



MEMORANDUM London

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Sent via E-mail

To: GRANT THORNTON LLP
From: Aaron Atcheson / 519-931-3526
Bryan Smits / 519-931-3556
Date: November 20, 2018
Re: Report to the Commission of Inquiry Respecting the Muskrat Falls Project
(the "**Project**")
And Re: Specific Questions Related to Astaldi Canada Inc. and Valard Construction
LP and the Astaldi Agreement and the Valard Agreement (as defined below)

We understand that Grant Thornton LLP ("**GT**") has been engaged by the Commission of Inquiry Respecting the Muskrat Falls Project (the "**Commission**"). We further understand that this phase of the GT engagement requires the review of materials and preparation of papers answering specific questions related (i) to the Articles of Agreement between Muskrat Falls Corporation ("**MFC**") and Astaldi Canada Inc. ("**Astaldi**") dated November 29, 2013 (the "**Astaldi Agreement**"), and (ii) the Articles of Agreement between Labrador-Island Link Limited Partnership ("**LIL LP**" and together with MFC, the "**Owners**") and Valard Construction LP ("**Valard**" and together with Astaldi, the "**Contractors**") dated August 8, 2014 (the "**Valard Agreement**" and together with the Astaldi Agreement, the "**Agreements**").

GT has engaged us to answer certain specific questions regarding contractual terms included in the Agreements. GT has also requested that we review the Agreements to provide our view as to whether the contractual terms of the Agreements: (a) contributed to delays and/or cost overruns, (b) provided sufficient risk transfer from the Owners to the Contractors, (c) reflected a procurement strategy appropriate for the Project, and (d) were reasonably and competently negotiated.

Executive Summary:

In brief, we have concluded that the Agreements generally provide the tools necessary for an owner of the Project to proceed toward completion of the Project. Although we have

identified certain limited concerns¹ about the final Agreements, it is our view that these points do not meet the threshold of being a significant negative impact on the Project.

Discussion:

The Project is comprised of various components, including the hydroelectric dam and associated infrastructure, as well as built-to-purpose transmission lines. The procurement process involved the engagement of various private parties in respect of the engineering, procurement, and construction of the Project components. For various reasons, as detailed in the documentation provided, the Agreements involved a varying degree of risk sharing in respect of certain costs and cost overruns. This procurement strategy appears to have been employed in order to avoid the elevation of certain Project costs by contractors seeking to be compensated for a higher proportion of assumed risk². Generally, the Project documents provided did include standard mechanisms for an owner to control material risks, including rights of termination, security for performance, and penalties for delay.

1. *Astaldi Agreement*

Question: Did the contractual terms of the Astaldi Agreement reflect a procurement/contractual strategy appropriate for the Project, and, specifically, did the contractual terms of the Astaldi Agreement contribute to delays and cost overruns in respect of the Project and provide for sufficient risk transfer from MFC to Astaldi?

Response from Miller Thomson LLP

Definitions used in this response but not defined herein have the meanings given to such terms in the Astaldi Agreement.

The procurement/contractual strategy employed by MFC was within the range of strategies typically used on similar projects. However, by not providing for a fixed price Contract Price and a hard cap on costs³, this strategy allowed for lower bid prices and resulted in a greater sharing of project risk with MFC.

Exhibit 2 to the Astaldi Agreement (the “**Astaldi Exhibit**”) provided mechanics in respect of the compensation payable by MFC to Astaldi. The Contract Price pursuant to Section 1.1 of the Astaldi Exhibit was not a fixed sum but rather consisted of a number of components that had the potential for fluctuation and therefore cost increases. However, the Astaldi Exhibit does provide for certain caps regarding specific components of the Contract Price and various approval rights in favour of MFC regarding additional costs.

¹ See examples in Appendix A.

² Inclusion of a “Limitation of Liability” provision in each of the Agreements beneficial to the Contractors is an example of a reduction to the Contractor’s assumed risk that may have resulted in a reduction to certain Project costs.

³ Examples of Contract Price not being truly “fixed” include: (a) the actual travel costs of Contractor’s trades labour is included in Contract Price and not subject to a cap; and (b) the cap on Reimbursable Cost of Labour, the LMAX, had the potential to fluctuate upwards with any approved Change Order that increases the Reimbursable Cost of Labour.

