

**Astaldi reply to MFC's summary response to Justification for Incremental Compensation**

1. Astaldi replies to MFC's 27 May 2016 Summary Response to Astaldi's 31 March 2016 Justification for Incremental Compensation ("JIC").
2. MFC relies heavily on its contract with Astaldi, so much so that MFC has failed to provide supporting documentation or analysis for much of its response. This level of reliance on the contract is seriously misplaced, and has become an impediment to the parties' negotiations. Where *Sattva*<sup>1</sup> requires a contextual reading, and *Bhasin*<sup>2</sup> requires honest performance of mutual contractual obligations, MFC takes a narrow and self-serving approach. In the result, MFC overlooks the true nature and extent of its duties to Astaldi.
3. Following sanctioning of the Lower Churchill Project by the Dunderdale Conservative government in 2012, Nalcor bound Astaldi to a contract that it knew at the time was incapable of completion for the contract price. Nalcor entered into a Limited Notice to Proceed with Astaldi on 24 September 2013, requiring "*good faith negotiations*" in respect of a scheduled list of items, several of which engaged the parties' reasonable expectations as to local labour productivity. Instead of pursuing good-faith negotiations, Nalcor took advantage of its superior knowledge to negotiate labour productivity out of the contract as a circumstance of *force majeure*, while at the same time negotiating an increase in Astaldi's performance security. Nalcor evidently foresaw the present predicament.
4. As discussed in greater detail in Section 1.0 below, the common law expects much more of public bodies like Nalcor in their bargaining with private corporations. In a public procurement context, well-established legal duties of disclosure exist that were

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<sup>1</sup> *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

<sup>2</sup> *Bhasin v. Hrynew*, 2014 SCC 71.

breached in this case. The facts of this case fall squarely within a body of law entitling Astaldi to a full remedy.

5. MFC has complained that Astaldi cites only the University of Calgary study concerning achievable labour productivity and Nalcor's identification of labour productivity as "the" project risk as a basis for its misrepresentation allegations. It does not lie in Nalcor's mouth to take such a position while Nalcor is in exclusive possession of documents which they refuse to disclose, relying upon discretionary power granted by special-purpose legislative amendments<sup>3</sup> to withhold documentation.
6. Full disclosure of all facts and documents in the possession, custody or control of MFC, Nalcor, the Province and SNC Lavalin, surrounding the review, consideration and recommendation of Astaldi's Proposal, as well as all documents surrounding the application for the federal loan guarantee, will substantiate Astaldi's position.
7. Astaldi notes the recent acknowledgement by Nalcor and the Province of fundamental issues underlying the planning of this project. Nalcor has finally acknowledged publicly that the original capital cost estimates for this project were "*very aggressive and overly optimistic,*" and that, from the outset, the project "*would probably cost what it's going to cost today.*" Premier Ball put it more bluntly, stating that the former provincial government "*grossly underestimated the cost and the schedule*" of this project. As a result, if a settlement cannot be achieved, Astaldi will require access to all layers of audit and reporting information created contemporaneously with these events.
8. Nalcor and the Province knew as they saw the gap between foreign and domestic proponents that the civil works could not be performed for Astaldi's price. Instead of working with Astaldi to ensure a reasonable price, the Province and Nalcor focused their attention on negotiating Astaldi's price down and binding Astaldi to restrictive

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<sup>3</sup> Access to Information and Protection of Privacy Act, 2015, s. 125.

contract terms and conditions. This amounted to an expropriation from Astaldi of much of the capital cost of the Province's civil works for this project.

9. The contract must now be placed on a sustainable financial footing. The contract must be renegotiated to fairly reflect the legitimate expectations of the parties and the true cost of CH0007.
10. The following document expands upon and supports the above points in four sections:
  - a) Section 1.0 - Duty to disclose
  - b) Section 2.0 - Misrepresentation
  - c) Section 3.0 - Response to MFC allegations of performance deficiencies
  - d) Section 4.0 - Astaldi's claims under the Agreement

## **1.0 Duty to disclose**

### **1.1 The common law duty to disclose**

11. While the issues between MFC and Astaldi may fall to be determined by arbitration, there are broader issues here between and among the Province, Nalcor and Astaldi that will engage judicial attention should no comprehensive settlement be reached.
12. MFC argues that *Bhasin* does not introduce a duty of disclosure at the time of contract formation. This simplistic formulation of *Bhasin* is misleading and presents an incomplete picture of the common law as it applies to the facts of this case. All *Bhasin* stands for is the proposition that a general duty to disclose does not arise out of the general duty to perform a contract honestly. *Bhasin* does not stand for the proposition that such a duty cannot arise in appropriate circumstances. The negotiation by an owner of competing proposals for a major public infrastructure project is just such a circumstance.

13. It is settled law that owners have a legal duty to disclose relevant documents and information to bidders prior to executing an agreement. By having information and deciding not to share it, Nalcor became liable to Astaldi for misrepresentation. Silence in such circumstances is the legal equivalent of affirmative misrepresentation.
14. The duty which is engaged in this case is found in two convergent lines of authority: first, a line of authority that can be traced from the House of Lords decision in May 2000 in *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 3)* with respect to the duties of public bodies generally in their dealings with private individuals;<sup>4</sup> and, second, the law following *BG Checo*<sup>5</sup> and *Opron*<sup>6</sup> regarding the liability of owners for misrepresentation by withholding of information from contractors.
15. *Three Rivers* dealt with the potential liability of the Bank of England to a group of private investors for licensing BCCI when it was likely to fail. The House of Lords held that notwithstanding that the Bank of England had jurisdiction to do as it had done, it might still be liable to a private party, in tort, for acting with reckless indifference to the probability of causing injury to private persons. This principle was adopted by the Supreme Court of Canada in 2003 in *Odhavji Estate v. Woodhouse*.<sup>7</sup> In *Odhavji*, Justice Iacobucci, for the Court, delineated a cause of action whereby conscious disregard for the interests of a person interacting with the state may become actionable if the state is aware that harm to a specific individual may flow from their decision.
16. With respect to the duties of owners towards contractors, *BG Checo* in British Columbia and *Opron* in Alberta establish that the withholding of material information by an owner from a contractor is unlawful *per se* and actionable as a

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<sup>4</sup> [2000] 3 All E.R. 1 (U.K. H.L.).

<sup>5</sup> *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12.

<sup>6</sup> *Opron Construction Co. v. Alberta* (1994), 14 C.L.R. (2d) 97 (Alta. Q.B.).

<sup>7</sup> [2003] 3 S.C.R. 263.

misrepresentation. In that respect, the common law mirrors the Civil Code approach in *Bail*.<sup>8</sup>

17. In *Opron*, the court held that the owner had intentionally withheld relevant essential information from the bidders. Importantly, the court relies on Civil Code principles enunciated in another Supreme Court of Canada case, *Québec (Commission Hydroélectrique) v. Banque de Montréal*<sup>9</sup>:

The obligation to inform is an immediate corollary of the allocation of risk. The party assuming the risk has a duty to become informed about it, as this Court held in *Corpex*, supra at pp. 663-664. However, the other party must not, by action or inaction, contribute to distorting the evaluation of the risk by the party who assumes that risk.

[...]

The owner's obligation to inform increases with its expertise relative to the contractor's, particularly when it provides information to the contractor which falls within its field of expertise, and that information is incorrect. Although the contractor must check the information provided to it by the owner, it need not necessarily redo in detail the work done by the owner's experts.

18. These principles come together in *Rain Coast*,<sup>10</sup> a 2016 trial decision in which the province of British Columbia was found to have acted with reckless indifference or wilful blindness in pursuing collateral benefits for the government, knowing that this was likely to cause harm to a private corporation engaged in negotiations with the government. The province's motivations became an important element of proof. One of the determinative findings in *Rain Coast* was that the province had allowed the plaintiff to invest money on the basis of erroneous assumptions as to the cost of permits. These facts are strongly analogous to the facts of the present case.
19. In the present case, Nalcor insisted on Astaldi opening all of its books to Nalcor and SNC Lavalin Inc. to allow a full, line-by-line review of all information underlying

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<sup>8</sup> *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554.

