Aboriginal claims and treaty rights and the Project's potential impact on, and the exercise of, those rights;
- (c) That the JRP is not the decision-making authority in respect of whether the Project (as defined below) is allowed to proceed;
- (d) That the Federal and Provincial governments consulted the Applicant in connection with the creation of the JRP, and since its creation, the JRP has actively engaged with the Applicant in a broad range of consultation activities, including with respect to the public hearing procedures;
- (e) That the Applicant seeks to enjoin a public hearing intended to provide a forum for consultation with respect to the Project's potential impacts on, among other things, the Applicant's (and others') claimed Aboriginal and treaty rights and the exercise of those rights;
- (f) That the JRP public hearing (the "**JRP Hearing**") is only one component of the overall consultation process, which provides for further Aboriginal consultation opportunities once the JRP Hearing is complete;

- (g) That, by its very terms, the JRP Hearing that the Applicant seeks to enjoin is neither the beginning nor the end of the consultation process with respect to the Applicant's claimed Aboriginal and treaty rights and the Project's potential impact on, and exercise of, those rights; rather, it is simply a part of the overall consultation process;
- (h) That Aboriginal groups will be invited to provide commentary on the report to be prepared by the JRP, and there will be additional consultation meetings with individual Aboriginal groups prior to any government decision being made in respect of the Project and in connection with the issuance of subsequent regulatory permits; and
- (i) The substantial and unrecoverable harm to Nalcor, Hydro, third parties, and the broader public interest if the JRP is enjoined from proceeding with the JRP Hearing and the Project is delayed.

Nalcor and Hydro

6. Nalcor is a body corporate existing pursuant to the *Energy Corporation Act*, S.N.L., 2007, c. E-11.01, with its head office located in St. John's, Newfoundland and Labrador.

7. Nalcor was created to engage in and carry out activities in all areas of Newfoundland and Labrador's energy resources, including hydro-electric generation.

8. Hydro is a body corporate existing pursuant to the *Hydro Corporation Act, 2007*, S.N.L. 2007, c. H-17, with its head office located in St. John's, Newfoundland and Labrador.

9. Hydro, a wholly-owned subsidiary of Nalcor, carries on business generating, transmitting and distributing electrical power and energy power to industrial, utility, and residential direct customers in Newfoundland and Labrador. Hydro's installed generating capacity is approximately 1,637 MW, of which 57 percent is hydroelectric generation.

10. Nalcor's corporate predecessor, Newfoundland and Labrador Hydro, initiated the Project that is the subject of these proceedings.

11. Nalcor is the proponent of the Project, responsible for obtaining the proper approvals and constructing the Project.

The Project

12. Nalcor is proposing to construct and operate two hydro-electric generating stations on the lower section of the Churchill River in Labrador (the “**Project**”).

13. The Project contemplates generation facilities with a combined capacity of 3,074 MW to be installed at Gull Island and Muskrat Falls:

- (a) the Gull Island facility will have a capacity of 2,250 MW, including a dam 99 m high by 1,315 m long with a reservoir 232 km long, flooding an additional 85 km² area; and
- (b) the Muskrat Falls facility will have a capacity of 824 MW, including a dam at the north section 32 m high by 180 m long, and the south section 29 m high by 370 m long with a reservoir 60 km long, flooding an additional 41 km² area.

14. The Project also contemplates the construction of, among other things, access roads and transmission lines between Gull Island and Muskrat Falls and Churchill Falls.

15. Pursuant to the Newfoundland and Labrador *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 and the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, the Project was registered with the Newfoundland and Labrador Department of Environment and Conservation (the “**NLDEC**”) and the Canadian Environmental Assessment Agency (the “**Agency**”) on November 30, 2006. As discussed below, this registration initiated the JRP process that the Applicant now seeks to enjoin.

16. Contrary to the assertions of the Applicant, the scope of the Project has not changed. Only the order of the proposed construction is proposed to be changed.