Section 1.1 of the Astaldi Exhibit provides that the Contract Price shall consist of the total of (a) the Reimbursable Cost of Labour, subject to adjustments and to the LMAX, (b) the Labour Profit, (c) the actual travel costs of trades labour, (d) the fixed lump sum amounts and unit prices, and (e) any adjustments in compensation pursuant to any changes in work or escalation in materials.

The only component of the Contract Price that is subject to a cap is the “Reimbursable Cost of Labour”, which includes the actual wages and benefits, plus “government burdens” paid by Astaldi to its work force performing the Work. The Reimbursable Cost of Labour is capped by the LMAX, being the “Final Adjusted Target Cost of Labour” (the Target Cost of Labour adjusted for the effect of all change orders and actual quantities installed of each unit price) plus \$64,300,000. As such, the cap on Reimbursable Cost of Labour (the LMAX) is still subject to fluctuation on account of any change orders approved by MFC⁴.

Ultimately, any increase to the estimate of the Reimbursable Cost of Labour included in the Target Cost of Labour, resulting in an increase of the actual Final Adjusted Target Cost of Labour had to be approved by MFC pursuant to the change order regime included in the Astaldi Agreement.

Other components that comprised the Contract Price, namely the Labour Profit and the actual travel costs of trades/labour, were not limited by a cap comparable to the LMAX and therefore presented a potential for cost overruns being flowed through to the Owner. For instance, the Labour Profit is fixed at 7% of the Target Cost of Labour (being 7% of \$507,598,340.87) plus 7% of the Final Adjusted Target Cost of Labour and is in addition to the Reimbursable Cost of Labour and is not subject to the LMAX. While the Labour Profit is effectively capped at 7%, the actual amount paid by MFC to Astaldi on account of the Labour Profit is subject to upward fluctuation depending on any increase to the Target Cost of Labour due to Change Orders approved by MFC. Additionally, the Contract Price included the actual travel costs of trades/labour, which was not subject to the LMAX or any other cap.

In addition to the transfer of risk from MFC to Astaldi as result of the effect of the LMAX, Section 13 of the Astaldi Exhibit provided for the payment of liquidated damages by Astaldi to MFC for delays in achieving any specific Milestone. The inclusion of liquidated damages for delay (“**Delay LDs**”) assists in transferring a proportion of the risk of delays from MFC to Astaldi, as it provides an incentive for Astaldi to achieve specific milestones by the applicable agreed upon dates. Assuming the quantum of Delay LDs was appropriate, it also streamlines the mechanism for MFC to collect its reasonable estimated costs as a result of such delay.

Question: Did the Astaldi Agreement include the appropriate tools to allow MFC to proceed toward completion of the Project, and, specifically, did the contractual terms of the Astaldi

⁴ The LMAX is tied to the Final Adjusted Target Cost of Labour and not the Target Cost of Labour. As such, the cap on the Reimbursable Cost of Labour is not the Target Cost of Labour plus \$64,300,000 but the Target Cost of Labour adjusted for the effect of Change Orders issued by MFC plus \$64,300,000. Therefore, the LMAX is subject to upward fluctuation depending on any increase to the Target Cost of Labour due to Change Orders approved by MFC.

Agreement allow for MFC to terminate the Astaldi Agreement due to Astaldi's poor performance?

Response from Miller Thomson LLP

Definitions used in this response but not defined herein have the meanings given to such terms in the Astaldi Agreement.

In our view, the Astaldi Agreement included appropriate tools to allow MFC to proceed toward completion of the Project. Included throughout the Astaldi Agreement are approval rights in favour of MFC in respect of any additional costs or time extensions requested by Astaldi (the “**Approval Rights**”). Examples of such approval rights include:

- Section 2.12(b): Astaldi acknowledged and agreed that the financial obligations of MFC to Astaldi in respect of the Work were limited to the payment of the Contract Price in accordance with the terms of the Astaldi Agreement.
- Section 12.1: MFC shall have no obligation to pay Astaldi for the purchase of any goods or performance of any services which have not been approved by MFC prior to delivery of such goods or performance of such services.
- Section 12.3 and Section 12.8: MFC must approve each payment certificate submitted by Astaldi prior to the applicable monthly progress payment being made.
- Section 14.2: Astaldi was not entitled to any compensation for a change in the scope of work without a change order being issued by MFC.
- Section 8.5: To the extent a change impacts a Milestone Date or an Interface Date such date or dates shall be extended to reflect additional time required for the Work occasioned by the change. Such extension of time required a change order.
- Section 14.4: Astaldi agreed to comply with the requirements of Exhibit 3 – Coordination Procedures⁵ in the development of the pricing, impacts on resources and schedule as it relates to a change and present a comprehensive proposal covering the change to MFC for approval.

