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Sent: Thursday, January 19, 2017 3:38 PM
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Subject: CH0032 - Pleadings
Attachments: MFC Defence (signed).PDF; Andritz Amended Statement of Claim - August 8 2016 (2).PDF; image003.png

Frank - Here is the Andritz Amended Statement of Claim and our Defence.

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2016 01G 3118

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

BETWEEN:**ANDRITZ HYDRO CANADA INC.****PLAINTIFF****AND:****MUSKRAT FALLS CORPORATION****DEFENDANT****DEFENCE**

1. The defendant denies the statements made in the amended statement of claim, except as may be expressly admitted in this defence.
2. Regarding paragraphs 1 and 2 of the amended statement of claim the defendant admits the incorporation of the plaintiff in New Brunswick with its registered office at Pointe-Claire, Quebec and the incorporation of the defendant pursuant to the *Corporations Act* of Newfoundland and Labrador with its head office at St. John's, Newfoundland and Labrador. The defendant is engaged in the development of the Lower Churchill Project, which includes work at Muskrat Falls.

Construction at Muskrat Falls and the Gates Contract

3. Regarding the statements made in paragraphs 3 and 4 of the amended statement of claim, the defendant admits that the work at Muskrat Falls includes the construction of a hydroelectric generating facility, located approximately 30 kilometres from Happy Valley-Goose Bay in Labrador, which will be capable of producing 824 megawatts of electricity. The facility will include a powerhouse, spillway and dams.

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4. Regarding the statements made in paragraphs 5 to 8 of the amended statement of claim, the defendant admits that the plaintiff and defendant entered into a written contract dated December 18, 2013 titled “Supply and Install Powerhouse and Spillway Hydro-Mechanical Equipment” which provides for the design, supply and installation of powerhouse and spillway hydro-mechanical equipment by the plaintiff (the “Gates Work”), and which is designated Agreement No. CH0032-001 (the “Gates Contract”). The defendant further states as follows:
 - (a) The Gates Contract expressly states that it comprises the entire agreement between the plaintiff and defendant for performance of the Gates Work, replacing and superseding all prior requests by the defendant for bids or proposals, all submission of bids or proposals by the plaintiff, and all negotiations conducted between them.
 - (b) The Gates Contract is a distinct and separate contract for the performance of the Gates Work. It is not tied to, connected with or dependent upon the Turbines & Generators Design, Supply and Install Agreement, Agreement No. CH0030 and is not a component of any broader scope of work awarded to the plaintiff.
5. Regarding the statements made in paragraph 9 of the amended statement of claim, the defendant denies that it failed to observe the provisions of the Gates Contract. The defendant says plaintiff has failed to observe provisions of the Gates Contract related to scope of work, changes, dispute resolution, schedule, safety, quality, and supplier document requirements. Further, the plaintiff has failed to perform to the Standard of a prudent Contractor in accordance with and as that term is defined in the Gates Contract.
6. Regarding the statements made in paragraphs 10 and 11 of the amended statement of claim, the defendant states as follows:
 - (a) The Gates Contract is a comprehensive agreement for the performance by the plaintiff of the Gates Work and reference should be made to the contract for its complete terms and conditions.

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- (b) The Gates Contract gives the defendant the right to make changes to the work by issuing change orders. Contract provisions addressing changes include Article 26, section 7 of Exhibit 2 – Compensation, and section 8 of Exhibit 3 – Coordination Procedures.
 - (c) “Change” is a defined term in the Gates Contract and, among other things, includes changes in the schedule for performance of the work by the plaintiff.
 - (d) If the plaintiff claims additional compensation as the result of a change to the work, it must submit a proposal to the defendant, in compliance with the terms of the Gates Contract.
 - (e) If the plaintiff and defendant do not agree on a price and impact on resources and schedule for the change, the plaintiff must perform the change to the work and/or meet the schedule directed by the change order. The plaintiff may give the defendant a notice of dispute in accordance with Article 39 of the contract invoking the dispute resolution process for determination of whether, and if so how much lump sum compensation is payable for the change to the work directed by the change order. Until the dispute is resolved and the amount, if any, to be paid for the change is determined, the defendant is not obligated to make any payment to the plaintiff in respect of the change.
 - (f) The Gates Contract, including section 7 of Exhibit 2 – Compensation, and section 8.4 of Exhibit 3 – Coordination Procedures allow the parties to agree on compensation for changes by payment on a lump sum basis or a reimbursable basis. However, where there is no agreement, changes are to be compensated by payment on a lump sum basis, not on a reimbursable basis.
7. Regarding the statements made in paragraphs 12 to 15.1 of the amended statement of claim, the defendant states that:
- (a) Reference should be made to Article 39 of the Gates Contract for the complete terms of the dispute resolution process.

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- (b) This proceeding was commenced on May 18, 2016 following the delivery of notice of dispute dated March 21, 2016, and is barred by Article 39.3 of the Gates Contract which prohibits legal proceedings until the expiry of ninety days following the delivery of a notice of dispute.
 - (c) The plaintiff's notice of dispute was itself defective as it failed to comply with the requirements of Article 39.1 of the Gates Contract in that plaintiff did not include all relevant particulars of the dispute.
8. The defendant admits the statements made in paragraphs 16 and 17 of the amended statement of claim and further states that reference should be made to Article 7.3 of the Gates Contract for the complete terms of the obligation on the plaintiff to provide the letter of credit and to the letter of credit issued by RBC Royal Bank for the complete terms of the letter of credit.
9. The defendant denies the allegations made in paragraphs 18 and 18.1 of the amended statement of claim. The defendant says that it made numerous attempts to engage the plaintiff in reasonable commercial negotiations, but the plaintiff responded with unreasonable demands and failed to provide any reasonable substantiation for additional compensation in relation to Change Order 10, as required by the terms of the Gates Contract and as are necessary for proper commercial negotiations. The defendant says the plaintiff has therefore breached the Standard of a Prudent Contractor by such acts and by commencing this action in breach of the terms of the Gates Contract.
10. The defendant says that the Gates Contract differentiates between "Milestones" and "Interfaces" and that schedule items I1A and I1B are "Interfaces" and not "Milestones", and the plaintiff is responsible for performing the work in accordance with the "Milestones".

Plaintiff's Delays and Mobilization

11. Regarding the statements made in paragraphs 20 of the amended statement of claim, the plaintiff did not deliver first anchors in accordance with the Milestones in the Gates Contract and did not progress deliveries in a timely manner. The initial delivery of

primary anchors for the Gates Contract, Milestone M3a, was not completed until April 24, 2014, over five weeks late. Further, the primary anchors for the hoist tower and bridge were not delivered until July 15, 2015, more than fifty-two weeks late. Further, delivery of materials for the spillway gates work, to complete the requirements of Milestones M3e and M3f, continued through the end of January 2016, approximately seventy-eight weeks late.

12. Regarding the allegations made in paragraph 22 of the amended statement of claim, the defendant says it kept the plaintiff fully apprised of the progress of work at the Muskrat Falls site through correspondence and meetings, including a revision to the mobilization date to commence the spillway gates work. This resulted in the defendant issuing Change Order 6 on March 18, 2015, revising Exhibit 9 – Interface and Milestone Schedule to reflect delays to Interface I1A and Interface I1B.
13. Regarding the allegations in paragraphs 23 and 24, there was no change to the scope of the upstream work that required the plaintiff to issue a subcontract to Groupe Canmec. The plaintiff knew, or ought to have known, at all times the full nature and scope of the upstream work. The plaintiff issued the subcontract to Groupe Canmec for its own convenience or because the plaintiff was not capable of performing the mechanical installation required by the terms of the Gates Contract.
14. Regarding the allegations made in paragraph 25 of the amended statement of claim, the defendant states:
 - (a) Pursuant to the revised Exhibit 9, issued with Change Order 6, the defendant was required to provide a sixty-day notice to the plaintiff to commence gates work on the spillway. On May 26, 2015, the defendant provided the plaintiff a ninety-day notice to mobilize, resulting in a mobilization date on or about August 24, 2015. With the additional thirty days notice, the defendant advised the plaintiff that work would commence on the downstream gates first followed by the upstream gates. The work on the upstream gates could not commence because the plaintiff had not completed its design of the hoist tower anchors for the upstream side of

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the spillway, and consequently delayed the defendant's completion of its work to permit access to the upstream portion of the spillway.