Nalcor has engaged in extensive consultations with the Applicant

17. Nalcor has taken a broad range of steps to consult with the Applicant, and to gather information in respect of the nature of the rights asserted by the Applicant and the

potential impact of the Project on the Applicant's rights and the exercise of those rights. Nalcor has also taken steps to actively engage the Applicant in direct consultations, and to encourage the Applicant's participation in the JRP established by the Federal and Provincial governments.

18. Contrary to the assertions made by the Applicant, at no time has Nalcor:
- (a) stated that the Applicant has no Aboriginal rights;
 - (b) taken the position that it requires the Applicant to have an accepted land claim in order to consult in respect of the Project; or
 - (c) represented to the Applicant that it has been entrusted with the entirety of the Federal and/or Provincial governments' common law duty to consult with and/or to accommodate Aboriginal groups.

19. Commencing in April 2007, Nalcor has engaged in extensive consultations with the Applicant, among other Aboriginal groups in Newfoundland and Labrador and Quebec. The following documents are attached hereto as **Exhibits A** and **B**, respectively:

- (a) a copy of a document submitted to the JRP, titled, "Supplemental Information to IR JRP.151 (Consultation Assessment Report)" and a subsequent *corrigendum*, which provides great detail in respect of these consultations as at September 27, 2010; and
- (b) a log detailing correspondence, telephone calls, and meetings between Nalcor and the Applicant regarding the Project.

20. I am advised by Mary Hatherly and do verily believe that the information detailed in the log documents the correspondence, telephone calls, and meetings between Nalcor and the Applicant regarding the Project.

21. In furtherance of its consultation activities, Nalcor and the Applicant entered into two agreements whereby the parties agreed to conduct consultation activities in respect of the Project.

22. The first agreement, dated December 11, 2009, titled, “Community Consultation Agreement”, provides for funding to the Applicant in the amount of \$103,800 to, among other things, conduct a community consultation process over a period of approximately three-and-a-half months, employ a full-time community consultation coordinator for the Applicant and prepare a report, which was submitted to the JRP. A copy of the Community Consultation Agreement is attached hereto as **Exhibit C**.

23. The second agreement, dated January 19, 2011, titled, “Phase II Community Engagement Agreement”, provides for funding to the Applicant in the amount of \$180,400 to, among other things, conduct a study to gather information in respect of potential socio-economic impacts of the Project, contemporary land use by the Applicant, and traditional ecological knowledge held by members of the Applicant. As to the intent of this agreement, the Preamble provides as follows:

A. The Parties entered into a Community Consultation Agreement dated December 9 [*sic*], 2009, setting out the process for, and funding related to, consultation between Nalcor and NunatuKavut regarding the Lower Churchill Hydroelectric Generation Project (the “Generation Project”) in order to familiarize NunatuKavut with the Generation Project, to collect information on land and resource use by NunatuKavut membership, to identify issues of concern regarding the potential effects of the Generation Project and to provide information in relation to the Labrador-Island Transmission Link (the “Transmission Project”).

B. The Community Consultation Agreement expired on March 31, 2010.

C. *It is the mutual wish of the Parties to build upon the relationship of trust and confidence which has been established in order to continue this process of consultation. More specifically, NunatuKavut has requested that the Parties continue the process of consultation with a focus upon the Transmission Project in order to exchange information concerning the Transmission Project, to identify issues and concerns of NunatuKavut membership regarding the Transmission Project, to collect information in relation to the contemporary land and resource use in the area depicted on the map attached as Schedule I (the “Study Area”) and in relation to the traditional ecological knowledge of NunatuKavut membership and to make any necessary refinements or*

adjustments to the information which was collected under the Community Consultation Agreement.

D. In particular, NunatuKavut and Nalcor wish to continue to work together to obtain information with respect to the following:

- questions and issues regarding the potential socioeconomic effects of the Transmission Project;
- questions and issues regarding the potential biophysical effects of the Transmission Project; and [sic]
- contemporary land and resource use by NunatuKavut in the Study Area;
- relevant traditional ecological knowledge held by members of NunatuKavut; and
- the interests and concerns of the NunatuKavut membership, and suggestions around potential measures to avoid or reduce those issues and concerns.