As demonstrated by the examples of MFC's Approval Rights above, Astaldi was largely unable to increase the Project cost/price or extend the construction schedules without the prior approval of MFC in the form of a change order or similar approval. MFC's Approval Rights included in the Astaldi Agreement provided an effective risk transfer “tool” as they limited the ability of Astaldi to unilaterally increase the cost of the Project or extend the construction schedule. Therefore, it is our view that the Astaldi Agreement largely included the necessary and typical tools found in an agreement of this type to allow MFC to limit cost overruns and delays by withholding any requested approvals and seeking alternative solutions at that time.

⁵ Exhibit 3 – Coordination Procedures not reviewed by Miller Thomson LLP.

Further, the Astaldi Agreement included the necessary tools that would have allowed MFC to terminate the Agreement due to Astaldi's poor performance. MFC had the ability to terminate the Astaldi Agreement "for cause" based on Astaldi's poor performance assuming that such poor performance had a "material adverse effect" on MFC or the Project itself:

Section 24.1: The following event shall constitute defaults by the Contractor [Astaldi]:

(a) if Contractor does not properly prosecute the Work or fails in the performance or observance of any of its obligations under this Agreement and such failure has a material adverse effect on the Company [MFC] or the Work except to the extent that the failure in performance or observance is excused by reason of Force Majeure or is caused by Company or any Person under its control.

Assuming that Astaldi's poor performance: (a) caused a material adverse effect on MFC or the Project, (b) such poor performance is not excused by reason of Force Majeure, and (c) such poor performance was not caused by MFC or any Person under MFC's control, then, the Astaldi Agreement allows MFC to begin the process to terminate the Astaldi Agreement "for cause".

Pursuant to Section 24.2 of the Astaldi Agreement, MFC was required to give notice to Astaldi of the default pursuant to Section 24.1 and Astaldi was afforded the opportunity to remedy/cure such default within fourteen days of receipt of such default. If such default could not reasonably be remedied with fourteen days, Astaldi was required to "promptly begin to remedy" such default within the fourteen day period and thereafter diligently prosecute to conclusion all acts necessary to remedy the default.

Pursuant to Section 24.4 of the Astaldi Agreement, in the event Astaldi did not remedy such default within the cure period provided in Section 24.2, MFC had the right to exercise any of the following remedies:

- (a) terminate in whole or in part, the right or obligations of Astaldi under the Astaldi Agreement;
- (b) take possession of the Work and finish the Work by whatever method MFC deemed expedient;
- (c) remedy or cause to be remedied the default;
- (d) call upon the performance security provided by Astaldi;
- (e) require the performance of the Work to be stopped; and
- (f) bring any proceedings in the nature of specific performance, injunction, or other equitable remedy.

Assuming Astaldi would not have remedied/cured the applicable default for poor performance pursuant to Section 24.1(a) within the fourteen day cure period or did not begin to remedy such default within the fourteen day period and thereafter diligently prosecute all acts necessary to remedy the default, MFC had a variety of tools at its disposal to mitigate

any material adverse effect of such default, including terminating the Astaldi Agreement, finishing the Work itself and/or hiring an alternative contractor.

Additionally, the Astaldi Agreement included a “termination for convenience” provision in favour of MFC at Section 24.11(b). Section 24.11(b) provides that at any time, MFC could, in its sole and absolute discretion and for any reason, including convenience of MFC and without any fault or default on the part of Astaldi, terminate the Astaldi Agreement effective immediately (or at a future date) upon providing Astaldi notice of such termination and the payment by MFC to Astaldi of a termination fee. The termination fee payable pursuant to Section 24.11 is an amount equal to the unpaid Labour Profit plus:

- (a) all amounts for all Work satisfactorily performed up to the date of termination for which Astaldi had not been paid previously;
- (b) expenses of Astaldi that are directly related to such termination and reasonable, including Astaldi’s obligations to other parties;
- (c) the cost of plant and materials ordered for the Work which have been delivered and which have been paid for by Astaldi;
- (d) the cost of removal of any temporary works and Astaldi’s items from the work site; and
- (e) the cost of repatriation of Astaldi’s staff and labour employed in connection with the Work at the date of termination.