- (b) During the mobilization planning meeting on June 12, 2015 the plaintiff's mobilization plans for the gates work on the spillway were reviewed with the plaintiff and the revised sequence of work was discussed.
 - (c) On June 12, 2015 the defendant reviewed opportunities to define the minimum scope of work required to achieve river diversion to reduce the installation duration and asked the plaintiff to develop ideas to reduce the installation duration and achieve the target completion date of June 15, 2016.
 - (d) On July 8, 2015 the plaintiff advised the defendant that the plaintiff was investigating various acceleration scenarios that recognized that the availability of the spillway site for performance of the Gates Contract work would be delayed, and that the plaintiff's work would be completed so as to allow diversion of the river through the spillway by June 15, 2016.
 - (e) On July 10, 2015 the defendant wrote to the plaintiff regarding the ninety-day notice issued on May 26, 2015, and to direct plaintiff to continue with its planned mobilization. The defendant's correspondence confirmed the start of work on Interface IIB (downstream) would be September 1, 2015, and that the start date for Interface IIA (upstream) would be November 1, 2015.
 - (f) On July 24, 2015, the plaintiff confirmed mobilization would commence on August 28, 2015 and the downstream spillway gates work would commence on September 1, 2015.
15. Regarding the allegations in paragraph 26 of the amended statement of claim, the defendant denies that commencing with the downstream spillway gates work instead of the upstream location was an effort to assist with schedule recovery. The plaintiff was

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required to start with the downstream work as the plaintiff was late in completing the design for the hoist tower anchors, which did not afford sufficient time for the defendant's engineer to complete the necessary follow-on engineering for the defendant to complete its work to allow the plaintiff access to the upstream portion of the spillway.

16. Regarding the allegations in paragraph 27 of the amended statement of claim, the defendant states that the plaintiff submitted its first acceleration proposal on August 19, 2015. The defendant conducted a thorough review of defendant's proposal and determined that the proposal was grossly incomplete and that the labour costs were excessive. Further, the defendant made repeated requests for contractually required documentation to support the compensation claimed for acceleration of the gates work but the plaintiff either refused to provide the documentation or was incapable of providing it. On September 11, 2015, the defendant advised the plaintiff that the defendant was prepared to issue a change order upon receipt of the contractually required documentation necessary to support additional compensation.
17. Regarding the allegations in paragraph 28 of the amended statement of claim, the defendant states that:
 - (a) While the plaintiff was working on an acceleration plan since July 2015, the plaintiff was unable to present a reasonable proposed acceleration schedule until October 28, 2015. Such a schedule was necessary for commercial discussions on pricing prior to issuing a change order.
 - (b) While Interface I1A had been delayed just over eight months, the plaintiff advised the defendant that the plaintiff was not in a position to commence the spillway gates work on the dates to which it had committed in July, 2015, due to the plaintiff's own delays.
18. Regarding the allegations in paragraph 29, the defendant states that:

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- (a) On July 9, 2015, the plaintiff met with the defendant and the defendant's civil contractor to review the deficiencies in the civil work on the spillway. A minor number of bolt holes for anchors had been damaged during construction and required repairs. The plaintiff agreed to conduct required surveys and make the repairs. The defendant subsequently issued a change order and paid for the repair work, all without any disruption or delay to the plaintiff's contract work.
- (b) The plaintiff started work at the Muskrat Falls site in early September, 2015. However, following the erection of stoplog guides in all five bays downstream in September 2015, plaintiff's subcontractor left the site. Upon returning to site in October 2015, plaintiff's subcontractor installed the hydro-mobile lifts in all five bays downstream, and again left the site. The plaintiff's subcontractor would not resume working on the downstream portion of the gates work until March 2016. The plaintiff did not perform any work itself in the fall of 2015 and subsequently all installation work was performed by the plaintiff's subcontractors.
- (c) The plaintiff was provided access to the upstream portion of the gates work on November 1, 2015, and after meeting with defendant and defendant's civil contractor, plaintiff stated there were no impediments to mobilization. Notwithstanding that there were no impediments, the plaintiff was slow to mobilize and was still performing mobilization activities into late January 2016.

Issuance of Change Order 10

- 19. Regarding the statements made in paragraphs 30 to 34 of the amended statement of claim, the defendant states that:
 - (a) Change Order 10 was issued on November 12, 2015, by the defendant to the plaintiff properly and in compliance with the terms of the Gates Contract, in particular Article 26, section 7 of Exhibit 2 – Compensation, and section 8 of Exhibit 3 – Coordination Procedures.

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- (b) The timing of the issuance of Change Order 10 was solely due to the plaintiff's failure to provide the requisite documentation the defendant had requested as a prerequisite to determining a price for acceleration for inclusion in a change order. The defendant finally issued Change Order 10 on November 12, 2015, as it was concerned that if a change order was not issued the plaintiff would continue to delay the performance of its work, no acceleration would be achieved and river diversion would be delayed for a year resulting in significant losses to the defendant.
- (c) The change order only directed the plaintiff to accelerate a defined scope of work for both the upstream and downstream hydro-mechanical work required for river diversion, which work formed a portion of the scope of work already included in the Gates Contract, by June 15, 2016. The purpose of the change order was to ensure that the spillway hydro-mechanical systems would be sufficiently complete by that date to allow diversion of the Churchill River through the spillway. Diversion of the river was essential to avoid delay to the overall project and the work of other contractors.
- (d) The plaintiff provided four proposals for acceleration of a portion of the Gates Contract work necessary for river diversion for compensation by a lump sum amount. The proposals are dated August 19, 2015; December 4, 2015; December 18, 2015; and March 12, 2016. The lump sum amounts proposed by the plaintiff were excessive, contained calculation errors, and lacked supporting documentation. The proposals, in addition to their other deficiencies, were not in compliance with the plaintiff's contractual obligations in that they were not limited to those costs, based on the rates and prices in Appendices D and E of Exhibit 2 to the Gates Contract, that were necessary for performance of the work for river diversion by June 15, 2016.
- (e) Based on its analysis of the August 19, 2015, proposal of the plaintiff, the defendant determined that a lump sum price of \$3,370,314.00, to be paid in addition to the price otherwise payable for the performance of the Gates Contract

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scope of work, would be equitable compensation determined in accordance with the provisions of the Gates Contract for all additional costs incurred by the plaintiff for acceleration of the work necessary for river diversion by June 15, 2016. Although not contractually obligated to do so, the defendant provided in Change Order 10 for payment of that amount as a lump sum price. It was to be paid progressively based on the physical progress of the acceleration of the work. Although the plaintiff was directed to accelerate the work so as to achieve readiness for river diversion by June 15, 2016, payment of progress claims against the lump sum was not made conditional on achieving river diversion by June 15, 2016.

- (f) Change Order 10 further provided for an incentive payment of \$2,000,000 if the change order scope of work was completed by June 15, 2016. The incentive payment would have been in addition to the costs incurred by the plaintiff to accelerate the partial scope of work called for by the change order. The defendant was under no contractual obligation to offer the incentive payment to the plaintiff for the performance of the partial scope of work called for by Change Order 10.
- (g) In the absence of agreement on compensation with the plaintiff, the defendant was contractually entitled to require the plaintiff to perform the work, with compensation, if any, to be determined in accordance with the dispute resolution process.
- (h) Further, upon delivery of Change Order 10 the defendant advised the plaintiff that the lump sum amount equitably reflected the additional costs the plaintiff would incur to accelerate the work, and that if the plaintiff did not agree it was nevertheless obligated to perform the work but it could invoke the dispute resolution procedure to assert a claim for additional compensation.

Plaintiff's Failure to Comply With Change Order 10

20. Regarding the statements made in paragraphs 35 to 38.1 of the amended statement of claim, the defendant states that:

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- (a) The plaintiff could have completed the partial scope of work called for in Change Order 10 by June 15, 2016 had it properly and diligently planned for, managed and executed that work.
- (b) At no time did the defendant refuse to engage in commercial discussions until plaintiff accepted Change Order 10. To the contrary, the defendant set forth the process for the plaintiff to follow to demonstrate entitlement under the terms of the Gates Contract to additional compensation to Change Order 10.
- (c) The plaintiff, upon receipt of Change Order 10, and having had prior notice of the necessity of achieving river diversion by June 15, 2016, failed to take action to promptly and effectively plan for, manage and execute the limited scope of work called for. In early March, 2016, despite having had notice of the need for acceleration in the summer of 2015, the plaintiff had completed only approximately 10% of the limited scope of work for river diversion instead of the planned 50% completion set out in its December proposal and schedule.
- (d) Consequently, on March 4, 2016 the defendant gave the plaintiff notice of default pursuant to Article 32.1 of the Gates Contract, stating in particular that the plaintiff was failing to execute the works in a timely manner, was failing to provide and maintain appropriate site management and craft resources, was failing to manage day-to-day site activities and was failing to manage and control the activities of its subcontractors. The notice of default stated that the plaintiff's default placed the river diversion date of June 15, 2016 in jeopardy. It stated that the plaintiff was failing to comply with the instructions issued by Change Order 10, which it was obligated to implement regardless of the existence of a dispute over commercial terms.
- (e) The notice of default required that the plaintiff cure its default by submitting, within ten business days of the notice, a detailed resource loaded recovery plan that met the river diversion date of June 15, 2016, with letters from sub-contractors confirming their commitment to the plan. The plaintiff failed to cure its default within the time required and failed to submit a plan meeting the

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requirements of the notice of default. However, on May 25, 2016, based on improvement in the plaintiff's performance and on the plaintiff's assurance that it would achieve the defendant's objectives for river diversion, the defendant withdrew the notice of default.