E. Nalcor and NunatuKavut wish to enter into this Community Engagement Agreement Phase II (the “Agreement”) *which is intended to provide NunatuKavut with capacity funding to work with Nalcor to develop and implement a framework and process that will assist the Parties to work collaboratively and cooperatively in the exchange of information and associated activities.* [Emphasis added]

24. The term of this agreement extends to April 15, 2011, the last scheduled day of the JRP Hearings.

25. A copy of the Phase II Community Engagement Agreement is attached hereto as **Exhibit D.**

26. All of the information received by Nalcor from the Applicant has been conveyed to the JRP Registry, and all documents are publicly available on the Agency’s website: www.ceaa-acee.gc.ca.

27. To Nalcor’s knowledge, its direct consultations with the Applicant have not concluded, and Nalcor has no fixed end date to any such consultations. On March 3, 2011, Nalcor issued a press release, attached hereto as **Exhibit E**, publicly confirming its intent to continue consultations with Aboriginal groups, including the Applicant.

Federal and Provincial review of the Project

28. The Agency and the NLDEC are responsible for coordinating the Federal and Provincial Crown's consultations with Aboriginal groups, including the Applicant, in respect of the Project. In that regard, the Federal and Provincial governments issued a Framework for Consultation (the "**Consultation Framework**"). A copy of a letter from the Agency to the Applicant attaching the Consultation Framework is attached hereto as **Exhibit F**.

29. In a letter dated February 1, 2008, the Provincial Assistant Deputy Minister (Environment) advised the Applicant of the proposed framework for consultation between the Provincial government and the Applicant. A copy of the February 1, 2008 letter is attached hereto as **Exhibit G**.

30. Nalcor supports, has cooperated pursuant to, and will continue to participate in the Consultation Framework.

31. One component of the Consultation Framework is the JRP, created by the Federal and Provincial governments by agreement dated January 8, 2009 (the "**JRP Agreement**").

32. Pursuant to the JRP Agreement, the Government of Canada (as represented by the Minister of the Environment) and the Government of Newfoundland and Labrador (as represented by the Minister of Environment and Conservation and the Minister for Intergovernmental Affairs) sought to establish a JRP for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project for the purpose of meeting these parties' legislatively-mandated environmental assessment obligations. A copy of the JRP Agreement is attached hereto as **Exhibit H**.

33. The JRP Agreement sets out, among other things, the following: the legislation pursuant to which the JRP was created; the parties that created it; the constitution of the JRP; the conduct of the environmental assessment; various administrative matters; provisions for participant funding; and the Terms of Reference for the JRP.

34. The JRP is just one component of the overall Consultation Framework.

The Mandate of the JRP Shows that it is Part of the Consultation Process with Respect to Claimed Aboriginal and Treaty Rights

35. With respect to Aboriginal rights considerations, the Terms of Reference require the JRP to adhere to the following mandate:

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

The [JRP] shall include in its Report:

1. information provided by Aboriginal persons or groups related to traditional uses and strength of claim as it relates to the potential environmental effects of the project on recognized and asserted Aboriginal rights and title.

2. any concerns raised by Aboriginal persons or groups related to potential impacts on asserted or established Aboriginal rights or title.

The [JRP] will not have a mandate to make any determinations or interpretations of:

- the validity or the strength of any Aboriginal group's claim to aboriginal rights and title or treaty rights;*
- the scope or nature of the Crown's duty to consult Aboriginal persons or groups;*
- whether Canada or Newfoundland and Labrador has met its respective duty to consult and accommodate in respect of potential rights recognized and affirmed by s. 35 of the Constitution Act, 1982; and*
- The scope, nature or meaning of the Labrador Inuit Land Claims Agreement. [Emphasis added]*

36. The JRP is mandated to invite information from Aboriginal persons or groups, including information related to the nature and scope of potential Aboriginal rights or title in the area of the Project, and to prepare a report to be delivered to the Provincial and Federal governments for their consideration. The JRP is not mandated to decide whether the Project will be permitted to proceed.