<sup>9</sup> [1992] 2 S.C.R. 554.

<sup>10</sup> *Rain Coast Water Corp. v. British Columbia*, 2016 BCSC 845.

Astaldi's bid. The purpose of this exercise was to ensure accuracy of Astaldi's bid. Astaldi was reasonable in relying on Nalcor to identify fundamental errors that could have catastrophic consequences for Astaldi. Nalcor's failure to disclose its full knowledge of fundamental underestimations constituted actionable misrepresentation by Nalcor.

20. This unlawful conduct, combined with the development of the law respecting public procurement, sets the legal stage for liability of both the Province and Nalcor.

### **1.2 The contractual duty to disclose**

21. MFC argues that labour productivity itself was not an item to be resolved under the LNTP, and therefore not a matter for negotiation in good faith. It is manifestly unreasonable to read Schedule 3 in this way. Schedule 3 raises labour productivity in several places:
  - a) Specifically, item number two of the "KNOWN ITEMS TO BE ADDRESSED" was to "Incorporate any clarifications or revisions confirmed in the Commercial Proposal clarification Forms (Nos. 1 to 20); also agree any outstanding items in the Forms, if any". Availability of qualified labour, and therefore issues of labour productivity, were specifically addressed within the Commercial Proposal Clarification Forms (see no. 5 for example which discussed the inclusion of unavailability of qualified labour as an event of force majeure). Accordingly, MFC had a duty of good faith when negotiating final resolution of this and other issues.
  - b) MFC was required to negotiate item numbers 6 and 7 with Astaldi in good faith pertaining to additional performance security as Company was fully aware that it would not be possible for Astaldi to complete the Project under the financial strictures of the Agreement. In light of this knowledge, MFC unfairly expropriated additional performance security, and therefore capital, from

Astaldi and ensured that such provisions were included in the Survival clause in the likely scenario of termination.

### **1.3 Misrepresentation**

22. As long as the Province, Nalcor and MFC shelter behind special purpose legislation shielding crucial documentation from disclosure, it is not open to Nalcor to criticize Astaldi's claim for lack of documentation.
23. As a result of its line-by-line review of all of Astaldi's backup documentation, assumptions, and estimates supporting Astaldi's bid and prices, including details of all Astaldi labour productivity assumptions and estimates, SNC-Lavalin, and thus, Nalcor, had full knowledge of the gross disparity between the two Italian proponents' labour productivity figures and the productivity figures of domestic competitors for the same work.
24. In meetings with Astaldi after execution of the Agreement, MFC's senior managers, including Ron Power, noted that Nalcor always knew that the productivity rates were unachievable, a fact reinforced by Dr. Ibbs's independent and jointly commissioned 2015 report, finding that the rates actually achieved by Astaldi were within the range of the best achievable on this project, even in favourable weather conditions.
25. Full and honest disclosure by Nalcor and MFC of underlying documentation will establish that, at the very least, Nalcor and MFC shut their eyes to the fact that they were expropriating capital from a private corporation based upon that corporation's imperfect information.

#### **1.3.1 Labour risks**

26. Any confirmation in writing by Astaldi that it understood and accepted risks associated with labour was made in reliance upon representations from Nalcor and MFC that Astaldi would have no difficulty in achieving labour productivity within the range of

Astaldi's estimates in its bid. Astaldi made this clear in Commercial Proposal Clarification Set #5, prefacing its statements with the note that

Astaldi has not felt the need to protect themselves from any non-availability of qualified personnel in Canada because the Client in various occasions declared that the Muskrat Falls project is of key importance and there will be many resources eager to participate.

27. MFC's allegation that Astaldi was in a better position than Nalcor to determine and assess the productivity rates likely to be achieved by a workforce sourced primarily from Newfoundland and Labrador, is at the very least an overstatement, if not outright false. MFC had the benefit of several Canadian consultants, including SNC-Lavalin, a Canadian engineering and construction management firm with significant experience building large scale infrastructure projects in Canada, particularly in remote parts of Canada, to advise as to the labour market.
28. In 2008, Nalcor commissioned a report from JYR Consultants on the labour productivity management and associated risks for the Lower Churchill Project (the "JYR Report"). In this report, the Lower Churchill Project's own personnel identified the inadequate supply of skilled trades people as a risk that was likely to occur and would have serious impact on the Lower Churchill Project. Such personnel included key Lower Churchill Project people such as Lance Clarke, Business Services Manager, and Jason Kean, Deputy Project Manager for Muskrat Falls and the Labrador-Island Transmission Link. In addition, the JYR Report recommended that leaders of the Lower Churchill Project develop mitigation strategies for the identified risks and suggested a transfer of risk to another party through contracts and financial agreements. Recklessly and in disregard of Astaldi's interest, Nalcor, the Province, and MFC kept this information to themselves.

### **1.3.2 Silence or inaction as misrepresentation**

29. Both *BG Checo* and *Opron* are examples of liability attaching to an owner for misrepresentation by withholding of information.



30. Two recent decisions of the Ontario Court of Appeal and the Manitoba Court of Appeal firmly establish the legal proposition that silence and half-truths can be actionable misrepresentations. Company's additional citation from this case law serves only to underscore the fact that Nalcor's actions constitute a misrepresentation in both classes of cases described by the Manitoba Court of Appeal in *Alevizos v. Nirula*:<sup>11</sup>

**When silence constitutes falsity.** There are two main classes of case in which reticence may contribute to establish a misrepresentation: (1) where known material qualifications of an absolute statement are omitted; and (2) where the circumstances raise a duty on the representor to state certain matters, if they exist, and where, therefore, the representee is entitled as against the representor to infer their non-existence from the representor's silence as to them.

### **1.3.3 Omission of material qualifications to an absolute statement**

31. Nalcor made the absolute statement to Astaldi that there would be no issue of availability of qualified manpower. This statement was first made to induce Astaldi to give up lack of availability of qualified labour as a circumstance of force majeure. This statement was repeated during the expressly "good faith" period of negotiation between the Limited Notice to Proceed and the Agreement, in manifest bad faith.
32. Nalcor omitted from its absolute statement, the material qualification that the available labour could not achieve the level of productivity that Astaldi required. This omission was made with full knowledge that such productivity was unachievable by the available labour force. Accordingly, at best, Nalcor's statement was only a half-truth. This falls squarely within the circumstances referenced by the Manitoba Court of Appeal, adopting the speech of Lord Chelmsford in the House of Lords in *Peek v. Gurney* as follows:<sup>12</sup>

...half a truth will sometimes amount to a real falsehood; and I go farther and say, that to my mind it contains a positive

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<sup>11</sup> *Alevizos v. Nirula*, 2003 MBCA 148, at para. 20.

<sup>12</sup> *Alevizos v. Nirula*, 2003 MBCA 148, at para 23, citing *Peek v. Gurney (1873)*, L.R. 6 H.L. 377 (U.K. H.L.).

misrepresentation. The language of the prospectus must be read in the sense in which the Respondents must have known it would be understood.

33. The Manitoba Court of Appeal also quoted Bower and Turner, *The Law of Actionable Misrepresentations*, as follows:<sup>13</sup>

To state a thing which is true only with qualifications or additions known to, but studiously withheld by, the representor, is to say the thing which is not. Such a statement is a "lie", and one of the most dangerous and insidious forms of lie. "If a man", says Chambre J. [in *Tapp v. Lee* at p. 372] "professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood."