- (f) After the withdrawal of the notice of default, the defendant's performance deteriorated as it failed to diligently, efficiently and effectively manage, supervise and execute the limited scope of work called for by Change Order 10 and, as a result, the defendant was unable to begin river diversion until August 3, 2016. While the defendant was able to open the gates and commence river diversion on August 3, 2016, the plaintiff had still not completed the limited scope of work in Change Order 10.

21. Regarding the statements made in paragraphs 38.1 to 38.6 of the amended statement of claim, the defendant states that:

- (a) The lump sum price provided for by Change Order 10 is an equitable and reasonable price for the additional costs to the plaintiff resulting from the acceleration of the limited scope of work.
- (b) The plaintiff has no right, under the terms of the contract or otherwise, to payment for the additional costs to the plaintiff resulting from the acceleration of the limited scope of work on a reimbursable basis.
- (c) The lump sum price is to be paid progressively based on the physical progress of the acceleration of the work. The Gates Contract provides for payment monthly, provided that invoices are submitted in accordance with the requirements of the contract with approved payment certificates and supporting documentation.
- (d) The plaintiff has submitted invoices as if payment for Change Order 10 work was to be made on a reimbursable basis. The plaintiff has refused to submit invoices in compliance with the Gates Contract requirements for payment for work on a lump sum basis, and consequently is not eligible for payment of the lump sum price.

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- (e) Change Order 10 does not add new work to the scope of work of the Gates Contract. It calls for acceleration of a portion of the work that the plaintiff was already obligated to perform. The invoices submitted by the plaintiff purportedly pursuant to Change Order 10 and those supporting materials made available do not differentiate between work included within the contractual scope of work and acceleration of the work called for by Change Order 10. The invoices, among other things, claim for all work performed by the plaintiff's subcontractors since Change Order 10 was issued, including the work within the contractual scope of work for which the plaintiff is entitled to payment of fixed lump sum prices only. The invoices also evidence flaws in the methodology used to calculate the invoiced amounts, double billing, and errors in hours and rates.
 - (f) The plaintiff has continued to invoice for, and the defendant has in accordance with the requirements of the contract made payment for, the lump sum prices for work within the contractual scope of work. The defendant is obligated to demonstrate by submission of supporting documentation that claims for progress payments against the Change Order 10 lump sum do not duplicate those invoices.
 - (g) The plaintiff is, subject to compliance with contractual invoicing requirements, entitled to progress payments against the Change Order 10 lump sum price. Because the plaintiff failed to complete the partial scope of work so that river diversion could be carried out by June 15, 2016, it is not entitled to the incentive payment voluntarily offered by the defendant.
22. Regarding the statements made in paragraphs 39 to 49 and 61 to 65 of the amended statement of claim, the defendant states that:
- (a) The defendant has a right under the Gates Contract to present for payment the letter of credit given by the plaintiff as security for the performance of its work if the plaintiff's performance of its obligations under the contract is in default or if the defendant otherwise has a claim against the plaintiff.
 - (b) The notice of default given to the plaintiff on March 4, 2016 has been withdrawn.

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- (c) The defendant has not taken any steps to call on the letter of credit given by the plaintiff as security for the performance of its work.
 - (d) The claims of the defendant related to the letter of credit are moot.
 - (e) The defendant retains its rights to call on the letter of credit in future in compliance with the terms of the Gates Contract and the letter of credit.
 - (f) The plaintiff is not entitled to the declaration sought or to any relief.
23. Regarding the statements made in paragraphs 50 to 54 of the amended statement of claim, the defendant states that:
- (a) Change Order 10 directing the plaintiff to accelerate the limited scope of work necessary for river diversion by June 15, 2016 was issued in compliance with the terms of the Gates Contract and in particular Article 26 and Exhibits 2 and 3.
 - (b) Because there was no agreement on compensation for the Change Order 10 work, the defendant was under no obligation, contractual or otherwise, to include terms for payment for the work in Change Order 10. Nevertheless the defendant did so, permitting the plaintiff, should it so choose, to claim progress payments against the lump sum price, while also acknowledging that the plaintiff could invoke the dispute resolution process if it were dissatisfied with the lump sum amount. The lump sum amount is, based on the proposals submitted by the plaintiff prior to issuance of the change order, sufficient to compensate the plaintiff for its costs, as determined in compliance with the terms of the Gates Contract, for the reasonably necessary acceleration work. The defendant has acted in good faith by providing the plaintiff with an incentive in excess of its contractual entitlements.
 - (c) The defendant denies the allegation that it, in effect, designed the terms of Change Order 10 so as to put the plaintiff in a position where it was impossible to perform the change order work thereby allowing the defendant to call on the letter of credit. The allegation is scandalous and vexatious. The defendant places the

plaintiff on notice that in respect of that allegation it will seek solicitor client or other aggravated costs against the plaintiff.

- (d) The defendant denies that it has failed to engage in the dispute resolution process. Following the delivery of the notice of dispute in relation to the terms of Change Order 10 representatives of the plaintiff and defendant met on May 19, 2016 and agreed on an approach to resolve the commercial issues raised by the notice of dispute. Following the May 19, 2016, meeting, the defendants had made several attempts to schedule meetings.

- 24. Regarding the statements made in paragraphs 55 to 57 of the amended statement of claim, the defendant states that the plaintiff was and remained in default of its performance obligations before and after the delivery of the formal notice of default on March 4, 2016 and its withdrawal on May 25, 2016 in that from the outset it failed to plan for, manage and execute the work required to achieve river diversion by June 15, 2016.

Plaintiff's Invoices for Acceleration Are Not Valid

- 25. Regarding the statements made in paragraphs 57.1 to 57.2 of the amended statement of claim, the defendant repeats the statements made above, and says in addition with respect to invoices submitted by the plaintiff:
 - (a) The plaintiff has double billed the defendant by claiming for work performed and paid for under the original scope of work and including such work in invoices for acceleration.
 - (b) The plaintiff has not provided the detailed documentation, common in the industry and required by the Gates Contract, necessary to support the amounts claimed in the invoices, including for the amounts claimed in relation to the plaintiff's subcontractors.
 - (c) The plaintiff has invoiced on a total cost basis and has failed to account for its and its subcontractors' inefficiencies, costs for rework to repair defects, safety shut downs, grossly poor productivity and wasted expenses.

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26. Regarding the statements made in paragraphs 57.12 to 57.14 of the amended statement of claim the defendant denies that the plaintiff is entitled to compensation for the work performed under Change Order 10 on a quantum meruit basis and states further that:
- (a) The terms of the Gates Contract fully provide for determination of the method of compensation for change order work.
 - (b) The lump sum provided for by Change Order 10 is fair and reasonable compensation for the performance of the limited scope of work by June 15, 2016.