The Applicant has already engaged in extensive consultation with the JRP

37. The Applicant has actively participated in a range of consultation activities with the JRP. The following is a brief summary of some of these activities.

The Applicant was consulted on the Environmental Impact Statement Guidelines

38. The Agency and the NLDEC invited the Applicant's participation in the drafting of the Environmental Impact Statement Guidelines (the "**EIS Guidelines**") to be issued to Nalcor. The EIS Guidelines identify for the Proponent and interested parties the nature, scope, and extent of the information and analysis required in the preparation of the EIS, including the following: alternatives to the Project; alternative methods for carrying it out; the environment that will be affected; the important environmental effects associated with the Project; measures that are required to mitigate against any adverse effects; and the significance of residual environmental effects.

39. In October 2007, the Agency and the NLDEC issued draft EIS Guidelines to Aboriginal groups, including the Applicant, for early comment. Thirty days later, the draft EIS Guidelines were issued to the general public for comment. Comments were received from the public until February 27, 2008, and Aboriginal groups, including the Applicant, were granted an additional 14 days to provide comments.

40. The Applicant provided written comments on the draft EIS Guidelines in a document titled "Labrador Métis Nation, Comments on the Lower Churchill EIS Guidelines", dated February 28, 2008. The Applicant received funding from the Agency in the amount of \$13,000 to support making these submissions.

41. Final EIS Guidelines were issued jointly by the Federal and Provincial governments on July 15, 2008. Section 4.8. of the EIS Guidelines provides guidance on Nalcor's consultation obligations, as follows:

4.8 CONSULTATION WITH ABORIGINAL GROUPS AND COMMUNITIES

The EIS shall demonstrate the Proponent's understanding of the interests, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues facing Aboriginal groups, and indicate how these will be considered in planning and carrying out the Project. The Aboriginal groups and communities to be considered include, in Newfoundland

and Labrador, the Innu Nation, the Labrador Métis Nation and the Nunatsiavut Government and, in Quebec, the Innu communities of Uashat Mak Mani-Utenam, Ekuanitshit, Nutaskuan, Unamen Shipu, Pakua Shipi and Matimekush-Lake John.

To assist in ensuring that the EIS provides the necessary information to address issues of potential concern to these groups, the Proponent shall consult with each group for the purpose of:

- (a) Familiarizing the group with the Project and its potential environmental effects;
- (b) Identifying any issues of concern regarding potential environmental effects of the Project; and
- (c) Identifying what actions the Proponent is proposing to take to address each issue identified, as appropriate.

If the Proponent is not able or should not address any particular issue(s), the EIS should include supporting reasons.

The results of those consultations are to be presented in a separate chapter of the EIS with individual section for each of the affected Aboriginal groups. The Proponent must refer readers to the relevant sections of the EIS, as appropriate.

The Applicant was invited to consult with respect to the creation of the JRP

42. The Federal and Provincial governments invited the Applicant to participate in the creation of the JRP.

43. On May 7, 2008, thirty days prior to the beginning of the public consultation period, the Federal and Provincial governments invited Aboriginal groups, including the Applicant, to comment on a draft JRP Agreement and appended Terms of Reference (the “**Draft JRP Agreement**”) to establish the JRP for the proposed Project. The public was subsequently invited to provide comments on the Draft JRP Agreement until July 5, 2008.

44. To my knowledge, the Applicant did not provide comments on the Draft JRP Agreement.

The Applicant was consulted on the appointment of independent panel members

45. On May 13, 2008, the Provincial and Federal governments also invited Aboriginal groups, including the Applicant, to nominate potential members of the JRP.

46. The Innu Nation was entitled to submit a list of three nominees for one position on the JRP, while the other Aboriginal groups, including the Applicant, were invited to submit up to three nominees each for one position on the JRP. The Applicant submitted one nominee.

47. The members of the Panel were announced on January 8, 2009.

The Applicant was consulted on the Environmental Impact Statement

48. After Nalcor submitted the Environmental Impact Statement (“EIS”), on March 9, 2009, the JRP invited the public, including the Applicant, to comment on the adequacy of the EIS. Aboriginal groups, including the Applicant, were provided 105 days in which to prepare written responses.

