

NR 2017-


TITLE: Review of the Decision to Sanction and the Execution of the Muskrat Falls Project

ISSUE:

Whether to undertake a Commission of Inquiry into the Muskrat Falls Project

RECOMMENDATIONS:

It is recommended that:

- 1) Approval be given for the Office of the Legislative Counsel, in consultation with the Department of Natural Resources and the Department of Justice and Public Safety, to draft an Order, pursuant to section 3 of the *Public Inquiries Act, 2006*, to
 - a) Establish a Commission of Inquiry (the Commission) into the sanction and execution of the Muskrat Falls Project (the MFP or the project);
 - b) Appoint a Justice of the Court of Appeal or the Supreme Court Trial Division as Chair of the Commission pending a discussion with the Chief Justice of the relevant court and the Minister of Justice and Public Safety;
 - c) Appoint 2 additional members from the list of potential commissioners, attached as Annex 2, subject to agreement of the Justice referenced in b) to form the Commission as a panel;
 - d) Designate the Minister of Natural Resources as the minister responsible for the Inquiry;
 - e) Set the Terms of Reference for the Commission of inquiry (Inquiry), substantially along the lines of the attached as Annex 3, as may be amended by Cabinet;
 - f) Identify June 30, 2019 as the date for the delivery of the Commission's report; and,
 - g) Set the remuneration of the members and the terms of appointment;

- 2) Approval be given for the Clerk of the Executive Council, when required, to issue the necessary Order in Council to make the Order referenced in Item 1.

BACKGROUND:

In light of the magnitude of MFP cost overruns, various groups of stakeholders and the public in general have made calls to examine these and related aspects of the project. In addition to public commentary, Nalcor's CEO has stated publicly that the projected construction costs, electricity demand, and energy prices to inform decision making pertaining to MFP sanctioning were "unrealistic." On September 28, 2017, Premier Ball announced it is now appropriate to proceed with an Inquiry into the project. The Premier noted in his announcement that the MFP is now approximately 83% complete.

With so much of the project complete, there are fewer concerns about the potential for an Inquiry to divert Nalcor resources and attention from MFP construction, thus leading to further project delays. While these concerns have abated, the construction of the project continues to require strong focus on risk mitigation, cost control and governance. For example, EY's "*Assessment of implementation of EY Interim Report recommendations*" (released on August 31, 2017) noted that the MFP is: currently in the period with an expected high planned spend rate; approaching a period of intensive activity involving many contractors and interfaces between them; and at the point where a series of complex and significant activities are to be initiated.

To date, various citizens and stakeholder groups have used the term "forensic audit" to generally describe a formal and thorough review of how and why the MFP was sanctioned, and why actual MFP costs and timelines have greatly exceeded the projections at sanction. However, as detailed in Annex 4, the term forensic audit generally refers to a relatively narrow undertaking employed when there is an indication of wrongdoing, and it cannot answer many of the questions that have been raised about the MFP. While options to undertake such review either through reference to the Auditor General (AG) or to the Board of Commissioners of Public Utilities (PUB), or through the Professional Services and Internal Audit Division of the Department of Finance exist, proceeding to establish a

Commission of Inquiry under Part I of the *Public Inquiries Act, 2006 (PIA)* appears to be the most transparent and comprehensive mechanism to examine the broad scope of issues pertaining to the MFP that have given rise to the concerns of various stakeholders and the Government. An overview of these other potential review options is provided in Annex 4.