Plaintiff has Failed to Perform in a Timely and Competent Manner

27. As to the whole of the amended statement of claim, the defendant states as follows:
- (a) The plaintiff failed to accelerate work as directed by Change Order 10 for river diversion by June 15, 2016, and failed to take any reasonable steps to attempt to accelerate that work.
 - (b) If the plaintiff has incurred costs in excess of the contract price, which the plaintiff denies, any such additional costs have been caused by plaintiff's:
 - poor construction and project management;
 - failure to adequately plan and schedule work, including periods of little or no work being performed, in accordance with the standards of a reasonably competent contractor and in breach of the requirements of the Gates Contract;
 - failure to adhere to any plan or schedule for the work, with work conducted out of sequence and in an ad hoc manner, resulting in grossly poor productivity;
 - failure to manage subcontractors;
 - delays in completing the plaintiff's design obligations;

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- late deliveries of anchors, shelter panels and gates;
 - shoddy work resulting in rework to rectify defective work;
 - equipment breakdowns;
 - slow mobilization and ramp up, with late completion of the plaintiff's laydown area and mobilization continuing into late January 2016;
 - grossly inadequate safety performance, including multiple safety incidents causing shut downs and contributing to delays and productivity loss.
- (c) The plaintiff failed to install the shelters at the spillway, critical for the progress of contract work as well as for the limited work for river diversion, in a timely manner. The shelters were scheduled to be fully enclosed by first week of January, instead the shelter installation and sealing continued until middle of March, 2016, causing delays to the plaintiff's start of gates alignment and the plaintiff's concrete pouring activities in all bays in the spillway.
- (d) The plaintiff changed its proposed roofing design over the shelters from plywood insulated panels to SeaCans in January, 2016. The plaintiff failed to appropriately design the complete enclosure of the roof with this methodology which caused delays while work was performed on an ad hoc basis to seal gaps and openings. In addition, shelter enclosure and temperature control was an ongoing problem with the result that the plaintiff could not perform precision alignment or pour concrete until the temperature inside the shelters was adequate.
- (e) Dismantling of shelters was planned to have been completed by mid April but continued until middle of June 2016 causing disruption to the installation of the towers and the hoist house and the gates.
28. The defendant says that the plaintiff knew, and failed to advise the defendant in a timely manner or at all, that the plaintiff would not, nor could it, accelerate the gates work to support river diversion on June 15, 2016:

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- (a) When it commenced the downstream portion of the work, the plaintiff knew that it did not have the requisite shelter panels to enclose the bays to complete the alignments, secondary concrete, and balance of the work for the downstream stoplogs, and would not have the panels until the first quarter of 2016.
- (b) When plaintiff mobilized to commence work on the upstream portion of the work, the plaintiff knew that it did not have enough platforms to operate all ten hydro-mobile systems in the upstream portion of the spillway or the requisite shelter panels to enclose the bays to complete the alignments, secondary concrete, and balance of the upstream gates work, and would not have sufficient panels until January 2016.
- (c) The plaintiff damaged roller gates guides during transportation and required that they be returned to plaintiff's subcontractor's facility to be repaired, which delayed delivery beyond the date necessary for work to be completed by June 15, 2016.
- (d) The plaintiff knew that the fabrication of the roller gates was delayed and final deliveries would be as late as June 2016.
- (e) The plaintiff failed to plan for and achieve its promised increases in manpower, which increases were necessary to accelerate the work.

Good Faith Performance


29. The defendant specifically denies the allegations of bad faith made in paragraphs 57.3 to 57.11 of the amended statement of claim. The defendant says that good faith performance is an "organizing principle" of contract law but not a term implied into contracts in Canada. The defendant nevertheless says that it has conducted itself towards the plaintiff and performed its obligations under the Gates Contract in good faith and in the proper exercise of its rights under the Gates Contract. The allegations of the plaintiff are scandalous and vexatious. The defendant places the plaintiff on notice that in respect of those allegations it will seek solicitor client or other aggravated costs against the plaintiff.

30. The Gates Contract, through Articles 3.4 and 1.2(ppp), expressly requires the plaintiff to perform its contractual obligations in good faith. The defendant says that the plaintiff has, throughout the performance of the gates work, demonstrated a careless disregard for honesty and a manifest lack of good faith.

Relief

31. Regarding the plaintiff's claim of damages in paragraph 65 (vi) of the amended statement of claim, the defendant says that the plaintiff was, under the terms of the Gates Contract and without a change order, required to perform the work necessary for river diversion. The value of the work for river diversion in the Gates Contract is approximately \$40 million, and the plaintiff's claim for an additional \$35 million solely for performing the same scope of work is manifestly unreasonable.
32. Regarding the relief claimed in paragraph 65 of the amended statement of claim:
- (a) The notice of default of March 4, 2016 has been withdrawn and the claim for a declaration made in paragraph 65(ii) is moot.
 - (b) The claim for an injunction restraining the defendant from calling on the letter of credit made in paragraph 65(v) is moot.
 - (c) The defendant denies that the plaintiff is entitled to the declarations, injunction, damages, including for damages for delay and acceleration, interest or costs claimed.
33. The defendant claims its costs against the plaintiff, including costs on a solicitor client or some other aggravated basis in respect of the allegations referred to above.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 2nd day of September, 2016.


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August 8, 2016

By Fax and Email

Daniel W. Simmons
McInnes Cooper
Barristers & Solicitors
5th Floor, 10 Fort William Place
PO Box 5939, Stn. C
St. John's, NL A1C 5X4

Dear Mr. Simmons:

Re: Andritz Hydro Canada Inc. and Muskrat Falls Corporation

Andritz Hydro Canada Inc. has amended its Statement of Claim. Enclosed is the Amended Statement of Claim, served pursuant to the *Rules*.

We had agreed to waive the requirement of a Statement of Defence until we provided you with notice that Muskrat Falls Corporation's Statement of Defence is required. I'm instructed by our client to advise you that it requires Muskrat Falls Corporation to serve its Statement of Defence by Friday, September 2, 2016.

Yours very truly,



Martin Sclisizzi

MS:nb

Encl.

2016 01G 3118

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

BETWEEN:**ANDRITZ HYDRO CANADA INC.****PLAINTIFF****AND:****MUSKRAT FALLS CORPORATION****DEFENDANT**

AMENDED STATEMENT OF CLAIM

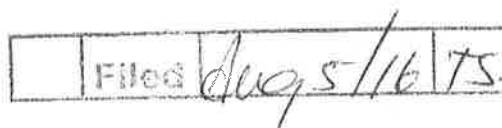
A. The Parties

1. The plaintiff, Andritz Hydro Canada Inc. (“**Andritz**” or the “**Plaintiff**”) is a corporation incorporated pursuant to the laws of New Brunswick, with its registered office in Pointe-Claire, Québec. Andritz is a wholly owned subsidiary of Andritz AG of Graz Austria, and currently employs over 350 employees in its Canadian operations, which provide full engineering and project management for all Canadian and selected export projects as well as other services.

2. The defendant, Muskrat Falls Corporation (“**Muskrat**” or by the name of the department responsible for managing the Project, the Lower Churchill Project (“**LCP**”)), is a body corporate constituted pursuant to the *Corporation Act*, RSNL 1990, c. C-36, as amended, having its head office in St. John’s, Newfoundland & Labrador. It was incorporated on November 13, 2013 to design, develop, construct, finance, and operate the Muskrat Falls hydroelectric facility. Muskrat is a wholly owned subsidiary of Nalcor Energy (“**Nalcor**”).

B. The Muskrat Falls Lower Churchill Project

3. The lower Churchill River project at Muskrat Falls, Labrador (the “**Project**”) is a major hydroelectric development on the lower Churchill River in Newfoundland and Labrador, 40



kilometres from Goose Bay, Labrador. The Project consists of a hydroelectric dam on the lower Churchill River and supporting infrastructure to deliver power to consumers in Newfoundland & Labrador, neighbouring Quebec, and the Maritimes. It currently employs over 1,500 people for construction and, when complete, is expected to have a generating capacity of 824 megawatts of power.

4. The Project was originally conceived about forty years ago, after the upper Churchill Falls development was completed by Hydro-Quebec. After several decades of political and economic review, tendering for the Project was ultimately commenced in 2012 as described below.

C. The Gates Contract

(i) Andritz Tenders and is Awarded the Gates Contract

5. In mid-2012, Nalcor approached Andritz in respect of the Project, and requested Andritz to submit a bid for the supply and installation of mechanical equipment (and in particular, mechanical gates) for powerhouse and spillway works (the “**Gates Works**”). Following an RFP for these Works in early 2013, Andritz submitted a bid in April 2013.

6. Negotiations were ongoing until the end of 2013. Nalcor had budgeted half the amount of Andritz’s bid for project completion and was looking for ways to reduce the costs and risk of the Gates Work. In or about September 2013, Andritz offered a price reduction valued at approximately \$5 million, with no corresponding reduction in the scope of work.

7. On December 18, 2013 Muskrat and Andritz entered into a spillway and powerhouse mechanical equipment agreement, entitled Supply and Install Powerhouse and Spillway Hydro-Mechanical Equipment, Agreement No CH0032-001 (the “**Gates Contract**”). The final contract price was \$204,938,732.