#### **1.3.4 Agreement provisions allocating responsibility**

34. Astaldi does not disagree that Article 5.1 of the Agreement assigns full responsibility to Astaldi to furnish and procure the numbers and classifications of its personnel required to perform the work without any dependence or reliance on MFC. Astaldi met its obligations to furnish and procure the numbers and classifications of personnel required to perform the work. The issue lies in the inability of these workers to achieve reasonable international standards of production.

#### **1.3.5 Entire agreement clause**

35. An entire agreement clause does not preclude a claim for misrepresentation if the misrepresentation was on a point of substance that could reasonably have induced the other party to enter into the contract, as is the case here.<sup>14</sup>

#### **1.3.6 Rescission as remedy for misrepresentation**

36. Astaldi has not affirmed the Agreement by continuing to perform:

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<sup>13</sup> *Alevizos v. Nirula*, 2003 MBCA 148, at para 25, citing G. Spencer Bower, K.C., & The Hon. Sir A. K. Turner, *The Law of Actionable Misrepresentations*, 3rd ed. (London: Butterworths, 1974) (at p. 94).

<sup>14</sup> *Zippy Print Enterprises Ltd. v. Pawliuk*, 1994 CarswellBC 4 (C.A.); *Beer v. Townsgate I Ltd.*, 1997 CarswellOnt 3753 (C.A.).

- a) Doing what is required under the contract does not necessarily indicate acquiescence.<sup>15</sup> In addition to knowledge of the misrepresentation, there must have been an unequivocal intention to elect rescission. In other words, it must be shown that Astaldi intentionally relinquished its right to treat the Agreement as at an end and instead treated the Agreement as subsisting.<sup>16</sup> On any reasonable analysis of Astaldi's conduct, such a finding could not be made. Rather, the opposite is true. Both parties intended that Astaldi continue working while settlement discussions proceeded.
- b) Nalcor and MFC imposed an extra-contractual, good faith dispute resolution process on Astaldi in March of 2015, which both parties have since been engaged in since that time, placing Nalcor's new acquiescence argument out of the question.
- c) Astaldi has continued to perform the Agreement in accordance with Article 31.5 on the basis that it is in the best interest of the Project that Astaldi continue to perform while MFC and Astaldi seek to resolve all issues between one another.
- d) Astaldi will continue to perform the work through to the end of July 2016, as agreed in the signed Minutes of Meeting of 8-10 June 2016; however, will reserve the right to terminate in accordance with Step 1, item (e) of those Minutes of Meeting, which allows Astaldi to reinstate its notices of default after the July 2016 negotiations conclude, if they conclude without settlement of all outstanding issues.

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<sup>15</sup> B. MacDougall, *Misrepresentation* (Markham: LexisNexis, 2016), at para 4.53.

<sup>16</sup> B. MacDougall, *Misrepresentation* (Markham: LexisNexis, 2016), at para 4.50; relying on *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490; *Mitchell & Jewell Ltd. v. Canadian Pacific Express Co.* (1974), 44 D.L.R. (3d) 603 (Alta. C.A.).

#### 1.4 *Quantum meruit*

37. MFC argues that the sum claimed by Astaldi for “additional compensation” is inconsistent with a *quantum meruit* approach because it includes profit. In support, MFC cites a decision of the Court of Appeal of Victoria, *Sopov v. Kane Constructions Pty Ltd. (No. 2)*.<sup>17</sup> Even if *Sopov* actually stands for that proposition in the Australian state of Victoria, the law of Newfoundland, which governs this case, clearly stands for the opposite. In *Horwood Lumber (1974) Ltd. v. Barnes*,<sup>18</sup> the Newfoundland Court of Appeal, relying on the Supreme Court of Canada decision in *R. v. Wallberg*,<sup>19</sup> quantified a *quantum meruit* claim as follows:

To put it succinctly, the ratio of *Wallberg* is that the contractor is entitled to the cost plus fair profit margin of necessary work actually performed.

#### 2.0 Response to MFC’s allegations of performance deficiencies

38. For their own reasons, Nalcor and MFC delayed proceeding with Astaldi until 29 November 2013, more than seven months after Astaldi’s April 2013 RFP submission and months after the anticipated contract award date. This delay in project start-up pushed Astaldi’s mobilization into the most difficult and least productive season, depriving Astaldi of the ability to perform the necessary preliminary activities in accordance with the original schedule.
39. Nalcor was fully aware that any delay to the efficient and early mobilization prior to the 2013-2014 winter period would significantly impact Astaldi’s ability to complete the work in accordance with the schedule and the contract price. Despite this knowledge, Nalcor and MFC were unwilling to adjust the work schedule which imposed significant inefficiency and wasted labour during the winter of 2013-2014. Had MFC not insisted that Astaldi maintain a schedule that was impossible as a result

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<sup>17</sup> [2009] VSCA 141.

<sup>18</sup> (1985), 52 Nfld. & P.E.I.R. 251 (Nfld. C.A.).

<sup>19</sup> (1911), 44 S.C.R. 208.

of Nalcor's late start, Astaldi would not have had to incur the significant winter work and excess labour costs which are now the subject of Astaldi's claim.

## 2.1 Detailed responses

### 2.1.1 Project planning

40. MFC alleges that Astaldi's "failures" resulted in a waste of "over three million labour hours and direct and indirect material expenses." This bald allegation is false and unsupported by detailed analysis or documentation.
41. MFC expressed its concerns about project planning in early 2014 by putting significant commercial pressure on Astaldi to adhere to an impossible schedule.
42. MFC should instead have collaborated with Astaldi to re-sequence work starting in the spring. Any reasonable owner would have done so. But to do so would have obliged MFC to acknowledge that its delay in awarding the contract rendered the original contract schedule impossible, a fact which no piece of paper – including the Mutual Release – could change. Instead, MFC disregarded Astaldi's interests and the interests of the project and steadfastly refused to accept responsibility for its role in delaying the start of the project.
43. MFC alleges baldly that Astaldi's "ready to place concrete" activity in its early works schedule slipped five months between January and April 2014. The fact is that:
  - a) concrete could not be placed until the batch plant was operational and the concrete mix was approved;
  - b) it was physically impossible to build the batch plant and approve concrete mixes in accordance with the original contract schedule; and,
  - c) slippage was an inevitable consequence of the late execution of the contract.
44. MFC also relies upon the false factual assertion that Astaldi had only one planner from March, 2014 to September, 2014:

- a) The assertion is factually incorrect. With the exception of a one-week period in June, 2014, there were always two or three planners on site from February-September, 2014.<sup>20</sup> In addition, Astaldi's on-site planners were supported at all time by schedulers in Rome.
  - b) The problems on site did not result from lack of planning. Adjustments to the project schedule were the result of, not the cause of the difficulties encountered on site, including harsh winter conditions, significant overbreak and delays by MFC in design approvals.
45. The growth in Astaldi's workforce, and Astaldi's low productivity, was not due to a lack of Astaldi management and supervision but rather the direct result of MFC's insistence on production at any cost.
46. MFC faults Astaldi for reassigning workers from the Powerhouse to the Spillway in February, 2015, ignoring the fact that this reassignment was the result of MFC's request that Astaldi accelerate Spillway work in order to allow river diversion in 2015. This is poor planning on MFC's part, not Astaldi's part.

### **2.1.2 Project Management**

47. MFC attributes the loss of the 2014 construction season to changes in Astaldi personnel. This is incorrect.
- a) The 2014 production season was not "lost"; it was just far less productive than planned as a result of the delayed start to the Project. Astaldi was delayed in the construction of the batch plant as a result of cold weather conditions. As a result, the concrete could not be tested until June 2014, after which it took MFC 52

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<sup>20</sup> See **Exhibit 1**: Weekly schedule of planners on site, February-September, 2014.

days to approve the concrete.<sup>21</sup> This delayed the first concrete pour to 9 August 2014.