Considerations for the Scope of the Inquiry


The scope of potential questions that have arisen with regard to various aspects of the MFP is very broad. Accordingly, addressing those questions through a Commission of Inquiry will require that the Commission is provided with broad Terms of Reference. [REDACTED]

[REDACTED] In addition, a broader scope will increase the Commission's need to retain experts and expert witnesses. Collectively, this will increase the cost and overall time it will take to complete an Inquiry of this magnitude. While these considerations are addressed in more detail below in the Financial Considerations [REDACTED] sections of this submission, the attached draft Terms of Reference reflect a very broad scope of questions for the Inquiry. [REDACTED]

Overall Structure of the Terms of Reference

The draft Terms of Reference (appended as Annex 3) provides for a comprehensive examination of the MFP structure along five primary lines of examination: (1) issues pertaining to MFP sanctioning; (2) issues pertaining to MFP execution; (3) issues pertaining to the exemption of the MFP from PUB oversight (4) issues pertaining to government approval and oversight of the MFP; and (5) forward-looking recommendations related to the foregoing. The following sections provide an overview of various elements of the proposed Terms of Reference.

[REDACTED]



(1) Sanction Decision

The draft Terms of Reference include a review of certain aspects of the decision to sanction the MFP, including Nalcor's development of options to address the electricity needs of Newfoundland and Labrador Hydro's Island interconnected customers, and the reasonableness of the forecasts and assumptions adopted.

(2) Execution of the MFP

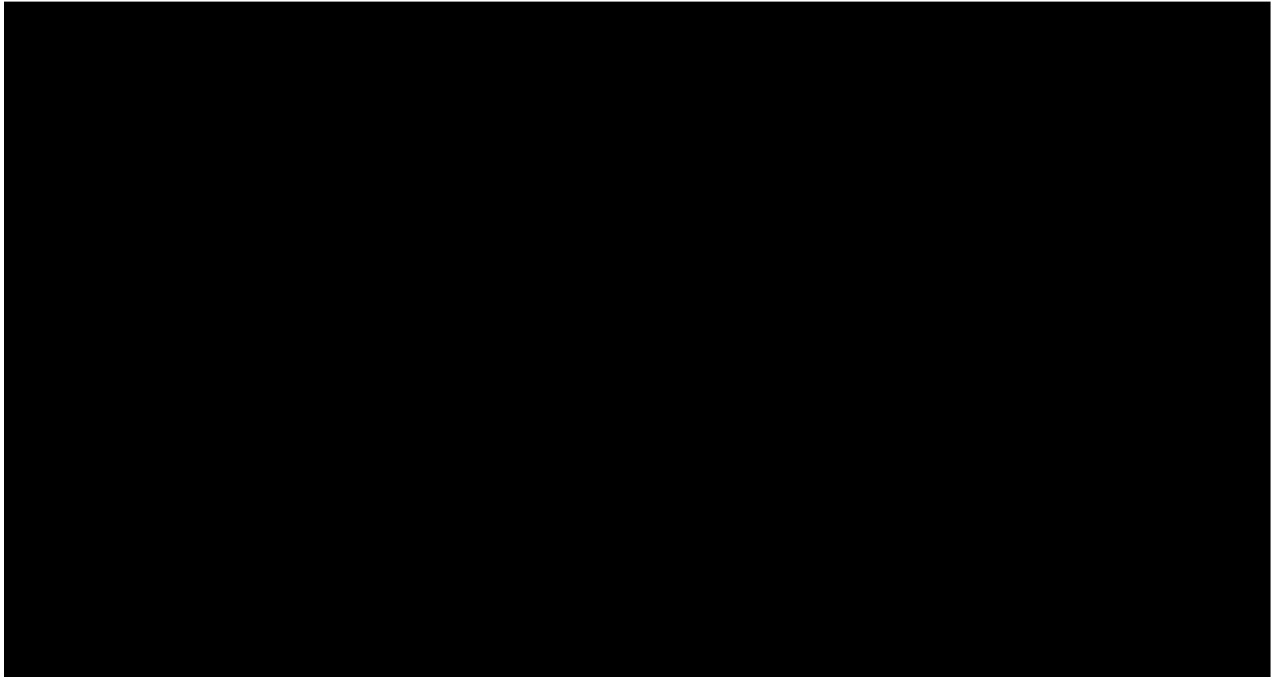
With regard to the execution of the MFP, the proposed Terms of Reference would enable the Commission to inquire into the reasons for the differences in the purported costs of the MFP at the time of sanctioning versus the actual costs incurred during project execution. This includes a review of arrangements with contractors; and the circumstances surrounding the 2013 SNC-Lavalin Risk Report. This line of examination is intended to reveal if there were unnecessary costs or poor project management practices. Such a review would likely require the input of multiple technical experts, including auditors.