Therefore, in the event Astaldi’s poor performance did not rise to the level of a “material adverse effect” on MFC or the Project or otherwise did not meet the minimum requirements to allow MFC to terminate the Astaldi Agreement “for cause” pursuant to Sections 24.1(a) and 24.2, MFC had the ability to terminate the Astaldi Agreement at any time pursuant to Section 24.11(b), provided MFC paid the applicable termination fee to Astaldi.

2. Valard Agreement

Question: Did the contractual terms of the Valard Agreement reflect a procurement/contractual strategy appropriate for the Project, and, specifically, did the contractual terms of the Valard Agreement contribute to delays and cost overruns in respect of the Project and provide for sufficient risk transfer from LIL LP to Valard?

Response from Miller Thomson LLP

Definitions used in this response but not defined herein have the meanings given to such terms in the Valard Agreement.

The procurement/contracting strategy employed by LIL LP was within the range of strategies used on these types of projects. Compared to the Astaldi Agreement, the Valard Agreement exposed LIL LP to less risk for potential cost overruns.

Section 1.1 of Exhibit 2 to the Valard Agreement (the “**Valard Exhibit**”) provides that subject to any additional compensation pursuant to a change order, only those lump sum payments,

unit rates and prices specifically identified in the Valard Exhibit shall be paid by LIL LP to Valard for the Work. No payment in excess of the Contract Price will be made by LIL LP without a formal change order. Despite a clear definition of "Contract Price" not being included in the Valard Exhibit, the Valard Exhibit does include a "Schedule of Price Breakdown" that provides a "total contract price". Additionally, any work completed by Valard on a reimbursable basis is subject to prior approval by LIL LP or its engineer prior to commencing any such work. LLP shall not be responsible for any amounts in relation to any such work that has not been approved by LIL LP or its engineer.

Section 10 of the Valard Exhibit provides for the payment of liquidated damages in the event Valard does not achieve substantial completion by the agreed date. The inclusion of Delay LDs assists in transferring a proportion of the risk from LIL LP to Valard, as it provides an incentive for Valard to achieve specific milestones by the applicable agreed upon dates. Assuming the quantum of the Delay LDs was appropriate, it also streamlined the mechanism for LIL LP to collect its reasonable estimated costs as a result of such delay. However, the Delay LDs are limited to 10% of the Contract Price by Section 26.1 of the Valard Agreement.

Article 23 of the Valard Agreement provides that in the event Valard encounters unforeseen geological or geotechnical conditions which it believes may impact upon its ability to complete the Works specified in Exhibit 9, Valard shall immediately notify LIL LP's engineer. Valard further agreed that the Construction Schedule and any timing of any Payment Milestone could be adjusted by LIL LP's engineer to reflect the time by which Valard is directly delayed as a result of the unforeseen geological condition. Valard had a positive obligation to use reasonable efforts and take all reasonable steps to eliminate or mitigate the impact on the Construction Schedule due to an unforeseen geological or geotechnical condition. To the extent that any unforeseen geological or geotechnical conditions constituted a "Change", Article 14 of the Valard Agreement applied which required the approval of a change order by LIL LP. Although this provision allowed Valard relief for unforeseen geological conditions, this is not an unusual provision and it was part of the original template agreement.

Question: Did the Valard Agreement include the appropriate tools to allow LIL LP to proceed toward completion of the Project?

Response from Miller Thomson LLP

Definitions used in this response but not defined herein have the meanings given to such terms in the Valard Agreement.

In our view, the Valard Agreement included appropriate tools to allow LIL LP to proceed toward completion of the Project. Included throughout the Valard Agreement are approval rights in favour of LLP in respect of any additional costs or time extensions requested by Valard (the "**LIL LP Approval Rights**"). Examples of such approval rights include:

- Section 2.12(b): Valard acknowledged and agreed that the financial obligations of LIL LP to Valard in respect of the Work were limited to the payment of the Contract Price in accordance with the terms of the Valard Agreement.