49. The Applicant received funding from the Agency in the amount of \$120,000 to prepare written comments regarding the EIS, which the Applicant did, in a document titled, “The Labrador Métis Nation, Response to Lower Churchill Hydroelectric Generation Project Environmental Impact Statement”, dated June 19, 2009.

50. In response to the EIS, the Applicant made further information requests, which the JRP conveyed to Nalcor by way of Information Requests 116, 120, 126, 128, 144, 1S/2S, and 70S. The JRP decided to conduct a thirty-day comment period, allowing Aboriginal groups, including the Applicant, to comment on the Nalcor’s responses to these Information Requests (“IR”).

51. The Applicant provided written comments regarding its review of Nalcor’s responses to these IRs. The Applicant provided the JRP with a document titled, “Labrador Métis Nation, Response to Lower Churchill Hydroelectric Generation Project Environment Impact Statement”, dated December 18, 2009.

52. These further requests were conveyed by the JRP to Nalcor by way of IRs 151, 152, and 161 to which Nalcor has responded.

The Applicant was consulted on the Public Hearing Procedures

53. On May 5, 2010, the JRP invited the public and Aboriginal groups, including the Applicant, to comment on various documents relating to the JRP Hearing, including the subject and location of the hearings, and the draft procedure (the “JRP Hearing Procedure”).

54. The Applicant provided the JRP with comments on the draft JRP Hearing Procedure in a document titled, “Comments on JRP Hearings Process”, submitted June 3, 2010.

The Applicant seeks to enjoin a public hearing that expressly provides for further consultation opportunities with respect to its claimed Aboriginal and treaty rights

55. On January 14, 2011, the JRP announced that the aggregate information submitted by Nalcor was sufficient to proceed to the JRP Hearing on the environmental effects of the Project, which began on March 3, 2011 and is scheduled to end on April 15, 2011. Attached hereto as **Exhibit I** is the Public Notice issued by the JRP.

56. The JRP issued JRP Hearing Procedures, a copy of which is attached hereto as **Exhibit J**, which, among other things, provide guidance to participants on the conduct of the JRP Hearing, procedural issues, various forms of participation, access to documents, and scheduling.

57. The objectives of the JRP Hearing are set out in Section 1.6 of the JRP Hearing Procedures as follows:

Objectives of the Public Hearings

1.6.1 For the Proponent, the public hearings provide an opportunity to explain the Project and respond to concerns and questions raised by the Panel and participants.

1.6.2 For Aboriginal persons or groups, the public, governments and other interested parties, the public hearings provide an opportunity to share with the Panel their ideas, interests, positions and concerns associated with the Project.

1.6.3 The Panel also invites Aboriginal persons or groups to provide information about the nature and scope of potential or established Aboriginal rights or title in the area of the Project, as well as information on the potential adverse impacts or potential infringement that the Project will have on asserted or established Aboriginal rights or title.

1.6.4 For the Panel, the public hearings provide an opportunity to receive information consistent with its Terms of Reference.
[Emphasis added]

58. The JRP Hearing Procedure also provides the Applicant (among others) with the opportunity to pose questions to Nalcor.

59. Contrary to the allegation made by the Applicants in paragraph 34 of the Interlocutory Application, the JRP Hearing Procedures do not in any way limit to points of clarification the presentations given by Aboriginal groups regarding potential or established Aboriginal rights or the Project's potential impact on, and the exercise of, those rights and title. In this regard, in a letter dated March 7, 2011, counsel to the JRP addressed this very issue with the Applicant. A copy of the letter is attached hereto as **Exhibit K**.