(3) Exemption from PUB Oversight

The draft Terms of Reference includes a review of the decision to exempt sanction of the MFP and MFP costs from PUB oversight. The Commission is asked to consider what impact these decisions had on the MFP, and whether they were reasonable.

(4) Government Approval and Oversight

The draft Terms of Reference includes a review of government's role in the sanction and oversight of the MFP. This may include the role of this Government and past governments in MFP decision-making. It should be noted, however, that the Terms of Reference do not limit this review to only Cabinet decision-making, and leave it to the Commission to determine the level and depth of the review it needs to undertake. As such, the Inquiry may extend to deputy ministers, assistant deputy ministers, directors, managers, etc.



(5) Forward-Looking Recommendations

With regard to Nalcor oversight and PUB regulatory authority, the draft Terms of Reference enable the Commission to make forward-looking recommendations related to the oversight structures of Nalcor and publicly-funded large scale projects, and PUB matters that the Commission has reviewed in the Inquiry.

In order to avoid duplication of work, it should be noted that in 2014, GNL called for an independent review of the NL electricity system as it transitions into an interconnected system, to make forward-looking recommendations on the optimal structure, governance and regulatory processes. Power Advisory, a consulting firm, was selected for the work, and submitted a report entitled “Review of the Newfoundland and Labrador Electric System” on July 20, 2015. This report detailed a number of electricity industry best practices, including some related to the oversight of Nalcor and PUB regulatory authority. These best practices are further discussed in Annex 5.

North Spur, Methylmercury, Mud Lake

There are three high-profile MFP environmental issues that have not been specifically included or excluded in the Terms of Reference: the North Spur; methylmercury; and Mud

Lake. With respect to North Spur, the engineering design, stabilization work and relevant independent expert reviews have been completed. However, if GNL wishes to undertake or order additional actions, such as a separate proceeding or review, it might not want to wait for the Inquiry to conclude before acting. Asking the Inquiry to address the North Spur could diminish GNL's options for acting in the short-term while the Inquiry considers the issue. With respect to MFP methylmercury and Mud Lake 2017 flooding concerns, GNL has already taken definitive actions to address these concerns, respectively, by establishing the Independent Expert Advisory Council and by appointing Dr. Karl-Erich Lindenschmidt to study and report on the flooding, which he submitted to Government on September 29, 2017. Although these and other environment-related issues are not mentioned in the attached draft Terms of Reference, the Commission may adopt a broad interpretation and expand the Inquiry to address them, unless they are specifically excluded in the Terms of Reference. Further discussion is provided in the Environmental Considerations section.

ALTERNATIVES:

1. Proceed immediately to establish a Commission of Inquiry into the Muskrat Falls Project (the MFP) examining Nalcor and the Provincial Government's respective roles in sanctioning and executing the MFP; select members of the Commission; designate the Minister of Natural Resources as the minister responsible for the Inquiry; approve the Terms of Reference for the Inquiry, substantially as outlined herein; identify June 30, 2019 as the date for the delivery of the Commission's report; and establish the remuneration and terms of appointment of the members of the Commission.