- b) These delays would have been mitigated but for excessive overbreak and MFC's delays in design approvals making it impossible for Astaldi to build the ICS before the winter of 2014-2015.<sup>22</sup> MFC's frustration of ICS design and construction was the direct cause of massive productivity losses to Astaldi and significant excess labour costs.

### 2.1.3 Safety

48. Astaldi's safety record on the project is admirable and MFC's suggestions to the contrary are false and unfounded.

- a) Astaldi's safety record on the project significantly exceeds industry standards. Astaldi has experienced only four lost time safety incidents on the project as of 18 June 2016, by which time Astaldi had worked 7,364,457 hours.<sup>23</sup> Accordingly, Astaldi's lost time incidence rate is 0.11.<sup>24</sup> This rate is far below the 2015 average for the Newfoundland and Labrador construction industry of 1.9.<sup>25</sup>
- b) MFC claims that safety incidents resulted in 2,569 modified workdays. This statement betrays a fundamental misunderstanding of the nature of modified workdays on the project. Modified workdays are assigned by MFC's site medical facility following a wide variety of medical complaints by workers. Most have nothing to do with safety incidents, but are the result of routine aggravation of the workers' pre-existing conditions. Workers experiencing aches and pains will often be assigned modified duty as a result of the physical nature of their work.

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<sup>21</sup> From June 17, 2014 to August 8, 2014.

<sup>22</sup> See Annex C to Astaldi Justification for Incremental Compensation

<sup>23</sup> **Exhibit 2:** C1 Weekly Safety Statistics Summary for Week Ending 18-Jun-2016

<sup>24</sup> Lost-time incidence rates are calculated by multiplying the number of lost-time incidents by 200,000 (being the typical annual hours worked by 100 workers), divided by the total hours worked on the project.

<sup>25</sup> **Exhibit 3:** WorkplaceNL Construction Industry Facts 2015

These modifications are not Astaldi's responsibility, and, notwithstanding statutory reporting requirements, are not reflective of safety on the project. It is noteworthy in this regard that 29% of workers engaged in direct labour for Astaldi in the last year are in their fifties, and 10% are in their sixties. Aches and pains are to be expected in a relatively older workforce engaged in demanding manual labour.

- c) As of 18 June 2016, only 18 workers required medical aid.<sup>26</sup> This is an excellent record in the context of the number of workers and hours worked to date.
- d) MFC states that Astaldi "has had 67 high potential near misses and 98 near misses." As MFC well knows in advancing this specious argument, this statistic does not reflect that the statutory classification of incidents and does not reflect the seriousness of incidents. Reported safety incidents include practical jokes and lapses in completing paperwork. For instance, Monthly Report No. 14 includes a "near miss" on 1 March 2015 in which a "Carpenter Foreman realized that someone had filled his hood with black and blue chalk that is used for chalk lines. Foreman was covered in chalk."<sup>27</sup> Monthly Report No. 2 includes a "High Potential Near Miss" as a result of a service technician having failed to fill out a Front-Line Risk Assessment – a government-mandated form.<sup>28</sup> While Astaldi's reporting of these incidents demonstrates its strict adherence to safety regulations, it does not follow that every reportable incident has resulted in any real hazard to workers.

#### 2.1.4 Quality

- 49. MFC's allegations concerning Astaldi's work quality are similarly irreconcilable with the facts.

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<sup>26</sup> **Exhibit 2:** C1 Weekly Safety Statistics Summary for Week Ending 18-Jun-2016

<sup>27</sup> **Exhibit 4:** Monthly Report No. 14 (MFA-AT-SD-0000-PMA06-0014-01) at p. 7 of 29.

<sup>28</sup> **Exhibit 5:** Monthly Report No. 2 (MFA-AT-SD-0000-PM-A06-0001-01) at p. 10 of 30.



- a) MFC's response gives the impression that there were 349 NCRs outstanding as of 30 April 2016. This is not correct; of 323 external NCRs issued to that date, 264 were closed.<sup>29</sup> On a project in which 172,047 m<sup>3</sup> of concrete had been placed by 30 April 2016,<sup>30</sup> a cumulative total of 323 external NCRs is not in the least excessive.
- b) The average time between a notice to complete a pre-pour inspection and the pour itself is not a "delay". Notices of inspection are routinely and appropriately sent out well before actual pours take place. Pre-pour inspections are progressive, and are the joint responsibility of Astaldi and MFC.<sup>31</sup> A gap between a notice of inspection and a pour might be the result of a slow response by MFC. It might also be reflective of efficient pour scheduling by Astaldi: it will not always make sense to start a pour immediately upon receiving approval, if surrounding pours are also awaiting inspection. There is no indication of how MFC has arrived at a figure of 115,000 "wasted" hours for rework. This figure is simply asserted without foundation, making it impossible for Astaldi to provide a response.
- c) MFC misrepresents Astaldi's response to Corrective Action Request CH0007001-0014. Astaldi did not "recognize" that "it was lacking sufficient resources to perform the basic quality control tasks." In fact, Astaldi asserted that "the current organizational structure" was "sufficient for current work fronts." Astaldi committed to adding personnel as required. MFC approved Astaldi's response.<sup>32</sup>

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<sup>29</sup> **Exhibit 6:** AST-CAN-NCR-LOG-001 dated 1-May-2016 at p. 8.

<sup>30</sup> **Exhibit 7:** Concrete Pouring Executive Summary dated 30 April 2016

<sup>31</sup> **Exhibit 8:** Astaldi's Master Inspection and Test Plan dated 5-Mar-2016 shows that "Hold" items require MFC presence unless otherwise communicated.

<sup>32</sup> **Exhibit 9:** CAR-CH0007001-0014.

## 2.2 Execution

### 2.2.1 Alleged pre-award bid errors

50. It is deeply disingenuous of MFC to allege that errors in Astaldi's proposal were "not readily apparent during the bid review".
51. Astaldi opened its books completely to Nalcor's project engineer, SNC Lavalin. Each line item in Astaldi's detailed schedule of price breakdown included labour and material components. In an effort to squeeze cost out of Astaldi's bid, and to ensure that Astaldi had properly allocated direct and subcontractor labour, SNC questioned Astaldi's assumptions underlying virtually every line item and Astaldi provided SNC with details whenever requested.
52. Astaldi responds to MFC's specific assertions regarding pre-award errors as follows:
  - a) MFC asserts that Astaldi's estimate for concrete embeds was "at least 150,000 hours too low." Even though this figure is much lower than the overall impact of the poor labour productivity on this project, the reason for this underestimate is directly tied to Astaldi's estimates for labour productivity. The responsibility for the labour productivity gap being experienced by Astaldi rests with Nalcor, who knew that Astaldi's labour productivity assumptions were unachievable, but chose to mislead Astaldi into believing that they were achievable in order to expropriate the costs of the project from Astaldi. Astaldi's decision to field fabricate water stop joints was perfectly reasonable assuming the labour could have achieved the productivity expected by Astaldi.
  - b) Astaldi's foundation preparation cost estimate would have been sufficient but for the excessive overbreak by Nalcor/MFC's contractor. As a result, Astaldi was forced to remove tonnes of rock fragments before pouring concrete.
  - c) MFC is correct that scaffolding was not specifically set out in Astaldi's bid. However, Astaldi's bid contained allowances for access to work areas, whether

this was through the use of the ICS, large construction lifts, or otherwise. As a result of MFC's actions, inactions, and directions, Astaldi was forced to utilise significantly more traditional scaffolding than initially anticipated, causing increases in the non-labour costs of the project.