8. The Gates Contract was a component of a broader scope of work awarded to ~~Andritz~~ Andritz. Earlier in the year, on January 2, 2013, Andritz also entered into a Turbines & Generators Design, Supply and Install Agreement, Agreement No CH0030 with Muskrat for the design, procurement, and installation of the turbine generator for the Project. (the “**T&G Contract**”).

(ii) **Key Provisions of the Gates Contract**

9. The Gates Contract makes provision, *inter alia*, for changes to the scope of the Gates Works, and corresponding compensation, as well as dispute resolution and security through a letter of credit in favour of Muskrat. As discussed below, Muskrat failed to observe these key contractual provisions.

10. Under the Gates Contract, it is contemplated that upon issuance of a “Change Order” to amend the Gates Works and necessary compensation, the parties will negotiate the appropriate compensation and schedule, as set out in Article 26:

26.1 Company has the right to make a Change at any time and from time to time prior to the issuance of a Final Completion Certificate by issuing a Change Order. Compensation for a Change shall be determined in accordance with Exhibit 2 – Compensation and Exhibit 3 – Coordination Procedures

26.2 Contractor shall not perform and shall not be entitled to any compensation for a Change without a Change Order issued by Company to Contractor for the Change.

26.3 Contractor will comply with the requirements of Exhibit 3 – Coordination Procedures in the development of the pricing, impacts on resources and schedule as it relates to such Change and present a comprehensive proposal covering the Change to Company for Approval.

(...)

26.6 In the event the Parties fail to reach agreement on the pricing and impacts on resources and schedule with respect to a Change, Contractor shall perform the work specified in the Change Order as issued by Company and the Dispute will be handled in accordance with Article 39.

11. Exhibit 3 – Coordination Procedures, Article 8.2 of the Gates Contract sets out in detail the procedure by which the parties are to address cost and scheduling, namely through the submission of proposals by Andritz, and review and approval, rejection or request for resubmission by Muskrat. Similarly, under Article ~~8.3~~8.4 the parties were to work out compensation under the rates and prices set out in Exhibit 2 - Compensation or “on a basis to be agreed” between Andritz and Muskrat. Article 8.4 of Exhibit 3 – Coordination Procedures further provides procedures where the Change proposed is to be compensated on a reimbursable basis.

11.1 With respect to compensation for a Change, Exhibit 2 – Compensation, Article 7 of the Gates Contract provides that Changes will be evaluated and agreed by the Parties on a lump sum basis. In the event the Parties cannot agree on a lump sum price for a Change, Andritz may prepare a cost estimate for the Change based on rates and prices set out in the Gates Contract. In certain circumstances, Changes are performed on a cost reimbursable basis.

12. Accordingly, while Muskrat is entitled to issue a Change to the scope of the Gates Works, it is not entitled to unilaterally ~~impose~~impose terms regarding pricing, resourcing or scheduling.

13. The Gates Contract also contains a scheme for the resolution of disputes between the parties (the “**Dispute Resolution Procedure**”). This is set out in Article 39:

39.1 If any dispute, controversy, claim, question or difference of opinion arises between the Parties under this Agreement including an interpretation, enforceability, performance, breach, termination or validity of this Agreement (“Dispute”), the Party raising the Dispute shall give Notice to the other Party in writing within thirty (30) days of the Dispute arising, and such Notice shall provide all relevant particulars of the Dispute.

14. Upon issuance of a Notice of the Dispute, Article 39.2 of the Gates Contract states that representatives of the parties must engage in meetings in good faith and in a commercially reasonable manner, with such meetings escalating from senior project managers to the senior executives of the respective companies.

15. Importantly, Article 39.3 of the Gates Contract prohibits the parties from taking any legal action before 90 days have elapsed from the date of delivery of a Notice of Dispute:

39.3 If the Dispute is not resolved by the Parties within ninety (90) days from the date of delivery of the Notice of Dispute then a Party may take whatever action is deemed appropriate pursuant to this Agreement. For greater certainty, the Parties must comply with this Article 39 before commencing any further action, legal or otherwise, with respect to a Dispute under this Agreement.

15.1 Where the Parties are unable to resolve a Dispute under the Dispute Resolution Procedure, they have agreed to submit such a Dispute to the Courts of the Province of Newfoundland and Labrador for resolution.

16. Lastly, under Article 7.3 of the Gates Contract Andritz was required to deliver to Muskrat a Letter of Credit in an amount equal to 10% of the original price of the Gates Contract to secure the performance of its obligations.

17. On January 8, 2014, Andritz established an Irrevocable Standby Letter of Credit issued by Royal Bank of Canada for the benefit of Muskrat in the amount of \$20,493,873 (the “**Letter of Credit**”). The Letter of Credit was originally issued for a period of one year, but is automatically extended for one year periods from the expiry date unless Royal Bank notifies Muskrat at least 60 days prior to the expiry date that it elects not to extend.

18. Muskrat has manifestly failed to observe the aforesaid key contractual provisions. In particular, by issuing a Notice of Default and threatening to call on the Letter of Credit for a purported default under the Gates Contract, Muskrat has failed to abide by the above provisions governing Change Orders and the Dispute Resolution Procedure.

18.1 As discussed below, Muskrat has refused to engage fully in good faith and in a commercially reasonable manner in the multi-level meetings set out in the Dispute Resolution Procedure, necessitating Andritz to seek redress through the present claim.

D. Delays in the Performance of the Gates Works

19. The Project was broadly speaking structured through reference to “Milestones” as set out in Exhibit 9 to the Gates Contract. In particular, Milestone I1A envisioned installation of works to the upstream side of the spillway (“**Milestone I1A**”) and Milestone I1B envisioned installation of works to the downstream side of the spillway (“**Milestone I1B**”).

20. Beginning in March 2014, Andritz began delivering the first anchors for the Gates to the Site, on or around the agreed milestone dates. Throughout 2014, Andritz continued to progress its Work and deliver materials to the Site.

21. Milestone I1A, originally scheduled for February 15, 2015, refers to the point when Andritz would be able to enter and begin its Gates Work on the upstream side of the spillway. Reaching this milestone required Muskrat’s contractor, Astaldi Construction Corporation (“**Astaldi**”) to

complete the underlying concrete foundations and other civil works before Andritz entered the area to set the anchors and install the Gates.

22. However, by the first half of 2014 it was obvious to Muskrat and Andritz that the civil works performed by Astaldi were delayed. Despite this delay to the civil works, Muskrat did not issue a Change Order adjusting the delivery schedule under Exhibit 9 of the Gates Contract.

23. Given the complexity of the upstream work, it was necessary to begin mobilization on Site by fall 2014 in order to be ready for the installation. Accordingly, on or about July 10, 2014, Andritz entered into a Supply and Install Subcontract for the Supply and Install Powerhouse and Spillway Mechanical Equipment, Agreement No CH0032-01 with a mechanical works subcontractor, Canmec Industries Inc. (“**Canmec**”).

24. On or about December 15, 2014, Muskrat wrote to Andritz and confirmed that Milestone I1A would be delayed until “late Q2 2015”, which was understood by Andritz to be approximately mid-May 2015. This delay in the schedule was formally extended on or about March 18, 2015 when Muskrat issued Change Order 6 (“**CO6**”), in which Muskrat delayed Milestone I1A indefinitely.

25. The new milestone dates were in fact not properly fixed until July 2015, when Muskrat re-issued a 90-day notice stipulating that the Project would be ready for the commencement of the downstream works (i.e. Milestone I1B) on September 1, 2015 and the upstream Gates Works (i.e. Milestone I1A) on November 1, 2015. This notice effectively switched the sequence of Milestones HA.

26. Nevertheless, in an effort to assist with the schedule recovery, Andritz and Canmec agreed to begin working on the downstream portion of the Gates Works in the summer of 2015.

27. Recognizing the delay to Milestone I1A, Andritz also made several efforts through July to November, 2015 to establish an acceleration plan for the spillway works with Muskrat. These efforts were all rejected or ignored by Muskrat.

28. As of November, 2015, there was no agreement in place regarding acceleration and no Change Order instructing Andritz to accelerate the Gates Works. Milestone I1A had been delayed approximately nine months, from February 2015 to November 2015.

29. On November 1, 2015, Andritz was finally given access to the upstream portion of the Gates Works. Upon entering this area of the Site, ~~Andritz~~ determined that Astaldi's civil works remained incomplete and, in certain cases, defective, contributing to further disruption and delay.