(Recommended)

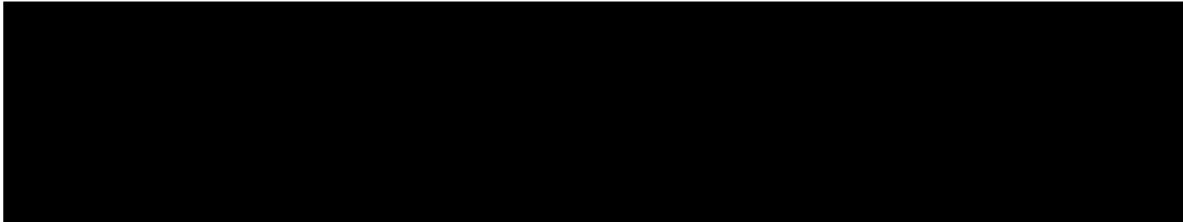
Advantages

- Represents the most thorough option to review the sanctioning and execution of the MFP
- Provides maximum transparency with regard to elements of the Inquiry
- Provides for an impartial, independent assessment of the issues raised in the Terms of Reference
- Provides a response to stakeholder requests to have the MFP made subject to a review as soon as possible

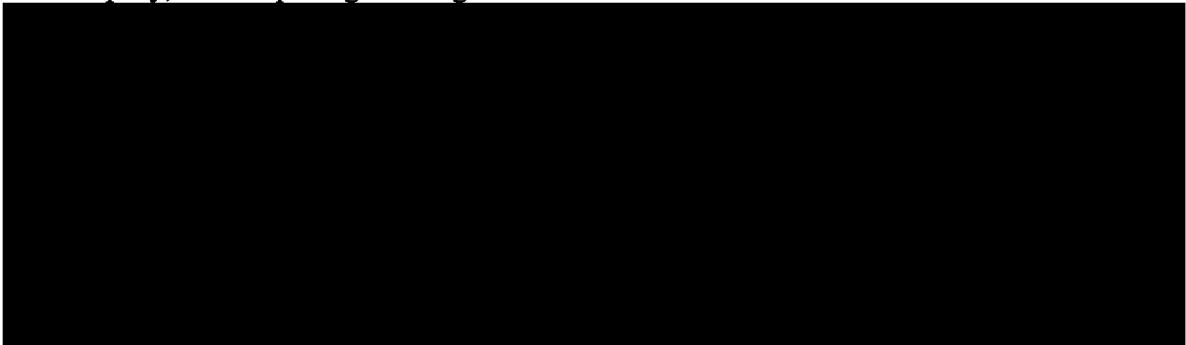
- Will help explain Nalcor's assumptions, analysis, planning and execution of the MFP
- May demonstrate Nalcor's interactions with government in selecting the options and recommending the MFP for meeting forecast power supply needs

Disadvantages

- Likely the most costly option to examine decision to sanction and execute the MFP



- Proposed June 30, 2019 deadline might not provide adequate time to complete the Inquiry, thus requiring future government to decide whether to extend



- May potentially divert Nalcor resources from MFP completion

2. Proceed immediately to establish a Commission of Inquiry into the Muskrat Falls Project with terms of reference that are narrowed from the ones in the attached Annex 3 to, for example, exclude the Provincial Government's role in sanctioning and executing the Muskrat Falls Project; select a Commissioner or panel for the Inquiry; designate the Minister of Natural Resources as the minister responsible for the Inquiry; approve the Terms of Reference for the Inquiry, substantially as outlined herein; identify June 30, 2019 as the date for the delivery of the Commission's report; and establish the remuneration and terms of appointment of the member(s) of the Commission.

Advantages

- Will help explain Nalcor's assumptions, analysis, planning and execution of the MFP

- May demonstrate Nalcor's interactions with government in selecting the options and recommending the MFP for meeting forecast power supply needs
- Provides for an impartial, independent assessment of the issues raised in the Terms of Reference

Disadvantages

- Ignores government's role in sanctioning the project and approving the financing model
- The proposed June 30, 2019 deadline might not provide adequate time to complete the Inquiry thus requiring a future government decide whether to extend the deadline