- d) Astaldi's estimate for winter protection was reasonable and would have been sufficient if Astaldi's labour assumptions were correct and Astaldi's ICS and Norseman structure had not been compromised by MFC's actions or inactions. In December 2013, Proco provided a quote of \$18,368,222 for construction of the ICS, including three optional extras, exclusive of tax,<sup>33</sup> and Astaldi reasonably expected that both the ICS and the Norseman Structure could be completed for the amount budgeted. Astaldi did not include costs for traditional heating and hoarding because Astaldi's execution method, which was compromised by MFC's actions or inactions, did not require traditional heating and hoarding.
- e) MFC provides no analysis or reasoning to support its assertion that Astaldi's cost estimate for road maintenance was too low. Any cost overruns related to road maintenance are related to unproductive labour and delay costs causing Astaldi to maintain the roads longer than anticipated.

### **2.2.2 Post award deficiencies**

53. Astaldi does not intend to respond in detail to all of the numerous unsupported allegations made by MFC in this section. However, Astaldi provides the following comments by way of reply:

- a) MFC is responsible for the dewatering failure in January 2014 as MFC handed over pumps and hoses to Astaldi that were not insulated or heated and which froze in the harsh winter conditions:

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<sup>33</sup> Exhibit 10: Proco Quote dated 17-Dec-2013.

- i. At an offsite meeting with MFC on 27 November 2013 – prior to contract execution – MFC advised that discharge water was properly flowing from the Powerhouse area into Sedimentation Pond No. 2, but that freezing discharge lines were becoming a problem because the hoses were not insulated or heat traced. MFC and Astaldi discussed the fact that all site grounds, including ditches and channels, were frozen and snow-covered.<sup>34</sup>
- ii. The dewatering system that was turned over by Kiewit to Astaldi was insufficient, with an unheated hose and no backup.<sup>35</sup> It was unsafe, given the icy conditions, for Astaldi to install a backup, which would have had to go up over the rock face and into the Sedimentation Pond. The line provided by Kiewit froze completely and as a result, water flooded the Powerhouse area.
- iii. In January 2014, the hoses in both the Spillway<sup>36</sup> and Powerhouse<sup>37</sup> areas were frozen, and the ground on which the Spillway and Powerhouse were to be built was covered in ice and water. Astaldi was forced to wrap the hoses with tarps and heat it in order to get the water drained.
- iv. Instead of being able to survey the rock face immediately, Astaldi had to invest many weeks simply to expose the rock face beneath the metres of ice. Astaldi's productivity was seriously impacted as a result.
- v. In April, when the ice melted, there were further failures of the dewatering system handed over by MFC to Astaldi.
- vi. On 26 April 2014, warmer weather and rain caused the diversion channels to fail, in turn causing sedimentation loading and flooding of the

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<sup>34</sup> **Exhibit 11:** Notes of Roger Biles.

<sup>35</sup> Deficiencies in the dewatering system were noted at section 8.1 of **Exhibit 12:** Monthly Report ending 25-Feb-2014.

<sup>36</sup> See **Exhibit 13:** pictures taken 5-Dec-2013.

<sup>37</sup> See **Exhibit 14:** pictures taken 11-Jan-2014.

Powerhouse area. Due to breaches in the impervious layers of the diversion ditch, water was finding its way underground through the rock into the Powerhouse area.

- A) For approximately two weeks, larger pumps were shipped in to help try control excess runoff from drainage diversion ditches.
  - B) Sedimentation Pond 2 failed due to a breach in the sedimentation liner.
  - C) Extra work was required to remove sediment and repair this diversion system. In an example of MFC's refusal to accept responsibility on the project, NCR-CH0007001-0025 was issued to Astaldi.<sup>38</sup>
- b) MFC faults Astaldi for the imposed shutdown of its rock crusher in March 2014. This was entirely a consequence of MFC's late start to the project. Because the crusher was set up in the middle of winter, Astaldi could not use water to suppress dust – water was either not available (because it was frozen), or it would freeze as soon as it was sprayed. Astaldi rented a mechanical system from Quebec, but had to wait several weeks for its arrival and installation.
  - c) The delay in erecting the Norseman Structure was due to the fact that the Spillway area was covered in metres of ice because of the failure of Kiewit's dewatering system.
  - d) There was no delay in awarding the subcontract to Labrador Ready-Mix ("LRM"); LRM commenced its work in December 2014. The erection of the batch plant was delayed as a result of MFC's delays in contract execution. LRM quickly established a temporary batching plant. The permanent batching plant could not be constructed in the middle of the winter.

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<sup>38</sup> Exhibit 15: NCR-CH0007001-0025

- e) The delays in concrete mix approval were largely the result of provision by MFC of inappropriate blasted rock stockpile containing high concentrations of frozen mud.<sup>39</sup> Had MFC not delayed contract award by half a year, LRM could have washed the mud from the aggregate, but this was impossible in the extreme cold.<sup>40</sup>
- f) Any deficiencies in Supermetal's work were not a result of a failure to provide shop inspection by Astaldi.
- g) Difficulties experienced by Astaldi's subcontractors were the same difficulties with Labrador labour unions that have hampered productivity on the project more generally.
- h) Far from Astaldi failing to connect to site power, MFC failed to meet its contractual obligations to provide power to the site. Exhibit 9 of the Agreement records at item 4.6 of the Pre Award Record of Site Inspection that MFC committed to supplying power to various areas of the site, including the Powerhouse and Spillway areas by 30 November 2014. In fact, power was not provided to the Spillway until early 2015. Lack of power has been a persistent problem. On 27 November 2015, MFC advised at Meeting No. 10 that site power was limited to 10 MW, of which 6 MW was required for the camp during the winter months.<sup>41</sup> It was not until early 2016 that Astaldi was provided with the 5 MW of permanent power it required.
- i) Liens by subcontractors are not the result of slow payment by Astaldi. In some cases, subcontractors have submitted invoices with insufficient backup documentation, and their invoices have been properly rejected by Astaldi. In other cases, bona fide disputes exist between Astaldi and the subcontractor.

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<sup>39</sup> See **Exhibit 16**: Photos of Stockpile, taken 7 March 2014.

<sup>40</sup> **Exhibit 17**: LRM letter dated 15 April 2014.

<sup>41</sup> **Exhibit 18**: Minutes of Meeting dated 27-Nov-2015 at 3.02.

Astaldi has made prompt payment of all amounts properly owing to subcontractors.

- j) Astaldi did not fail to provide a survey for the ICS. Survey data was prepared by the end of March, 2014.<sup>42</sup> The ICS was indeed a major failure; the responsibility for that failure lies with MFC, not Astaldi and is further particularised in Annex C.

### 3.0 Astaldi's claims under the Agreement

#### 3.1 Annex A: Time at large

54. MFC has no response to the core allegation that, on 25 March 2015, it imposed an extra contractual "good faith" process "*...to discuss outstanding commercial matters such as FWO's CHR's, ECN's ... etc. plus any other matters of a commercial nature that either party may wish to raise*". As set out in Astaldi's JIC, the result is that time is at large in this contract.
55. As a result of time being at large, the contractual schedule and milestones are no longer applicable or enforceable and therefore there cannot be any delay on the project as long as the contractor completes within a reasonable period of time. Without any delay, there cannot be any delay-related damages. This is not specific to liquidated damages, but to all delay damages.
56. Time being placed at large does not invalidate liquidated damages provisions, it merely renders them inapplicable as there are no longer any milestone dates upon which to measure delay.
57. As explained by O'Connor and Laudan:<sup>43</sup>

. . . without the proper application of an extension of time clause, the contractor remains entitled to additional time to complete but that time period is not defined and therefore time is put at large, with the result,

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<sup>42</sup> Exhibit 19: ICS Survey 31-Mar-2014

<sup>43</sup> C.J. O'Connor, D. Laudan, "Time at Large in Canada" (2011 J. Can. C. Construction Law 71).

among others, that the **owner is not entitled to liquidated or delay damages at all.**

[Emphasis added]