E. Muskrat Issues the Change Order for Spillway and River Diversion Acceleration

(i) Muskrat Issues an Unilateral Change Order Contrary to Article 26

30. On or about November 10, 2015, approximately two weeks after receiving Andritz' final acceleration proposal offer, Muskrat issued a Change Order (the "**Change Order**" or "**CO10**") instructing Andritz to accelerate the installation of the upstream spillway hydro-mechanical equipment. In particular, this work involved a diverse range of installation activities of hydro-mechanical equipment on a large concrete structure, consisting of six vertical walls that are approximately 40m high by 60m long. The first phase of the work requires the precise alignment of vertical guides that are embedded in the spillway. The second phase of the work involves the concreting and embedment of the guides from the top of the structure, requiring precise temperature control for concrete pouring. The final phase involves the erection of heavy steel structures on concrete supports and the commissioning of the overall system. Once all of these steps are complete, the river may be diverted into the spillway (the "~~Spillway Acceleration~~**River Diversion**").

31. In breach of Article 26 of the Gates Contract, as well as Exhibits 2 and 3, CO10 purported to bind Andritz to a fixed deadline and price for the Change Order. Specifically, it stated as follows:

Company directs Contractor to accelerate the installation of the spillway hydro-mechanical equipment [...] to meet the river diversion requirements on/or before 15 June 2016. This change order covers all additional costs for the acceleration of Andritz' baseline schedule installation logic and deductions, including but not limited to the costs for:

1. Increase staff, supervision, and indirect expenses;
2. Additional labour, including sub-contractor costs and overtime;

3. Additional small tools, PPE, and consumables;
4. Additional equipment hours; and
5. Lost productivity due to winter working conditions and all productivity impacts associated with the acceleration.

Payment to cover the cost of the acceleration shall be on a lump sum basis and shall be made progressively based on the physical progress of the Work.

If completion of the installation of the spillway hydro-mechanical equipment for river diversion is achieved on/or before 15 June 2016, [LCP] will issue a separate Change Order to pay [Andritz] an incentive payment of \$2,000,000. If [Andritz] fails to achieve the date of 15 June 2016 for any reason whatsoever, [LCP] will have no obligation to make the incentive payment. [...]

32. The total price of CO10 was listed as a single, lump sum of \$3,370,314 ~~million~~ to cover all additional costs for the acceleration. This sum is grossly inadequate.

33. The Gates Contract allowed Andritz approximately one year to complete its work at the spillway. Muskrat's request to complete the same works between November 1, ~~2014~~2015 and June 15, 2016 resulted in a time for completion that was shortened by 4 to 5 months, and had been shifted to the much more difficult winter period.

34. Andritz objected to the purported deadline, pricing, and payment terms, which had been determined unilaterally without reference to Article 26 of the Gates Contract and its related Exhibits, and imposed in breach of the Gates Contract. This total price was well below the amounts proposed by Andritz to Muskrat while exchanging proposals in the summer of 2015. It was wholly insufficient for the ~~Spillway Acceleration~~River Diversion works demanded in CO10.

(ii) Andritz takes Good Faith Actions to Implement the Change Order

35. Nevertheless, Andritz immediately complied with the Change Order as required by the Gates Contract. On or about November 16, ~~2014~~2015, Andritz notified Muskrat that it had accelerated its installation of the spillway hydro-electrical equipment and had directed its subcontractors to do the same immediately.

36. The imposed deadline of June 15, 2016 was aggressive and, in Andritz' view, likely unattainable on Muskrat's stated budget. However, despite the challenges of working in harsh,

winter conditions, as well as unforeseen repair work and disruptions arising from Astaldi's civil works, Andritz successfully engaged in the Spillway Acceleration work required for River Diversion. Working in the Labrador winter resulted in predictably lower productivity of labour and far more complicated logistics.

37. Muskrat had waited months to issue a formal Change Order (CO10), when it was clear well in advance that acceleration would be necessary. The late issuance of CO10 in November 2015 undermined Andritz' ability to fully prepare the necessary resources to meet the significantly accelerated schedule.

37.1 On or about November 24, 2015, Andritz formally objected to the terms of CO10. Andritz objected to the purported lump sum price imposed by Muskrat for its work under the Change Order, which was far below the cost estimates for CO10 developed by both Andritz and Muskrat. Andritz also refused to accept the unreasonable and unilaterally imposed deadline for CO10, and sought agreement with Muskrat on adjustments to scheduling to reflect the delays for which Muskrat was responsible. Andritz stated that, in the absence of agreement on the lump sum price for CO10, it would be entitled to payment for CO10 work on a cost reimbursable basis.

38. ~~On or about November 24, 2015, Andritz formally objected to the terms of CO10. In response to Andritz' formal objection, Muskrat continued to insist on a June 15, 2016 completion date for the acceleration works instructed under the Change Order. It refused to engage in any commercial discussions until Andritz accepted this unilaterally imposed and wholly unrealistic deadline. On December 18, 2015, Andritz replied that it would work towards this deadline on a "best efforts basis" only. It continued to submit invoices and proposals reflecting its actual cost of the work. Muskrat has failed or refused to pay such invoices.~~

38.1 Andritz continued to submit invoices and proposals reflecting the actual cost of the CO10 work. However, Muskrat has failed or refused to pay such invoices.

(iii) Muskrat Refuses to Properly Compensate Andritz for CO10

38.2 Despite numerous requests, Muskrat has refused to pay Andritz' invoices or to provide the necessary schedule adjustment for the performance of CO10.

38.3 Since receiving CO10, Andritz has staffed CO10 and directed its subcontractors to accelerate the work, taking into account the proposed time for completion of June 15, 2016. Muskrat has been kept fully advised of the accelerative efforts and associated increased costs from Andritz and its subcontractors, particularly CRT Construction Inc and Canmec, required to complete CO10. For example, on December 18, 2015 Andritz provided to Muskrat an updated proposal of approximately \$11.75 million for CO10, plus a variable portion and bonus, with a completion date of June 15, 2016 on a “best efforts” basis. Muskrat failed to agree to this, or any other commercially reasonable proposal.

38.4 In the absence of any agreed cost proposal to CO10, Andritz has provided to Muskrat monthly invoices for its costs for completing CO10 and regular updates as to the completion date of CO10. For example, on March 25, 2016 Andritz submitted an invoice for the costs to February 29, 2016 totalling approximately \$5 million. In this invoice, Andritz estimated the total cost of CO10 to be approximately \$20.6 million. Most recently, Andritz issued an invoice to Muskrat, and a statement of the accumulated cost of the CO10 work to the end of June 2016, and the anticipated cost to complete the CO10 work as follows:

<u>Current Billing Amount</u>	<u>Total Billing to Date</u>	<u>Remaining Billing (anticipated)</u>
<u>\$4,825,479.32</u>	<u>\$25,714,768.10</u>	<u>\$5,787,347.27</u>

38.5 As set out above, Andritz currently anticipates the total cost for CO10 to exceed CAD \$31 million.

38.6 Despite receiving Andritz’ invoices for the CO10 work and related progress reports, Muskrat has rejected all payment requests and continues to impose a purported deadline for CO10 of June 15, 2016. In breach of the Gates Contract, Muskrat has failed to pay Andritz’ invoices for CO10 work, as required, or to confirm Andritz’ justified extension of time to complete CO10.

(iv) ~~(iii)~~ Muskrat issues a Notice of Default and Threatens to Call on the Letter of Credit

39. On or about March 4, 2016, Muskrat delivered to Andritz a purported Notice of Default (the “**Notice of Default**”). In the Notice of Default, Muskrat threatened to call upon the Letter of Credit to pay for “losses” caused by Andritz’s “failure to complete by June 15, 2016.” Apart from

being glaringly premature, the threatened call on the Letter of Credit ignored the express language of the Dispute Resolution Procedure.

40. In threatening to call upon the Letter of Credit, Muskrat ignored Article 39.3 of the Gates Contract which prohibits a party from taking further legal action with respect to a Dispute without first engaging in the Dispute Resolution Procedure, and in particular the clear language precluding such action being taken within 90 days of a delivery of Notice of Dispute.

41. On March 8, 2016, Andritz responded to Muskrat by stating that the Notice of Default was invalid and reiterating its position that Muskrat had not issued a valid change order. Despite this, Andritz continued to work diligently towards a Spillway Acceleration River Diversion completion date of June 15, 2016.

42. On March 17, 2016, Muskrat again threatened to call on the Letter of Credit if the alleged default was not remedied. Muskrat took the untenable position that recourse against the Letter of Credit could be made by Muskrat “at any time without further notice” to Andritz.