- May potentially divert Nalcor resources from MFP completion

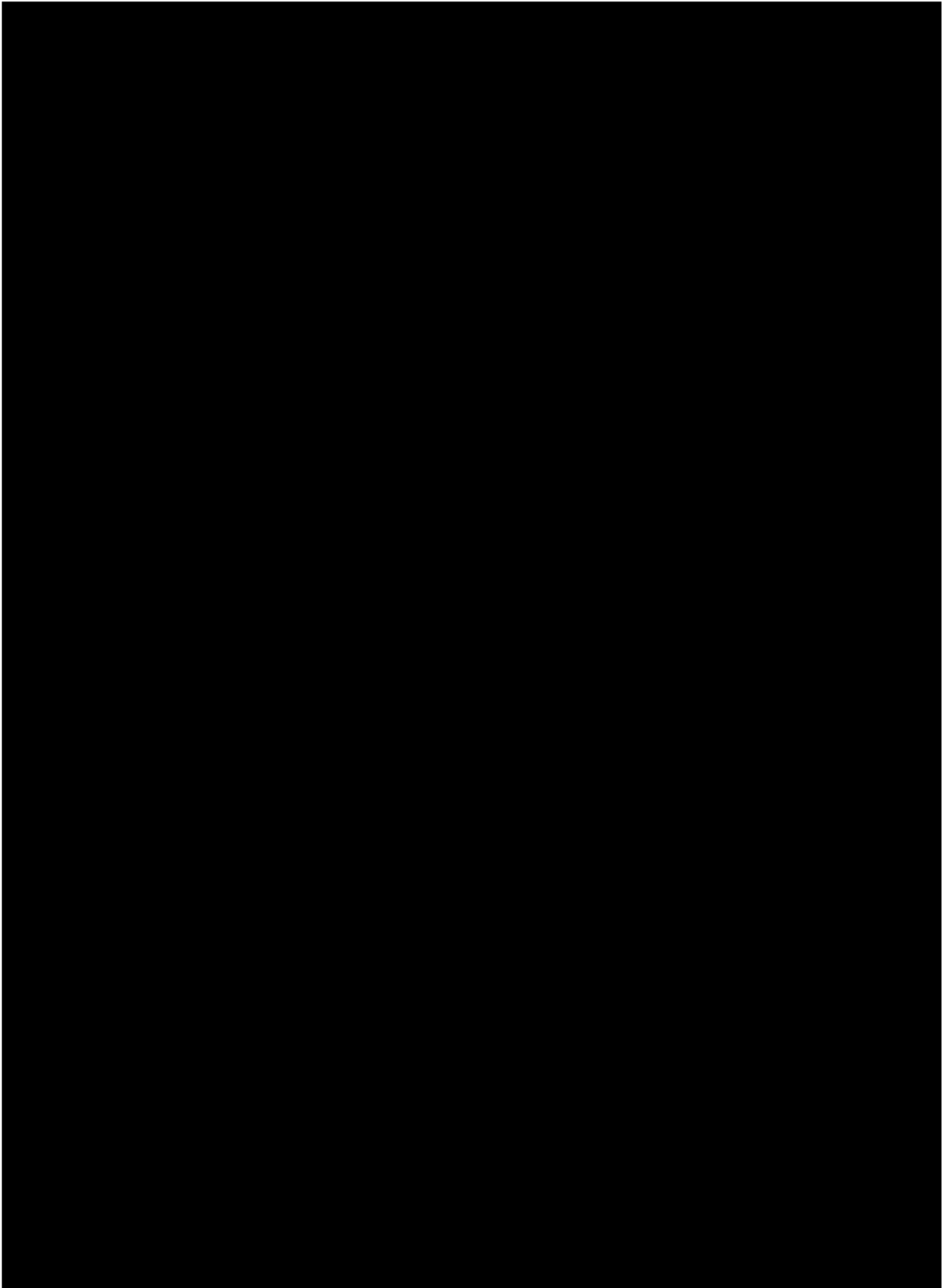
3. Direct NR and JPS to give further consideration to the additional options outlined in Annex 4 and return to cabinet with an alternative recommendation.