58. Thus, as a result of MFC's actions placing time at large, MFC is not entitled to **any** damages for delay.

### 3.2 Annex B: Labour market conditions

59. As noted in Section B above, Nalcor was aware of the labour market conditions in Labrador and failed to adequately advise Astaldi of these conditions.
60. Nalcor had identified labour productivity as a key project risk, and key Nalcor personnel testified to this at the PUB in hearings prior to project sanction. In fact, it is clear that Nalcor performed detailed analyses of workforce skill and availability.<sup>44</sup>
61. Additionally, the Collective Agreement, imposed by Nalcor on Astaldi, represented that the local labor unions were able to provide qualified staff. Article 7.08(b) of the Collective Agreement states:

The Parties agree that it is fundamental to the success of the Project to have highly qualified trained employees, and accordingly agree to the following:

i) Workers will be selected or name hired by the Contractor and/or referred by the Union from a group of workers that have received pre-employment multifaceted orientation and training, including Site and collective agreement orientation, safety, environment, cultural and gender sensitivity, respectful workplace and productivity, as is set out above in 7.08 a), so that such employees have the skills and tools to succeed;"

62. Astaldi had every reason to believe – on the basis of Nalcor's representations – that its labour productivity assumptions were reasonable and achievable.
63. As detailed in the JIC, it became apparent to Astaldi that Nalcor's representations in this regard were not accurate. This has resulted in significant increases to the number

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<sup>44</sup> Transcript of the Hearing before the Board of Commissioners of Public Utilities held on 13 February 2012.



of manhours required to complete work to date and will continue to impact the Project through completion.

### **3.3 Annex C: Overbreak in excavations & ICS delayed redesign approval claim**

64. In its response to the JIC, MFC has entirely overlooked its own obligations in regards to the construction methodology in the Powerhouse area.
65. As outlined in further detail below, MFC delayed access to the Powerhouse area and turned the area over to Astaldi in an unacceptable condition. MFC further exacerbated these issues by delaying its review and approval of the ICS structure, forcing Astaldi's eventual abandonment of the ICS.
66. These conditions clearly deviate from the circumstances represented to Astaldi by Nalcor during the proposal evaluation phase and from the conditions contemplated in the Civil Works Agreement.
67. MFC refers to Section 3.4.1 of Exhibit 1 of the Agreement, which made Astaldi responsible for surveying the as-built profile of the excavation. This in no way transferred responsibility for the performance of MFC's excavation contractor to Astaldi. Section 3.4.1 of Exhibit 1 concerns "Setting-Out or Implementation of Survey Points and Lines." Section 3.4.1.1 makes Astaldi responsible for "Surveying required...for as-built profile of the excavation and structures." Incredibly, MFC now suggests that a contractual provision making Astaldi responsible for doing the survey necessary to develop and as-built profile makes Astaldi responsible for improper work by MFC's prior contractor. This is a typically aggressive and self-serving reading of a contractual provision plainly confined to surveying.
68. It is no surprise that MFC would seek to shift its responsibility in this regard to Astaldi: the overbreak was significant and made the work more difficult. Astaldi raised the

issue of overbreak with MFC in a letter dated 27 January 2014.<sup>45</sup> MFC response, typical of its approach on this project, was to reject any suggestion of a schedule impact.<sup>46</sup> Astaldi noted the problem of overbreak again on 30 April 2014.<sup>47</sup> Correcting the overbreak required pouring additional concrete, which caused delays and added costs.<sup>48</sup> Astaldi delivered notice of a delay on 24 June 2014, setting out in detail the required tasks which would delay the work.<sup>49</sup>

69. While the contract may have initially assigned surveying responsibility for the Powerhouse to Astaldi, MFC waived that contractual provision and assumed the responsibility itself. During a site visit on 29 November 2013, MFC represented it would provide “...complete survey of the powerhouse excavation by the end of the week [6 December 2013].”<sup>50</sup> This representation was further confirmed in the Astaldi February 2014 Monthly Report, which noted:<sup>51</sup>

During a site meeting Astaldi informed Nalcor that the as-built rock profile in the powerhouse appeared to be significantly different from that shown on the drawings. Nalcor informed Astaldi that it would make changes to the IFC drawings for the powerhouse to adapt to this over break condition.

70. As such, MFC relieved Astaldi of any responsibility to perform a survey for the Powerhouse area.
71. Additionally, Astaldi did not have access, shared or otherwise, to the area at that time, further hindering its ability to perform a survey. The minutes of the 29 November 2013 site visit also indicate that shared access to the Powerhouse area, which MFC indicated would be available as of 2 December 2013, was not available as of that date.

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<sup>45</sup> **Exhibit 20:** LTR-CH0007001-0061.

<sup>46</sup> **Exhibit 21:** LTR-CH0007001-0063.

<sup>47</sup> **Exhibit 22:** Minutes of Meeting No. 16, MOM-CH0007001-0035, 30-Apr-2014 at 3.10.

<sup>48</sup> **Exhibit 23:** Minutes of Meeting No. 20, MOM-CH0007001-0049, 10-Jun-2014, note the placement of concrete at 6.10.

<sup>49</sup> **Exhibit 24:** LTR-CH0007001-0188.

<sup>50</sup> See **Exhibit 25:** Nalcor Minutes of Meeting for Site Visit with Astaldi on 29 November 2013.

<sup>51</sup> See **Exhibit 26:** Astaldi February 2014 Monthly Progress Report at 8.5.

As noted in the JIC, shared access to the Powerhouse area was available on 15 December 2013.<sup>52</sup> Further complicating Astaldi's access to the Powerhouse area was MFC's inability to properly implement and maintain dewatering activities in the area prior to Astaldi's access, leading to substantial ice build-up and significantly impacting Astaldi's ability to begin the work in earnest. As the first monthly report submitted by Astaldi, the February 2014 Astaldi Monthly Report "...sets out the history of the project thus far, identifies issues that Astaldi has faced and is facing..." In this report, Astaldi noted the challenges related to dewatering and ice buildup:

Astaldi found out that the dewatering system installed by the previous contractor and handed over to Astaldi was not suitable for use in winter conditions. This issue was addressed and solved with the replacement of most of the components of said pumping systems.

In the powerhouse, Astaldi proceeded with dewatering and ice removal, after having made some modifications to the dewatering system in order to make it functional in winter conditions.

72. Even if MFC had not assumed responsibility for the revised survey of the Powerhouse excavations, MFC's delays in making the area available made it impossible for Astaldi to perform this survey. A photograph of the Powerhouse floor indicates the significant challenges Astaldi faced in regards to the lack of dewatering and the resulting ice accumulation:



Figure 8: Powerhouse floor – December 2013

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<sup>52</sup> See **Exhibit 27**: Nalcor Letter LTR-CH0007001-0046 dated 17 December 2013.

73. MFC's failure to adequately dewater the Powerhouse area required Astaldi to incur considerable additional costs in order to rectify the situation and complicated the efforts required to proceed with the design of the ICS. MFC, being aware that any further delay in granting Astaldi with the necessary condition to allow surveying activities would be detrimental to the timely performance of the work, committed itself to provide Astaldi with the 3D As built Model of the Powerhouse excavation. This was provided in its final revision only on 27 February 2014. Moreover it was only on 3 April 2014 that MFC, through ECN No. 4 Rev. 1 included the remaining Issued for Construction ("IFC") drawings which incorporated the revised rock surface profile.
74. As detailed in the JIC, the MFC's inability to provide the Powerhouse excavation survey data adversely impacted Astaldi's ability to finalize the ICS design.
75. In its response to the JIC, MFC confirms that the data provided in January 2014 was *"...for information only [and] that Astaldi's reliance on this data for design purposes was at its sole risk..."* Astaldi has asserted, and MFC has confirmed, that this information was preliminary in nature. Notwithstanding numerous requests by Astaldi and concerns raised regarding the excessive over-break in the Powerhouse, MFC did not provide the IFC documentation required to finalize the ICS design until 3 April 2014.
76. Even after this documentation was provided, MFC defeated the utility of the approval process for the ICS. In its response to the JIC, MFC itself confirms Astaldi's position that the excessive over-break led to this design situation:
- Astaldi proposed a method of adapting the ICS foundation design to the [excessive] over break using two concrete pours rather than one . . .
77. By the time the ICS design was conditionally approved in September 2014, MFC's inaction had caused nearly a year of delay to the planned schedule for the ICS.
78. Despite Astaldi's continued efforts to construct and utilize the ICS, the delays and other impacts caused by MFC were simply too significant to be fully overcome. As a

result, Astaldi was forced to abandon this execution strategy – a significant change event.