43. The next day, Andritz again reiterated its position that it was working towards a completion date of June 15, 2016, and to that end provided commitment letters from its sub-contractors. Andritz further provided a revised schedule with a completion date of June 15, 2016.

44. While the Dispute Resolution Procedure has been held in abeyance by the inaction of Muskrat, Andritz has continued its best efforts to meet the deadlines unilaterally imposed by Muskrat. On March 31, 2016, Andritz reiterated its commitment to complete the work by June 15, 2016 and set out its record on this commitment, despite the difficulties in meeting this date.

45. Andritz initiated a request for a “first level meeting” as required by the Dispute Resolution Procedure under the Gates Contract. This invitation was rebuffed in a Muskrat letter dated April 14, 2016.

46. Despite these efforts by Andritz to resolve the dispute, Muskrat’s position has hardened and regressed. On April 18, 2016, it outlined its position that Andritz is actually not entitled to any amount in excess of the “Lump Sum Change Order amount” (i.e. \$3,370,314) stipulated in CO10 and disputed several subsequent invoices.

47. Accordingly, Andritz issued a Notice of Dispute dated April 20, ~~2016~~, 2016 over Muskrat's failure to ~~properly~~adequately compensate Andritz ~~for its work on CO10~~, and to properly amend the schedule due to the Work arising from CO10. Andritz followed this letter with confirmation of the Dispute regarding the threatened call upon the Letter of Credit on April 21, 2016.

48. ~~The parties have since begun first level meetings, without reaching any resolution. As a consequence of continued concern that Muskrat would wrongfully call on the Letter of Credit, Andritz filed an application in this action for interim injunctive relief on May 18, 2016.~~

48.1 Immediately thereafter, on May 25, 2016, Muskrat confirmed that Andritz had rectified the alleged defaults identified in the Notice of Default to the satisfaction of Muskrat.

49. ~~As a result, as of the date of this Statement of Claim, not only do Muskrat's threats against the Letter of Credit remain in place, but~~Consequently, Muskrat has confirmed that Andritz is not in default. Nevertheless, Muskrat continues to refuse to pay any more than a nominal amount for the work performed to date, under CO10.

F. Breach of Contract

(i) The Change Order Fails to Comply with Article 26 of the Gates Contract

50. The Change Order contains an unilateral imposition of unrealistic deadline, cost, and payment terms, contrary to Article 26 and related Exhibits of the Gates Contract. Muskrat failed to utilize the procedure mandated by the Gates Contract, in particular that found in Exhibits 2 and 3 as referenced in Article 26.

51. The Gates Contract does not allow a deadline, cost, and payment mechanism to be unilaterally imposed. This would permit Muskrat, as it has done here, to insist upon a deadline that cannot realistically be met and without regard to the legitimate expectations of Andritz, and in turn impermissibly call on the Letter of Credit.

52. A unilaterally imposed deadline and price, contrary to Article 26 of the Gates Contract, would have the effect of allowing Muskrat to effectively call on the Letter of Credit at its sole and unfettered discretion. This was not the intention of the parties when entering the Gates Contract and produces a commercially absurd result.

53. Muskrat failed to engage in the negotiation process stipulated by Article 26 of the Gates Contract, and in fact has failed to cooperate with Andritz in reaching an accommodation with respect to the Spillway Acceleration/River Diversion work, and either rejected or ignored Andritz' prior good faith efforts to establish an acceleration plan for the spillway to remedy the delay to Milestone II A.

54. Accordingly, the purported scheduling and price demands contained in the Change Order are invalid and of no force and effect.

(iii) Andritz is Not in Default under the Gates Contract

55. In the alternative, and assuming that the contents of the Change Order are valid and binding on ~~Andritz~~Andritz, which is denied, Andritz is not in default under the Gates Contract and the purported Notice of Default is invalid.

56. ~~Among other things, Andritz relies upon the fact that the purported deadline of June 15, 2016 for completion under CO10 has not in fact elapsed, which renders the Notice of Default speculative and premature.~~If Andritz was in default under the Gates Contract, which is not admitted, but expressly denied, on May 25, 2016 Muskrat confirmed that any purported defaults had been cured by Andritz.

57. Moreover, Andritz has made good faith efforts to strictly comply with the requirement under Article 26 of the Gates Contract that the contractor proceed with the requested Spillway Acceleration in the interim work under CO10 while the Change Order is being disputed. In fact, Andritz has made significant progress to completing the Spillway Acceleration work required for River Diversion under CO10 in the month of July, 2016.

(iv) Muskrat has Breached the Gates Contract by Failing to Compensate Andritz for the Change Order Work

57.1 Muskrat has breached the Gates Contract by failing to compensate Andritz for the CO10 work, particularly under the terms of Article 26 – Changes in the Work, Exhibit 2 – Compensation, and Exhibit 3 – Coordination Procedures. The parties have failed to agree to a lump sum price for the CO10. In the course of the performance of CO10, Muskrat has repeatedly revised its

instructions and the scope of the Change Order, and disrupted the Work. Muskrat has attempted, in breach of the Gates Contract, to unilaterally impose a lump sum price of \$3.37 million for CO10 and, of this unreasonable amount, to date has only offered to pay the sum of \$80,000.

57.2 Andritz is entitled to payment for CO10 on a cost reimbursable basis. Pursuant to Article 5.7 of Exhibit 2 – Compensation of the Gates Contract, Andritz submitted its costs for performing the CO10 work in monthly invoices, including the full cost of Andritz’ personnel, equipment, material and third party services of its subcontractors, including Canmec, CRT Constructors Inc., and Grimard, based on detailed timesheets, payroll records, invoices and other supporting documents. These costs reflect the increased expense of the River Diversion on a “best efforts basis” to meet the unrealistic schedule unilaterally imposed by Muskrat, and the increased expense of overcoming the significant disruption created by the timing and complexity of CO10.

(v) **Muskrat has Acted in Bad Faith in Performance of its Obligations under the Gates Contract**

57.3 Parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. Muskrat has exercised its contractual rights and performed its contractual duties under the Gates Contract capriciously, arbitrarily and in bad faith without regard to the legitimate expectations of Andritz.

57.4 As described above, in mid-2015 Andritz agreed to rearrange the schedule and coordinate with its subcontractors, including Canmec, to commence work on the downstream portion of the Works. This adjusted sequencing reflected the fact that the upstream portion of the spillway was not ready for Andritz to commence its work due to Muskrat’s delay and alterations to the Milestones.

57.5 When the upstream section of the Works became ready for mobilization in November, 2015, Canmec and Andritz moved resources to the critical upstream section. Muskrat accused Andritz of “abandoning” the downstream portion of the Works. This ignored the alternation of the Milestones sequence by Muskrat itself and the fact that Andritz had commenced work downstream in an effort to assist Muskrat in ameliorating the effects of its own delay.

57.6 In issuing CO10, Muskrat demanded that the River Diversion be completed by June 15, 2016, after months of delay in issuing a formal Change Order and a refusal to engage Andritz in the necessary preparations for a significant acceleration order. Aside from being a breach of the Gates Contract, this unilaterally imposed deadline is commercially unreasonable, ignored the prior proposals of Andritz regarding scheduling and failed to take into account the time required to mobilize the necessary personnel and resources to accomplish such an extensive Change Order.

57.7 The payment terms of CO10 and its wholly inadequate and unreasonable (and unilaterally imposed) lump sum price for the work demonstrates Muskrat's arbitrariness and bad faith. In October 2015, Muskrat itself acknowledged that the estimated cost of loss of labour productivity alone was \$4.58 million. However, roughly a month later on November 10, 2016, Muskrat issued CO10 for the lump sum fixed price of \$3.37 million for all aspects of the work. This amount is patently unreasonable and manifestly well below the amount required by Andritz to complete the work, particularly on an expedited timetable in the winter, and less than the amount Muskrat itself attributed to the cost of lost labour productivity alone.

57.8 In response to Andritz' objection of to the CO10 price, Muskrat retaliated by inundating Andritz with multiple letters per day containing spurious allegations of delay and poor management. Muskrat's letter campaign against Andritz needlessly diverted the attention and resources Andritz required on Site to perform under CO10. It also started refusing to sign timesheets for Andritz' staff and labour, despite the fact that it continued to oversee Andritz' staff and labour force on Site and was fully aware of the work performed.