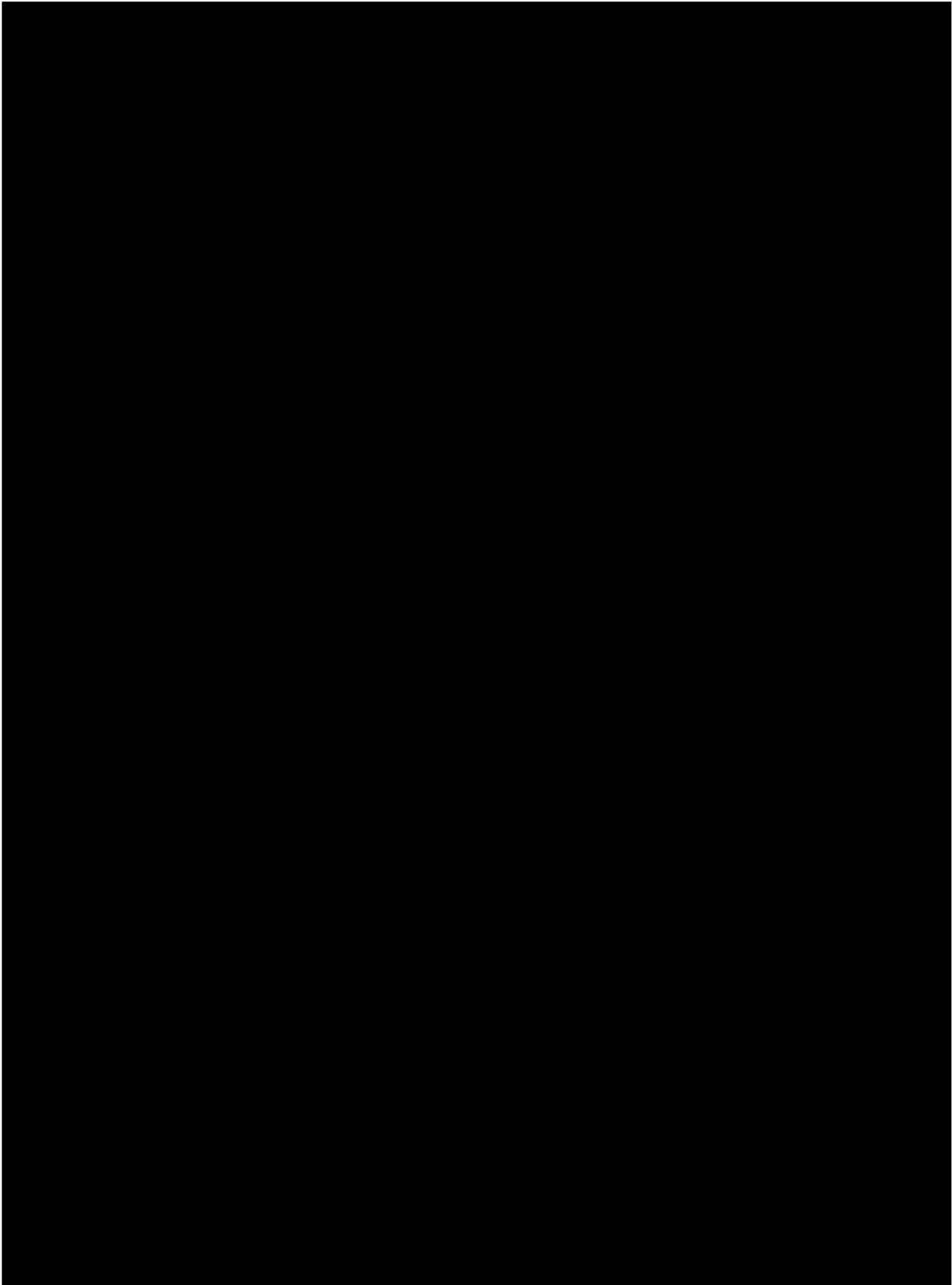
Advantages

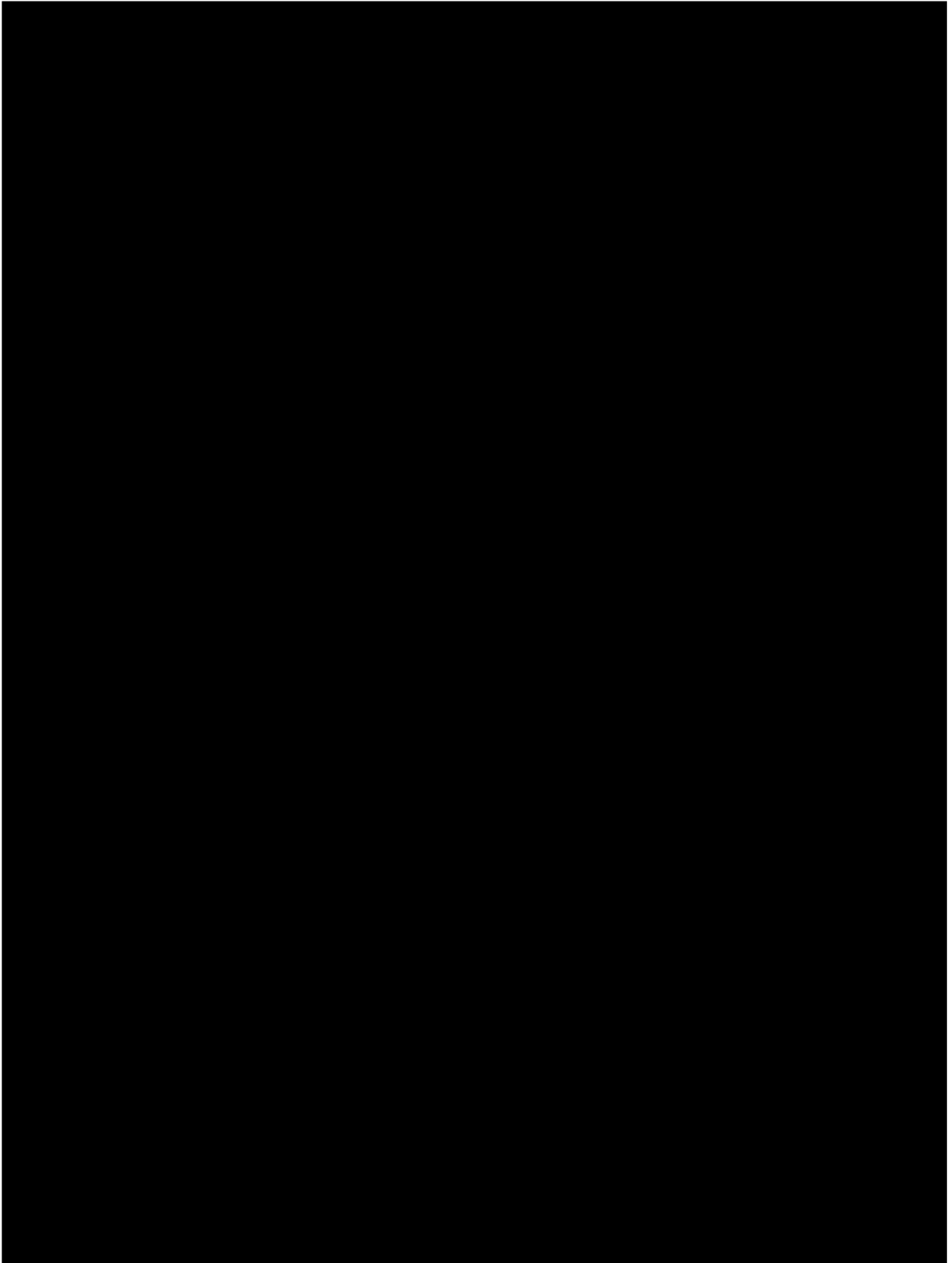
- Allows more time to seek an alternative with lower cost and shorter time frame for completion
- May enable other independent review mechanisms such as the PUB and Auditor General