60. Attached hereto as **Exhibit L** is the list of registered participants as of February 28, 2011. Included among the registered participants are the following: NunatuKavut Community Council (eight time slots); Innu Nation; Sierra Club Atlantic; Labrador North Chamber of Commerce; Grand Riverkeeper Labrador Inc.; Nunatisavut Government; Food Security Network; Mennonite Central Committee of Newfoundland and Labrador; Melville Native Housing Association; Labrador Grenfell Health Authority; Labrador Friendship Centre; Sivunivut Inuit Community Corporation Inc.; Unamen Shipu Innu Council; representatives of the Canadian and Newfoundland and Labrador governments; Nalcor; and a large number of individual registrants.

61. Despite efforts by the Applicant to enjoin the Panel Members from convening the public hearing by way of an *ex parte* injunction application on February 20, 2011, the JRP Hearing commenced on March 3, 2011.

62. The Applicant was in attendance at the JRP Hearing on March 4, 2011 and made a presentation. On behalf of the Applicant, Mr. Montague announced that the Applicant would not participate in the JRP Hearing pending the outcome of these proceedings. Attached hereto as **Exhibit M** is an excerpt of the transcript of March 4, 2011.

63. To my knowledge, the Applicant has not raised any procedural issues before the JRP.

The public hearing that the Applicant seeks to enjoin is neither the beginning nor the end of the consultation process with respect to its claimed Aboriginal and treaty rights; rather, it is simply part of the consultation process.

64. It is Nalcor's understanding that the JRP Hearing does not constitute the entirety of the consultations with the Applicant, and that the Applicant has a range of further

opportunities for consultation with the Federal and Provincial governments. Below is a summary of some of these opportunities.

Aboriginal groups will be invited to provide commentary on the report prepared by the JRP

65. Pursuant to the Consultation Framework, Aboriginal groups, including the Applicant, shall be invited to prepare written submissions on the JRP Environmental Assessment Report within 45 days following its public release. The Agency has committed to carefully consider such submissions.

There will be additional meetings with Aboriginal groups

66. Pursuant to the Consultation Framework, the Agency has committed to engage in direct consultations with individual Aboriginal groups upon request. In particular, the Consultation Framework states as follows:

The governments will give full and fair consideration to any such views so presented by the Aboriginal groups. Where requested by any party, a meeting between the governments and the Aboriginal groups will occur with respect to the JRP Environmental Assessment Report.

In particular, the consultation will seek to establish whether all concerns about potential impacts of the Project on potential or established Aboriginal and treaty rights have been characterized accurately. It will also consult on the manner and extent to which any recommended mitigation measures might serve to accommodate these concerns, and whether there remain any outstanding issues. [Emphasis added]

There will be further consultation relating to regulatory permitting

67. Phase Five of the Consultation Framework relates to regulatory permitting, at which point various federal departments may seek additional input from Aboriginal groups, including the Applicant, on specific regulatory issues as it relates to consultation and accommodation. As stated in the Consultation Framework:

The decision to undertake additional consultation will take into consideration:

- The consultation record;

- Mitigation, compensation, accommodation measures to address outstanding concerns not addressed through the environmental assessment;
- The government response to the JRP Environmental Assessment Report; and
- Any direction that may be provided by federal Cabinet.

Decision by the Federal and Provincial governments

68. It is Nalcor's understanding that the ultimate decision whether to allow the Project to proceed rests with the Federal and Provincial governments.

Granting the relief sought by the Applicant will result in substantial harm to Nalcor and to third parties

A delay in the JRP process will result in a delay of the Project

69. It is Nalcor's understanding that if the relief sought by the Applicant is granted, the work of the JRP will be delayed until such time as a final legal determination is made in respect of the Applicant's claim. The duration of such delay is uncertain.

70. Any delay in the JRP process will halt the work of the JRP. This in turn will result in a delay in the completion of the following stages of the Project: Nalcor's consultations with other Aboriginal groups and the public; the legislatively mandated environmental review process; the Ministerial decision-making process; the remaining regulatory processes; Project planning and design; financing of the Project; the commencement of construction; timing of availability of power generation from the Project; and earning a return on the taxpayer's investment. In short, the Project will be put on hold.

71. A delay of an indeterminate nature such as that proposed by the Applicant will create considerable uncertainty with respect to the future of the Project. The effects of a delay of an indeterminate nature are inherently difficult to predict, and will ultimately depend on the length of the delay. The longer the delay, the more serious the harm that will be suffered by both the broader public and by Nalcor.

