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Commission of Inquiry Respecting
the Muskrat Falls Project
5th Floor, Suite 502
Beothuck Building
20 Crosbie Road
St. John's, NL A1B 3Y8

VIA E-Mail

Attention: R. Barry Learmonth, Q.C., Commission Counsel
barrylearmonth@muskratfallsinquiry.ca

Dear Mr. Learmonth:

**Re: Newfoundland and Labrador Building and Construction Trades
Council and Resource Development Trades Council of
Newfoundland and Labrador**

This correspondence is intended to provide some additional background on the owner's involvement in labour relations at the Muskrat Falls special project worksite.

As you are aware, the Muskrat Falls Project is a Special Project. Subsection 2(u) of the Labour Relations Act, RSNL 1990 c-1 (the Act), defines a special project as any undertaking or ancillary work in the furtherance of a long-term major construction project. Section 70 (1) of the Act permits the Lieutenant-Governor in Council to declare a project to be a "special project" through issuing an Order in Council (an "SPO").

The Muskrat Falls Special Project Order (Regulation 67/13) declared the Lower Churchill Hydroelectric Generation Project to be a Special Project.

The Order provides that there is a single collective agreement, and the exclusive entities which are permitted to bargain in relation to that agreement are the Muskrat Falls Employees Association (the "MFEA"), on behalf of all the various contractors, and the RDTC, on behalf of its constituent local unions. The special project collective agreement identifies Nalcor Energy Inc. ("Nalcor") as the project owner.

Nalcor has taken this role to include the promulgation of various policies, including a drug and alcohol policy, a search and seizure policy, a site access policy, among others.

Involvement In Labour Relations

We have been involved in a number of grievance arbitrations which have illustrated Nalcor's involvement in labour relations on site. Attached, please find the decision of Arbitrator Morgan Cooper in **Grievance #132**. Specifically, we would draw your attention to Mr. Cooper's recitation of the evidence of David Clark, on pages 19 through 25.

The MFEA's **by-laws** and **articles of incorporation** were also entered as exhibits through Mr. Clark at that arbitration, and have been enclosed for your reference.

Mr. Clark is a lawyer, the owner of D.W. Clark Services P.C. Inc. based in Fredericton, New Brunswick. Mr. Clark has a part-time role with Nalcor as a Senior Labour Relations Advisor for the Muskrat Falls Corporation (the "MFC"). The MFC is a subsidiary of Nalcor, and together with the Lower Churchill Management Corporation, is involved in the administration of its commercial contracts. The MFC is not formally part of the MFEA.

In Grievance #132, Mr. Clark testified he was involved in negotiating the collective agreement between the MFEA and the RDTC. He has also provided advice to the MFEA in relation to the organization's incorporation. Mr. Clark and other colleagues at his firm frequently appear and participate in grievance meetings as counsel for the MFEA.

Mr. Clark admitted the MFEA is a corporation without share capital that is comprised of Nalcor, as its founding member, and the contractors, as its subscribing members. He described a pyramid, with Nalcor at the top. In reviewing By-Law No. 1 of the MFEA, Mr. Clark gave evidence that the reference to the "Lead Member" of the MFEA is in fact a reference to its founding member, Nalcor Energy: pages 19, 20 of the decision:

Mr. Clark stated that he provided advice in relation to the incorporation of the Muskrat Falls Employers' Association Inc., including the drafting of the Articles of Incorporation. He indicated that there are a number of corporations in the Lower Churchill Project and agreed that Nalcor would be at the top of the pyramid, with Muskrat Falls Corporation and the Lower Churchill Management Corporation as two of its subsidiary or related corporations.

...

Mr. Clark stated that the primary purpose of the MFEA is to provide advice and recommendations to contractors, when requested, on the application and interpretation of the Collective Agreement. He agreed that the MFEA is a corporation without share capital and that it is comprised of Nalcor, as its founding member, and the contractors. In reviewing the by-laws of MFEA, Mr. Clark stated that the reference to Lead Member is a reference to the founding member, Nalcor Energy.

The MFEA was incorporated on January 28, 2013. Section 4, Schedule "A" to the MFEA's articles of incorporation give the MFEA broad powers, including "*exclusive representation of all members of the corporation in matters relating to employment on the Project, including without limitation...*" The articles cite these powers to include, among other things, collective bargaining, the administration of the collective agreement, and the coordination and resolution of grievances and all other manner of disputes.

Section 5, Schedule "B" to the articles of incorporation state there are three "classes" of membership: incorporation members (the incorporating directors), the lead member (Nalcor), and the contractor members. The incorporating directors of the organization include Normand Bechard, Hillary Hynes, Ed Over, Lance Clarke, and David Clark.