57.9 Muskrat's aforesaid conduct culminated in Muskrat's March 17, 2016 threat to make an unjustified call on the Andritz Letter of Credit.

57.10 Muskrat has acted and continues to act in bad faith, capriciously and arbitrarily. Muskrat's aforesaid conduct has been characterized by unreasonableness, arrogance and high-handedness.

57.11 As a result of such conduct Andritz has suffered significant damages, particulars of which will be provided prior to trial.

G. Unjust Enrichment

57.12 In the alternative, Andritz claims the full cost of CO10, including the River Diversion work, on a quantum meruit basis. As a result of Andritz' good faith efforts to perform the Work under CO10, Muskrat has been furnished with a successful river diversion for the Works, including completed dry testing for five spillway gates, operational mechanical and electrical hoist protection systems, successful spillway stop log dry testing, and all associated engineering, procurement and construction (including staff, labour and temporary facilities). Muskrat has been unjustly enriched as a result of its failure to pay fair and reasonable compensation to Andritz for the Work under CO10 issued pursuant to the Gates Contract. Andritz has been correspondingly deprived of fair and reasonable compensation for the CO10 Work.

57.13 There is no juristic reason for the enrichment of Muskrat. To the contrary, Muskrat has manifestly failed to perform its obligations under the Gates Contract, and in particular has made no good faith effort as required under the Gates Contract to reach a negotiated and commercially reasonable amount of compensation commensurate with the amount of work required under CO10.

57.14 Similarly, as a result of CO10, Muskrat has compelled Andritz to issue its own Change Orders to its subcontractors while failing to compensate Andritz for the cost of these subcontractor accelerations. Muskrat has taken the benefit of the work done at the Site, while disclaiming any obligation to pay more than a token amount to Andritz.

(vi) ~~(iv)~~ Muskrat has Failed to Observe the Dispute Resolution Procedure

58. Muskrat has failed to observe and engage in the Dispute Resolution Procedure, which provides for a series of escalated meetings in good faith between representatives of the parties. Article 39 of the Gates Contract also expressly maintains that no further action may be taken before 90 days have elapsed from the issuance of a Notice of Dispute.

59. Following its delivery of Notice of Default, Muskrat made no effort to engage in the required dispute resolution meetings. To the contrary, Muskrat took the unreasonable position that absent a cure by Andritz within ten business days, Muskrat would immediately call on the Letter of Credit.

60. Andritz has been forced to trigger the Dispute Resolution Procedure, yet Muskrat has maintained its intransigence, refusing to engage in any meaningful way ~~at~~beyond the first level of meetings. Muskrat has taken the position that no invoice payments should be made while the parties are negotiating the payment terms for CO10. However, Muskrat has failed to negotiate the pricing of CO10. Since issuing CO10, Muskrat has repeatedly failed to respond to meeting requests from Andritz to negotiate payment and scheduling terms for CO10. Most recently, notwithstanding the fact that the parties agreed to have their respective Vice-Presidents meet on July 6, 2016, Muskrat failed to attend the scheduled meeting. To date, the meeting has not yet occurred.

(vii) ~~(v)~~ Muskrat Cannot Lawfully Draw upon the Letter of Credit

61. Muskrat has threatened to call on the Letter of Credit notwithstanding the clear prohibition contained in Article 39 of the Gates Contract.

62. Article 36 of the Gates Contract specifically provides that liquidated damages constitute Muskrat's sole and exclusive remedy for any purported delay in Andritz' performance, and failure to meet set Milestones.

63. Moreover, and for the reasons set out above, the Change Order is invalid and Andritz is not in default under the Gates Contract. Accordingly, there is no lawful basis upon which Muskrat may call for payment on the Letter of Credit.

H. ~~G.~~ Irreparable Harm

64. If Muskrat calls on the Letter of Credit it would cause irreparable harm to Andritz. Among other things, the threatened call would likely cause the following adverse consequences for Andritz:

- i) a call on a Letter of Credit is an extraordinary development in a construction project – akin to termination – that would attract the attention of the entire hydro power industry both within Canada and abroad;
- ii) Andritz' reputation in the marketplace would be adversely affected. A call on a Letter of Credit immediately indicates the contractor is in financial difficulty, whether the call was justified or not. This “chilling effect” in respect of current and future clients is

particularly damaging in an industry (hydroelectric works) that involves only one or two new projects annually nationwide, which are generally complex and high value. Losing out on a project because of a perceived performance blemish or “risky” profile can result in years of negative commercial consequences;

iii) Andritz’ bank will likely require the other existing standby letter of credit for the Project to remain funded going forward, resulting in a permanent cash burden on Andritz that was never previously anticipated;

iv) the Andritz Group would be required to step in to financially back the call and maintain Andritz’ solvency, thereby pushing Andritz into significant debt to its related companies;

v) Andritz will have significant difficulty attracting and maintaining personnel and staff, which would permanently affect Andritz’ ability to progress the Project and compete in the marketplace. Competitor companies will recruit Andritz personnel more aggressively and it would be difficult to attract new hires. In essence, there would be permanent, harmful staffing consequences for the Project and for Andritz as a whole; and

vi) Andritz possesses credible grounds to be concerned that if the payment is made to Muskrat pursuant to the Letter of Credit, it is unlikely that Andritz will be able to recover the payment if it is later found that Muskrat was not entitled to call upon payment. Muskrat, as a special purpose vehicle with increasing debt obligations and claims against it, would likely be required to use the funds from a call towards existing obligations. There is a credible reason for uncertainty that, upon adjudication of this litigation, the funds that Muskrat drew down from the Letter of Credit would not be available for Andritz to recover if it was ultimately vindicated in its position that a call is premature and unwarranted.

65. The balance of convenience favours the relief sought by the Plaintiff.

AND THE PLAINTIFF claims:

- (i) A declaration that the unilateral imposition of schedule and price under the Change Order is invalid under Article 26 of the Gates Contract;

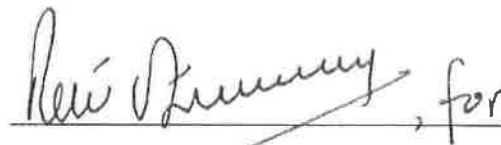
- (ii) A declaration that Andritz is not in default under the Gates Contract, and the purported Notice of Default of March 4, 2016 is of no force or effect;
- (iii) A declaration that Muskrat is not entitled to call for payment on the Letter of Credit;
- (iv) A declaration that Andritz is entitled to a full extension of time in respect of Muskrat Change Orders;
- (v) ~~(iv)~~ An interim and interlocutory injunction restraining the Defendant from calling on the Letter of Credit;
- (vi) Damages for breach of contract, and in the alternative on the basis of quantum meruit, for acceleration works under CO10, currently in the amount of \$35 million;
- (vii) Damages for delay in an amount to be determined and quantified prior to trial of this action;
- (viii) Prejudgment and post-judgment interest pursuant to the *Judgment Interest Act* RSNL1990 c J-2;
- (ix) ~~(v)~~ Costs of this action; and
- (x) ~~(vi)~~ Such further and other relief as this Honourable Court may deem just.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador this 18th day of May, 2016.



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TO: **Muskrat Falls Corporation**
350 Torbay Road Plaza, Suite No. 2
St. John's NL, Canada
A1A 4E1
Attention: Scott O'Brien, Project Manager

ISSUED at the City of St. John's, in the Province of Newfoundland and Labrador this 18th day of May, 2016.

AMENDED at the City of St. John's, in the Province of Newfoundland and Labrador this ___ day of August, 2016.

2016 01G 3118

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

BETWEEN:

ANDRITZ HYDRO CANADA INC.

PLAINTIFF

AND:

MUSKRAT FALLS CORPORATION

DEFENDANT

NOTICE TO DEFENDANT

You are hereby notified that the Plaintiff may enter Judgment in accordance with the Statement of Claim or such order as, according to the practice of the Court, the Plaintiff is entitled to, without any further notice to you unless within ten (10) days after service hereof upon you, you cause to be filed in the Registry of the Supreme Court of Newfoundland and Labrador at St. John's a Defence and unless within the same time a copy of your Defence is served upon the Plaintiff or the Plaintiff's solicitor at the Plaintiff's solicitor's stated address for service.

To: Muskrat Falls Corporation
350 Torbay Road Plaza, Suite No. 2
St. John's NL, Canada
A1A 4E1
Attention: Scott O'Brien, Project Manager

And to: The Registrar
Supreme Court of Newfoundland and Labrador
Trial Division (General)
313 Duckworth Street
St. John's, NL A1C 5M3