Nalcor would suffer substantial harm if the JRP is enjoined from proceeding with the Public Hearings

72. There will be substantial harm to Nalcor if the JRP is enjoined from proceeding with the JRP Hearing and the Project is delayed. These harms include: (a) direct financial harm to Nalcor; (b) termination or increased costs of contracts; (c) loss of key project management team members; (d) higher financing and insurance costs; and (e) postponement of key Project timelines.

73. **(a) *Direct financial harm to Nalcor:*** for each month that the Project is delayed Nalcor will incur direct costs of approximately \$4 to \$5 million, related to corporate support, salaries, professional fees, third party fees, travel, office and overhead, suspension or cancellation of vendor or supplier contracts, and insurance and financing.

74. **(b) *Termination or increased costs of contracts:*** a delay in the Project in excess of six months will trigger payments pursuant to certain contracts entered into with third parties. In particular, Nalcor's current agreement with SNC-Lavalin in respect of engineering, procurement, construction and management of the Project (the "**SNC-Lavalin Contract**") provides that Nalcor will be directly liable for the costs associated with de-mobilization of SNC-Lavalin's employees and equipment resulting from a delay.

75. The SNC-Lavalin Contract may be terminated at the option of SNC-Lavalin in the event of a delay of over six months. In the event of termination, Nalcor would be required to retender or renegotiate this contract, which will result in additional time and costs associated with these activities, and the risk that Nalcor may not be able to achieve equally favourable terms.

76. **(c) *Loss of key project management team members:*** if the Project is delayed Nalcor will likely lose key project management team members. In the short term, the Project will retain all of its project management team members. However, any material delay will increase the risk of loss of key project management team members, or in Nalcor being required to de-mobilize project management team members. Key project management team members that are currently available to work on the Project may not be available in the future due to demand from other large projects in the Province. The loss of project management team members with

institutional and Project knowledge and intellectual capital would result in additional recruitment costs to Nalcor, in addition to inefficiencies in restarting the Project work.

77. Any delay in the commencement of construction of the Project (if approved) will likely result in increased costs of critical construction trades due to overlapping construction timelines with other east coast projects. The increased demand for critical construction trades will have cost, scheduling and safety consequences.

78. **(d) Higher financing and insurance costs:** a delay of the JRP process may have a detrimental effect on the profile of the Project in the financial community. This may result in the Project being associated with a higher risk profile. A heightened risk profile would be reflected in higher financing and insurance costs. Further, a delay of the Project may also result in an increase in the level of equity required in the capital structure, requiring additional equity injections of Newfoundland and Labrador public funding.

79. **(e) Postponement of key Project timelines:** a delay of the JRP process will result in the postponement of key Project timelines, which are affected by critical timelines for the ordering and delivery of essential components such as turbines and undersea cable, weather and seasonal interruptions, and availability of labour and equipment. A delay in the commencement of the Project will result in rescheduling critical Project timelines.

80. Due to the seasonality of the critical construction window, a near term six month delay will have the approximate effect of a one year delay.

81. Nalcor would face significant costs associated with delays to the Project, which are difficult to assess in advance.

Third parties will suffer substantial harm if the JRP is enjoined from proceeding to Public Hearings

82. There will be substantial harm to third parties and the broader public interest if the JRP Hearing does not proceed and the Project is delayed. These harms include: (a) loss of investment made to date in the JRP process; (b) loss of opportunity of Aboriginal groups and the public to consult in respect of the Project as planned; (c) financial harm to the local and

provincial economy; (d) financial harm to Innu Nation; (e) loss of employment; (f) termination or suspension of contracts for goods and services; and (g) loss of tax revenue.

83. (a) *Loss of investment made to date in the JRP process*: considerable resources have already been dedicated to the JRP process. The scheduling of the JRP Hearing has required the arrangement of translators, court reporters, venues and logistics to support community sessions. This investment in time and resources will be lost, and the JRP will be required to duplicate this effort if and when the public hearings are permitted to reconvene.