- Section 12.1: LIL LP shall have no obligation to pay Valard for the purchase of any goods or performance of any services which have not been approved by LIL LP prior to delivery of such goods or performance of such services.
- Section 12.3 and Section 12.8: LIL LP must approve each payment certificate submitted by Valard prior to the applicable monthly progress payment being made.
- Section 14.2: Valard was not entitled to any compensation for a change in the scope of work without a change order being issued by LIL LP.
- Section 14.4: Valard agreed to comply with the requirements of Exhibit 3 – Coordination Procedures⁶ in the development of the pricing, impacts on resources and schedule as it relates to a change and present a comprehensive proposal covering the change to LIL LP for approval.

As demonstrated by the examples of the LIL LP Approval Rights above, Valard was largely unable to increase the Project cost/price or extend the applicable schedules without the prior approval of LIL LP in the form of a change order or similar approval. The LIL LP Approval Rights included in the Valard Agreement provided an effective risk transfer “tool” as they did not allow Valard to unilaterally increase the cost of the Project or extend the schedule in most circumstances. Therefore, it is our view that the Valard Agreement included the necessary and typical tools found in an agreement of this type to allow LIL LP to limit cost overruns and delays by withholding any requested approvals and seeking alternative solutions at that time.

Conclusion:

In conclusion, while certain contractual terms included in the Agreements were negotiated to be more favourable to the Contractors than as originally included in the Owners’ template, we did not locate any contractual terms included in the Agreements that were clearly unsuitable for an agreement of this type. Included in the Agreements were contract terms providing the Owners with the ability to approve additional costs and time extensions, and to terminate the Agreements for convenience or for poor performance on the part of the Contractors. Therefore, delays and cost overruns that occurred cannot be attributed directly to the contractual terms of the Agreements themselves. The contractual terms of the Agreements reflect a procurement/contractual strategy employed by the Owners to limit the aggregate cost of the Project, and in so doing, allocated a higher proportion of risk to the Owners.

Limitations:

Our analysis is limited to documents actually reviewed; certain exhibits to the Agreements and ancillary documents were not provided to Miller Thomson LLP. We did not review any working drafts of the Agreements or have the benefit of speaking with the Owners’ counsel regarding the context of the negotiations or client instructions. Our analysis is limited to the

⁶ Exhibit 3 – Coordination Procedures not reviewed by Miller Thomson LLP.

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legal availability of specific rights and remedies included in the Agreements; we did not conduct an analysis regarding the practical constraints of certain contractual terms included in the Agreements. The above analysis and conclusions do not contemplate or take into account any specific considerations arising from or relating to the law of the Province of Newfoundland and Labrador.

APPENDIX A

The following are examples of provisions included in the Agreements that were revised from the civil template and have the consequence of transferring risk from the Contractors to the Owners. The track changes indicate what was removed from, or added to, the civil template to form the Agreements.

Astaldi Agreement

Section 21.4: Except to the extent caused or contributed to by Contractor's breach of this Agreement or by

Contractor's negligent act or omission, Company shall defend, indemnify, keep indemnified and shall hold Contractor harmless from and against any and all Claims, including legal costs on a substantial indemnity basis, which the Contractor may at any time sustain or incur by reason of or in consequence of any one or more of the following:

- (a) any negligent act or omission or wilful misconduct of Company or any licensee, invitee or Person acting on behalf of any of them in connection with or incidental to the performance of or default in any of Company's obligations under this Agreement;
- (b) any inaccuracy in any representation or warranty made by Company;
- (c) any breach or non-performance by Company, or any licensee, invitee or Person acting on behalf of Company of any of the obligations of Company in respect its obligations under this Agreement;
- (d) any Claims by any third party in contract, tort, under any statute or otherwise at law or in equity with respect to any bodily injury or death, damage to or loss of property, damages, losses, costs, and expenses arising out of a breach of contract or negligent actions or omissions or wilful misconduct of Company, or any invitee or Person acting on behalf of Company in connection with or incidental to the performance of Company's obligations under this Agreement;
- (e) any reasonable action taken by Contractor to mitigate or cure a breach or nonperformance by Company of any covenant or inaccuracy in any representation or warranty pursuant to the Agreement;
- (f) any non-payment of amounts due and payable to Company's Other Contractors resulting from furnishing of services, material, equipment, labour or otherwise in connection with the performance of Work;
- (g) any Claim in respect of loss or damage to the property of Contractor caused by a breach of contract or negligent acts or omissions or wilful misconduct of Company or any invitee, or Person acting on its behalf;

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- (h) any Claims in respect of personal injury or death of Personnel of Contractor caused by a breach of contract or negligent acts or omissions or wilful misconduct of Company or any invitee, or Person acting on its behalf;

any representation or holding out by Company that it is an agent of Contractor;

all Claims (including any fine, penalty or demand of any Authority) which may be brought against or suffered by Contractor or which Contractor may sustain, pay or incur, arising out of any failure by Company to comply with its obligations, or any negligence or failure to comply with Applicable Law in carrying out its obligations, with respect to the environment under Article 15.