### 3.4 Annex D: 2014-2015 winter work

79. In its response to the JIC, MFC indicates that Astaldi's obligations under Article 22.7 of the Civil Works Agreement absolve MFC of any liability for forcing Astaldi to work during the 2014-2015 Winter season. MFC neglects or has otherwise disregarded various relevant facts, including the MFC-caused impacts that delayed substantive concrete placement until August 2014. In an effort to mitigate its own impacts, MFC then required Astaldi to perform concrete placement activities through the winter months. This winter work was neither contemplated in Astaldi's tender nor as part of the Civil Works Agreement. As such, this requirement, and all related costs are recoverable by Astaldi.
80. As noted in Section A above, Astaldi's work throughout the first half of 2014 was subject to numerous impacts by MFC. Specifically, as related to the spillway area, Astaldi was impacted by the condition of the area upon turnover (lacking adequate dewatering and full of ice),<sup>53</sup> excessive over-break by MFC's contractors, and the redesign and amended execution plan as a result of the excessive over-break.<sup>54</sup> Additionally, Astaldi was delayed in the construction of the batch plant and as a result, the concrete could not be tested until June 2014, after which it took MFC 52 days to approve the concrete.<sup>55</sup> This delayed the first concrete pour to 9 August. This delay is directly attributable to MFC's failure to fulfil its obligations and responsibilities under the Civil Works Agreement.
81. Further compounding the impacts of MFC's requirement that Astaldi work through the 2014-2015 winter was the exceptionally harsh conditions of the 2014-2015 winter

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<sup>53</sup> See **Exhibit 13**: Photographs of Spillway Area on 5 December 2013.

<sup>54</sup> See **Exhibit 28**: Site Instruction No. 3 dated 23 April 2014.

<sup>55</sup> From June 17, 2014 to August 8, 2014.

season, which brought “...30% greater [snow fall] than normal...” in October and November 2014 and “...about 85% above normal [snow fall] in the Happy Valley-Goose Bay area” in January and February 2015. Temperatures were also 3.4°C colder on average each day of January 2015 and 6.3°C colder on average each day of February 2015. The harshness of the 2014-2015 winter was undoubtedly acknowledged in the December 2014 and March 2015 reports of the Muskrat Falls Oversight Committee, which have since been referred to by MFC as “*anecdotal reports*.” It is unclear how MFC can assert the Muskrat Falls Oversight Committee reports, an independent committee established by the Government of Newfoundland and Labrador to review the status of the Project, are now “*anecdotal*”; particularly considering that the weather information referenced in the JIC is entirely based on actual historical weather data accumulated by the Committee. These reports independently confirm the justification for the additional costs incurred by Astaldi in the 2014-2015 winter period.

82. Barring any other influence, Astaldi would have likely decided to postpone major concrete activities through the winter months, as this winter work was not planned and was not included in its estimated costs for the Project. However, MFC required Astaldi to work throughout the 2014-2015 winter, leading to the substantial additional costs outlined in the JIC.
83. Given the delays caused by MFC and its requirement for Astaldi to work through the winter period, Astaldi confirms its claim for additional costs incurred to work through the 2014-2015 winter. This claim includes an estimated increase to LMAX in the amount of \$91.2 million and additional costs for hoarding works and diesel fuel in the estimated amount of \$15.1 million.

### **3.5 Annex E: Labour wage escalation**

84. As noted throughout the JIC, and elaborated upon within this document, Astaldi has been impacted by several factors solely within MFC’s control. As such, MFC is

responsible for all the cost increases resulting from these issues, including the labour wage escalation that will occur due to the extended Project schedule.

### **3.6 Annex F: Compensation for construction managers**

85. As detailed in the JIC, MFC clearly committed to reimburse Astaldi for the incremental cost increase to retain Mr. Bill Knox and Mr. Roy Collier and their team of superintendents. MFC now seeks to renege upon its commitment to pay after having already received the benefit of the work.
86. Astaldi recognizes the prospective nature of the estimated costs of this claim. At this time, however, Astaldi seeks at least a comprehensive increase to the Contract Price for the incremental cost of the MFC-mandated construction management team; however, only actual costs will be invoiced as they are incurred. Accordingly, MFC will not be invoiced for any incremental costs not incurred by Astaldi.

### **3.7 Annex G: Shift gap**

87. In its response to the JIC, MFC indicates that Astaldi has sole discretion to determine shift schedule. While an accurate statement under the Collective Agreement, this assertion neglects the realities of the Project. MFC is well aware of the challenges faced in making requests of and negotiating with the RDTC. Additionally, MFC's statement that *"Company has requested Astaldi on a number of occasions to amend the shift gap, as per Dr. Ibbs' report, and on each occasion this was rejected by Astaldi"* is factually inaccurate.
88. Astaldi raised the shift gap with the unions in 2014 – well ahead of Dr. Ibbs' recommendations. Astaldi encountered resistance from the union representatives to its suggestion that the second shift start an hour before the first shift, in order to ensure continuity on large pours.<sup>56</sup>

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<sup>56</sup> Exhibit 29: Minutes of Meeting dated 15-Jul-2014, at p. 4.

89. The rejection of these requests has resulted in further impacts to labour productivity, leading to cost increases to Astaldi.
90. The Collective Agreement was included in the RFP documentation and the Civil Works Agreement. As MFC notes in its response to the JIC, the Collective Agreement indicates that Astaldi shall be provided certain latitude in determining the work shifts, as long as the work shifts align with the requirements of the Collective Agreement. As noted above, Astaldi has not been able to apply this flexibility per the terms of the Collection Agreement. Astaldi's inability to utilize the full liberties of the Collective Agreement, and, therefore the Civil Works Agreement, constitute a change to the Civil Works Agreement. Astaldi is entitled be compensated accordingly.

### **3.8 Annex H: Sanitary services**

91. Resolved by Change Order 16, dated 17 January 2016.

### **3.9 Annex I: High angle rescue service**

92. As MFC has indicated in its response to the JIC, Astaldi agrees that it is responsible for ensuring the health and safety of its personnel in accordance with Article 15 of the Civil Works Agreement. Article 15.2 more specifically addresses the procedure by which Astaldi shall comply with its health and safety requirements:

Contractor shall develop and submit to Engineer for Acceptance a detailed health and safety plan for the Work which demonstrates that, in connection with Contractor's performance of the Work, Contractor has identified risks pertaining to the health and safety of Contractor's Personnel, and that effective controls are implemented to prevent accidents and health and safety threats.

93. In accordance with the Civil Works Agreement, Astaldi submitted its Health and Safety Management Plan ("H&SMP") for review and acceptance by the Engineer (acting on behalf of MFC).<sup>57</sup> Within its H&SMP, Astaldi outlines its process for handling

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<sup>57</sup> See **Exhibit 30**: MFA-AT-SD-3000-HS-A28-0001-01 Rev. 8 dated 23 September 2014; however, Rev. 0 of this document was submitted on 15 October 2013, but was marked as "Not reviewed" by Nalcor or its



emergency issues, which exclusively refers to the use of the MFC's medical response team. As this document was originally submitted on 15 October 2013, prior to the signing of the Civil Works Agreement, it is clear that Astaldi's original Contract Price was based on this contemplation of the H&SMP.