84. (b) *Loss of opportunity of Aboriginal groups and the public to consult in respect of the Project as planned*: when the Applicant brought the Application *ex parte*, the JRP Hearing was only days away from commencement. Groups and individuals have undertaken significant preparations in order to appear before the JRP, including retaining expert and professional advice, drafting and submitting written presentations, and incurring costs such as travel and accommodations. The indeterminate delay of the public hearings will prevent these parties from making their presentations, and will require these groups and individuals to recommence the process at a later date, incurring additional costs and duplication of work.

85. Depending on when the JRP Hearing is recommenced, some groups or individuals may never have the opportunity to present their views on the Projects.

86. (c) *Financial harm to the local and provincial economy*: a delay of the Project will postpone the income accruing to local labour and business. During the construction phase, the total direct, indirect, and induced labour and business in Newfoundland and Labrador is estimated at an average of \$184 million per year (in 2010 dollars).

87. Since 2003, \$157 million, excluding interest charges, has been invested in the Project and related transmission options. These investments are in addition to the \$115 million spent in previous years and \$79 million of interest incurred, for a total of \$351 million.

88. A delay in the Project will defer the returns to the taxpayer, while a termination of the Project will result in a loss to the taxpayer.

89. (d) *Financial harm to Innu Nation*: the Impact Benefits Agreement between Nalcor and Innu Nation, when in effect, contemplates significant payments to Innu Nation if the

Project is approved. A lengthy delay to the Project will result in a deferral of payments to Innu Nation, while a halting of the Project will result in no such payments being made.

90. (e) *Loss of employment*: a delay in the Project will result in a loss of employment opportunities in the Province. During the construction phase, the Project is expected to employ 15,600 direct person years, of which 10,200 direct person years are identified as Newfoundland and Labrador residents. During operations, the Project is expected to employ 80 persons on an annual basis. Further, employment opportunities from businesses that support the Project may also be threatened if the Project is delayed.

91. (f) *Termination or suspension of contracts for goods and services*: a delay in the Project will result in termination or suspension of various contracts for goods and services, which will be born in part by third party vendors and service providers (and their employees) throughout the province and Canada.

92. (g) *Loss of tax revenue*: a delay in the completion of the Project will postpone the tax revenue that the Province is expected to collect because of the Project. During the construction phase, the total Newfoundland and Labrador taxes associated with the Project is estimated at an average of \$30 million annually (in 2010 dollars).

93. Lastly, an extended delay may jeopardize the future of the Project. The Project is expected to contribute 23,500 direct, indirect, and induced person years of employment to the Newfoundland and Labrador economy during the construction phase, generate an average annual net cash flow of \$700 million (in 2010 dollars) to the provincial shareholder, and contribute to greenhouse gas emissions reductions in the range of 6 to 17 million tonnes per year. If the Project does not proceed, all of these anticipated benefits will be lost.

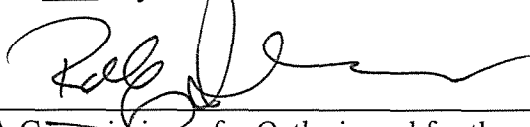
The Applicant has not made an undertaking as to damages arising from a delay in the JRP

94. To my knowledge, the Applicant has not provided an undertaking as to damages arising from a delay in the JRP process.

Relief Sought

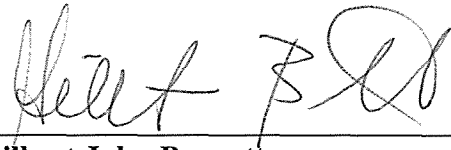
95. I swear this affidavit in opposition to the Interlocutory Application brought by the Applicant seeking to enjoin the JRP from proceeding with the JRP Hearing.

SWORN BEFORE ME at Happy Valley-
Goose Bay, Newfoundland and Labrador
this 10th day of March 2011



A Commissioner for Oaths in and for the
Province of Newfoundland and Labrador

Barrister NL.



Gilbert John Bennett