Miller Thomson LLP Commentary: Section 21.4 above provides for indemnification by MFC to Astaldi. The civil template used as a "starting/base document" for the Astaldi Agreement provided for limited indemnification of Astaldi by MFC from any claims by a third party arising out of a breach or non-performance by MFC or any agent, employee, licensee, invitee or Person acting on behalf of the MFC arising from the performance of the Work. The Astaldi Agreement includes numerous heads of indemnity in favour of Astaldi that are not included in the civil template. However, all of the above heads of indemnity are limited to claims arising from MFCs negligence, breach, default, non-performance, or wilful misconduct. Claims are also limited to the extent of Astaldi's own breach of the Agreement or its negligent acts or omissions. We do not believe this provision was unreasonable.

Section 21.5:

Except to the extent caused or contributed to by Company's breach of this Agreement or by Company's negligent act or omission, Contractor shall defend, indemnify, keep indemnified and shall hold Company harmless from and against any and all Claims, including legal costs on a substantial indemnity basis, which Company may at any time sustain or incur by reason of or in consequence of any one or more of the following:

- (a) any negligent act or omission or wilful misconduct of Contractor Group or any licensee, invitee or Person acting on behalf of any of them in connection with or incidental to the performance of or default in any of Contractor's obligations under this Agreement;
- (b) any inaccuracy in any representation or warranty made by Contractor;
- (c) any breach or non-performance by Contractor, or any licensee, invitee or Person acting on behalf of Contractor of any of the obligations of Contractor in respect of the performance of the Work or its obligations under this Agreement;
- (d) any Claims by any third party in contract, tort, under any statute or otherwise at law or in equity with respect to any bodily injury or death, damage to or

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loss of property, damages, losses, costs, and expenses arising out of a breach of contract or negligent actions or omissions or wilful misconduct of Contractor Group, or any invitee or Person acting on behalf of Contractor Group in connection with or incidental to the performance of the Contractor's obligations under this Agreement;

(e) any reasonable action taken by Company to mitigate or cure a breach or nonperformance by Contractor of any covenant or inaccuracy in any representation or warranty pursuant to the Agreement;

(f) any non-payment of amounts due and payable to Subcontractors, Subcontractors' subcontractors of every tier, vendors and suppliers resulting from furnishing of services, material, equipment, labour or otherwise in connection with the performance of Work;

(g) any Claim in respect of loss or damage to the property of Company caused by a breach of contract or negligent acts or omissions or wilful misconduct of Contractor Group or any invitee, or Person acting on its behalf;

(h) any Claims in respect of personal injury or death of Personnel of Company caused by a breach of contract or negligent acts or omissions or wilful misconduct of Contractor Group or any invitee, or Person acting on its behalf;

any representation or holding out by Contractor that it is an agent of Company;

all Claims (including any fine, penalty or demand of any Authority) which may be brought against or suffered by Company or which Company may sustain, pay or incur, arising out of any failure by the Contractor to comply with its obligations, or any negligence or failure to comply with Applicable Law in carrying out its obligations, with respect to the environment under Article 15.

Miller Thomson LLP Commentary: Section 21.5 provides for indemnification of MFC by Astaldi. The heads of indemnity included in Section 21.5 mirror the heads of indemnity included in Section 21.4. Subsection (g) and (h) were narrowed in scope to only be applicable in cases where damage to property or personal injury or death were caused by a breach of contract, negligent act or omission, or willful misconduct of Astaldi or by anyone for whom Astaldi is liable. Originally, these subsections provided for indemnification arising from any loss or damage to property or personal injury or death however caused and regardless of whether or not the Claim was caused by negligence, breach of agreement or breach of duty. While this narrowing of scope does not indicate a favourable negotiation point for MFC, as all heads of indemnity mirror the heads of indemnity in Section 24.1, we do not believe this provision is inappropriate.