The incorporating documents state the minimum number of directors are three (3), and the maximum number of directors are twelve (12). The contractor members have, as a class, the right to elect and remove up to five (5) directors. The remaining seven directors are selected by the Lead Member: Schedule B, Section 5 of the articles.

The organization's by-laws provide further confirmation that the Lead Member, Nalcor, is the controlling mind behind the MFEA and all labour relations decisions on site.

For example, a quorum of the MFEA's *directors* are required to transact the organization's business: Sections 12 & 13 of By-Law No. 1. Section 44 of By-Law No. 1, on page fourteen, states that a quorum of the directors shall be three, provided however that a quorum shall not be deemed to exist unless the directors appointed by the Lead Member are both present and form a majority of those present at the director's meeting.

Similarly, there may be a meeting among the *members* of the organization, including all of the various contractors. In order to transact any business at such a meeting a quorum is also required. This time two members may form a quorum, provided a representative of the Lead Member is present: By-Law No. 1, Sections 12-13, which states as follows:

12. No business shall be transacted at the meeting of the Members unless a quorum of Members is present at the commencement of such business.

13. A quorum of Members for the transaction of business shall be two (2) provided that a quorum shall not be deemed to exist unless a representative of the Lead Member is present.

These clauses in the by-laws are buttressed by Schedule B, Section 5(b) of the Articles of Incorporation, which defines the "Lead Member" and which contemplates the Lead Member having more than one vote at any given meeting of the membership:

Schedule B, Section 5: (b) Lead Member. The Lead Member shall be either the proponent of the Project or such other person, corporation, partnership, firm, joint venture or other entity engaged by the proponent from time to time to represent its interests respecting labour relations affecting the Project. At meetings of members of the Corporation, the Lead Member shall have more than one vote. The Lead Member shall have the right to appoint and remove one or more directors of the Corporation provided that the total number of directors for the Corporation does not exceed the maximum number of directors set out in the Articles.

The foregoing demonstrates that the Lead Member, Nalcor, may appoint the majority of the MFEA's directors and controls a quorum of its voting members.

Sections 76 through 78 of By-Law No. 1 deal specifically with labour relations. Section 78, on page twenty-two, provides that every contractor member of the MFEA shall abide

by and comply with any direction given to it by the Board of Directors, a majority of which is comprised of individuals appointed by the Lead Member.

Consistent with the foregoing, in Grievance #132, David Clark, on page twenty-two of the Cooper decision, stated that a member contractor which refuses to follow a direction from the MFEA will be expelled from the association. If a contractor is expelled from the association, it can no longer operate on site, meaning a contractor which refuses direction from the MFEA does so at the risk of its commercial contract:

"Mr. Clark ... noted that if a contractor chose not to follow a direction from the MFEA, the by-laws dictate that the contractor would have to leave the MFEA."

In Grievance #132, Lyndon Quinton, President of Speuta Security, one of the contractor members on site, rehired an employee without a referral from the union because Speuta had been directed to do so by David Riffe. Mr. Riffe, Safety Manager with the Lower Churchill Project, wrote to Mr. Quinton on the letterhead of not the MFEA, but rather, the Muskrat Falls Corporation. In Quinton's testimony, Quinton noted Speuta's commercial contract is with the MFC, and even though the direction was the first of its kind that he had experienced, Speuta did not wish to ignore its client's interests: page thirty-two. In Clark's testimony, on page thirty-three, Clark stated he drafted Riffe's correspondence to Quinton at the request of Riffe and Scott O'Brien, Nalcor Project Manager.

David Clark's evidence in Grievance #132 has been subsequently stipulated to by the MFEA and the RDTC as evidence in other cases, including Grievance #243, a drug and alcohol testing case in which the MFEA took the position a site access ban imposed on the grievor by the owner was inarbitrable, as it was a decision of the owner, Nalcor.

Nalcor has various employees who are present on site and who are directly involved in labour relations and site access issues, including Mark McGrath and George Kean. In the view of the RDTC, a revocation of site access has always been a disciplinary issue subject to the grievance and arbitration procedure. There are two decisions from our Court of Appeal in relation to the Long Harbour Project and the Hebron Project which state that when an owner makes decisions which affect the labour relations regime in place for the project, the owner's decision is subject to the grievance process: *LHEA v. RDTC*, 2013 NLCA 9, and *HPEA v. RDTC*, 2017 NLCA 28. Nalcor has insisted, however, that its actions are shielded from arbitration under the collective agreement.

We trust the foregoing serves to illustrate the close relationship between the MFEA and its Lead Member, Nalcor Energy.

Regards.

MARTIN WHALEN HENNEBURY STAMP



Michael S. Gillingham