94. In its response to the JIC, MFC confirms Astaldi's position that MFC has required Astaldi to have an approved rescue plan that incorporates high angle rescue procedures. This requirement was not specified in the Civil Works Agreement and was not noted or reserved in MFC's acceptance of Astaldi's H&SMP. Therefore, any cost associated with this new requirement institute a change to the Contract Price.
95. Astaldi's response to this requirement was to employ the services of a subcontractor to provide the high angle rescue services.
96. In regard to Astaldi's offer to contribute to training of the Company Fire Department, this proposal was made in an effort to find a more cost effective solution to Nalcor's extra-contractual requirement for Astaldi to provide high angle rescue services.<sup>58</sup> As noted in LTR-0611, a single contribution of an estimated \$40,000 towards training the Company's Fire Department would save MFC an estimated \$30,000 per week. MFC did not respond to this proposal. Additionally, LTR-0611 specifically states:

In any event, [Astaldi] reserves its rights for the cost incurred so far and any future costs incurred for the provision of High Angle Rescue Service

...

97. Therefore, MFC's assertion that Astaldi has "admitted" its contractual and/or statutory obligations or other waived its rights to recover this costs is not in accordance with the factual evidence.

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representative Engineer. Revision 5, dated 31 May 2014, was the first version marked as "Reviewed and Accepted – No Comments".

<sup>58</sup> See **Exhibit 31**: Astaldi Letter LTR-CH0007001-0611 dated 23 June 2015 ("LTR-0611").

### 3.10 Annex J: Accommodations

98. In its response to the JIC, MFC confirms that the Camp Accommodations Complex was not available until March 2014. However, contrary to MFC's position, the Civil Works Agreement clearly obligates MFC to provide camp accommodations:<sup>59</sup>

5.1.1.1 Company will provide a year-long operating Accommodation Complex, located approximately 10 km from the Muskrat Falls Site.

5.1.1.2 At the Accommodation Complex, Company will provide room and board free of charge for the mandatory use by Contractor's staff and its Personnel, as authorized by Engineer.

99. MFC confirmed its responsibility to provide accommodations in September 2013 in the Pre-Award Record of Site Inspection:<sup>60</sup>

#### Excerpt from Pre-Award Record of Site Inspection

4. Company has reported on the Status of Company supplied facilities as follows:
- 4.1 Camp accommodation will be available 30<sup>th</sup> October 2013, in accordance with the manpower requirements submitted by Astaldi;

100. MFC again recognized and confirmed its responsibility to provide accommodations in December 2013:<sup>61</sup>

#### Excerpt from MFC Letter 0049

- o The email of 29-Nov-2013 referenced above also revised the projected need for camp accommodations to mid-January of 2014 beginning with 100 beds. The schedule should reflect a required date of January 13<sup>rd</sup> or 14<sup>th</sup>. For clarity Nalcor can now meet your early Camp Accommodation requirements provided requests are submitted as per the contract.

<sup>59</sup> See Article 5.1 of Exhibit 12 to the Civil Works Agreement.

<sup>60</sup> See **Exhibit 32**: Package CH0007 Pre-Award Record of Site Inspection, and Status of Site Conditions, which was conducted on 11-12 September 2013.

<sup>61</sup> See **Exhibit 33**: Nalcor Letter CH0007001-0049 dated 18 December 2013.

101. However, as noted above, MFC was not able to meet its contractual obligation to provide camp accommodations until March 2014. As such, Astaldi is entitled to recover the cost incurred to provide accommodations for its personnel during the period in which MFC was unable to do so.

### **3.11 Annex K: Poor quality stockpile**

102. Astaldi's position regarding this claim has been established in the JIC and MFC has not presented any evidence to contradict Astaldi's claim.
103. MFC was responsible for providing a suitable stockpile and did not fulfil this obligation.
104. Poor quality of material provided by the MFC from stockpile C2 was unexpected. Astaldi relied upon the experience of its subcontractor in charge of crushing activities, LRM, who worked on the MFC's package CH0006, prior to execution of the Civil Works Agreement. In 2013, LRM used the stockpile of blasted rock in area A as source material for concrete aggregates production. During the relevant crushing activities, LRM did not experience any issues with the quality of raw material provided by MFC. Based this experience, no production difficulties were foreseeable by Astaldi at Proposal stage. By comparing work performed using stockpile A with work performed using stockpile C2, the direct negative effect of stockpile C2 on all related activities, particularly the concrete production and pouring can be seen.<sup>62</sup>
105. On 28 September 2014, Astaldi notified MFC that the contaminated stockpile would result in a shortage of available aggregate materials.<sup>63</sup>
106. In fact, MFC acknowledged the poor quality of the original stockpile in September 2015 by agreeing to supplement the stockpile available to Astaldi.<sup>64</sup> As noted in the JIC, Astaldi retained Golder Associates to provide an independent assessment of the

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<sup>62</sup> **Exhibit 34:** LTR-CH0007001-0201.

<sup>63</sup> See **Exhibit 35:** LRM letter dated 15 December 2014, Exhibit k-7 of Claim Annex K.

<sup>64</sup> See **Exhibit 36:** Nalcor Letter LTR-CH0007001-0796 dated 21 September 2015.

stockpile.<sup>65</sup> This report included several photos that captured the condition of the stockpile.

107. Further, Astaldi has implemented numerous measures to improve productivity of the crushing operation. However, these measures have not led to the profound improvements MFC has implied would occur, further indicating that the root cause of the stockpile issues is related to the quality of the stockpile itself, rather than the processes being utilized. MFC has confirmed this reality, and further admitted its liability for issue, by its agreeance to provide Astaldi access to other additional stockpile material during the start of the 2016 construction season.

### **3.12 Annex L: Site blockade**

108. In its response to the JIC, MFC has confirmed Astaldi's impact through 21 August 2015. However, despite temporary improved production with limited staff prior to 28 August 2015, Astaldi was not able to remobilize its full workforce until that date. As such, Astaldi maintains that the full impact period for this site blockade was 15 days.
109. MFC's assertion that this blockade was in some way related to mismanagement by Astaldi is entirely unfounded. In fact, by proposing a time extension of 7 days, MFC has previously confirmed that this blockade event was not due to any fault of negligence of Astaldi.<sup>66</sup>
110. Also contrary to MFC's response, Astaldi is entitled to compensation per Article 29.6 of the Civil Works Agreement:

During any period in which the performance of the Work is prevented because of Force Majeure, Contractor and Company shall mutually agree either (1) to continue maintaining Contractor's Items and Personnel at or near the Worksite, in which case Company will reimburse Contractor at the rates outlined in Exhibit 2 - Compensation which is intended to cover only those expenses incurred by Contractor

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<sup>65</sup> See **Exhibit 37**: Golder Associates Report dated 23 May 2014.

<sup>66</sup> See **Exhibit 38**: Nalcor Letter LTR-CH0007001-0855 dated 27 October 2015.

as a direct result of such prevention of performance, or (2) to demobilize Contractor's Items and Personnel at Company's expense until this Agreement is terminated in accordance with Article 24.

111. In the case of the August 2015 Site Blockade, Astaldi and MFC employed a combination of these two circumstances, both of which result in Astaldi being entitled to compensation for the blockade period.

**3.13 Annex M: Reimbursement of subcontractor staff**

112. In its response to the JIC, MFC repeats its previous position that these costs are not reimbursable, as it believes these costs are reimbursed within the Non Labour Component of the Contract Price.
113. As stated in the JIC, the only method for Astaldi to be reimbursed for labour of any kind is within the Labour Component. As such, MFC's assertion that these costs are recovered within the Non Labour Component lacks basis, contractual or otherwise. As it stands, Astaldi has no way to be reimbursed for these costs, to which it is contractually due.

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