Section 30.1 Notwithstanding anything contained in this Agreement:

- (a) other than liquidated damages payable pursuant to **Article 26**, neither Party shall have any responsibility and shall not be liable under this Agreement to the other Party for any indirect or consequential damages or

losses, including and whether or not the following are determined in any proceeding to be direct damages, any Claim in respect of loss of profit, loss of revenue, business interruption, loss of use, loss of opportunity, loss of goodwill, cost of capital, cost of replacement power, whether foreseeable or not, resulting from, arising out of or in connection with the performance or nonperformance of any obligation pursuant to this Agreement howsoever caused, provided however, for clarity, that such limitation shall not apply in respect of Claims by third parties (outside of the Company Group or the Contractor Group); and

- (b) the maximum aggregate liability of the Contractor toward the Company for all Claims arising out of or connected with the Work or performance or breach of this Agreement shall be limited to the sum of fifty percent (50%) of the Contract Price and actual insurance proceeds received from insurance to be maintained under this Agreement, provided however that such limitation shall not apply in cases of:
 - (I) Claims for personal injury (including death) suffered by third parties;
 - (ii) Claims for property damage or loss suffered by third parties;
 - (iii) Contractor's wilful, deliberate or intentional breach of this Agreement;
 - (iv) Taxes, fines and/or penalties (including in respect of breaches of environmental laws) imposed by any Authority for which Contractor is liable under this Agreement; and
 - (v) Claims for infringement of patents and/or other intellectual property rights.

Miller Thomson LLP Commentary: While the inclusion of the above limitation of liability in favour of Astaldi is not favourable to MFC, it is not unusual for a limitation of liability provision to be included in agreements of this type. This limitation of liability provision limits the aggregate liability of Astaldi to MFC for all claims related to or arising from the Work to the sum of 50% of the Contract Price, plus insurance proceeds received. This limitation of liability does not apply to any claims for personal injury or property damage suffered by third parties, Astaldi's wilful breach, taxes, fines, or penalties imposed for which Contractor is liable, and claims for infringement of intellectual property. The cap being based on 50% of the Contract Price is a negotiated term, and while it could be argued that 100% of the Contract Price would have been more appropriate in the circumstances, the existing provision, as conditioned by the various exceptions, does not appear to be unreasonable. Without further information, it is difficult to determine if a number equal to 50% of the Contract Price was appropriate based on the potential liability that could be caused by Astaldi while completing its obligations under the Astaldi Agreement.

Valard Agreement

Section 21.15: Notwithstanding anything to the contrary in this Agreement, the maximum aggregate liability of Contractor to Company for all Claims arising out of or connected with the Work or performance or breach of this Agreement shall be limited to the sum of:

- (a) one hundred percent (100%) of the total Contract Price; and
- (b) the amount of actual insurance proceeds received with respect to such Claims from insurance to be maintained under this Agreement, less any applicable deductible in respect of any proceeds received by Company under Contractor's third party liability insurance;

provided however that such limitation shall not apply in cases of:

- (i) Claims for personal injury (including death) for which Contractor is liable to Company or has a duty to indemnify Company under this Agreement;
- (ii) Claims for property damage or loss for which Contractor is liable to Company or has a duty to indemnify Company under this Agreement, except for damage to or loss of the Work;
- (iii) Contractor's fraud, willful misconduct or gross negligence;
- (iv) Taxes, fines and/or penalties imposed by any Authority for which Contractor is liable under this Agreement;
- (v) Claims for infringement of patents and/or other intellectual property rights, or breach of the confidentiality provisions of this Agreement;
- (vi) Claims for any environmental damage or loss for which Contractor is liable to Company or has a duty to indemnify Company under this Agreement or resulting from a breach of this Agreement by Contractor; and
- (vii) any other Claims by a third party, including any Authority, for which Contractor has a duty to indemnify Company under this Agreement.

Miller Thomson LLP Commentary: As discussed above in respect of the Astaldi Agreement, it is not unusual for a limitation of liability provision to be included in agreements of this type. This provision caps the liability of the Valard to LIL LP at 100% of the Contract Price, but this limitation does not apply to any indemnification for claims for personal injury or property damage suffered by third parties, Valard's wilful breach, taxes, fines, or penalties imposed for which Valard is liable, claims for infringement of intellectual property, claims for environmental damage or loss, and any other indemnity claims arising from third party claims. While the level of the cap is a negotiated term, a cap of 100% of the applicable Contract Price is generally reasonable, depending on the potential liability that could be caused by Valard while completing its obligations under the Valard Agreement.