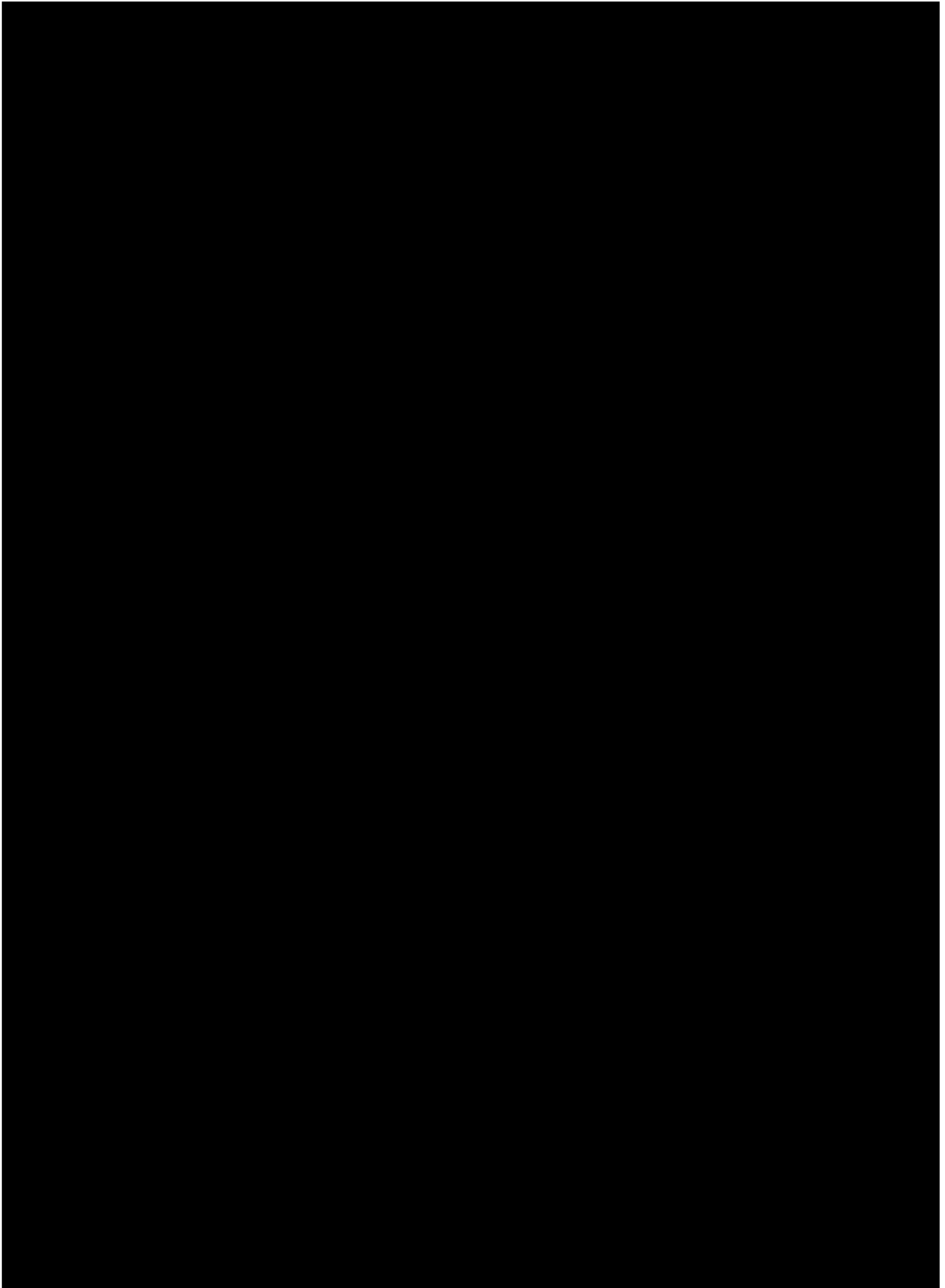
Disadvantages

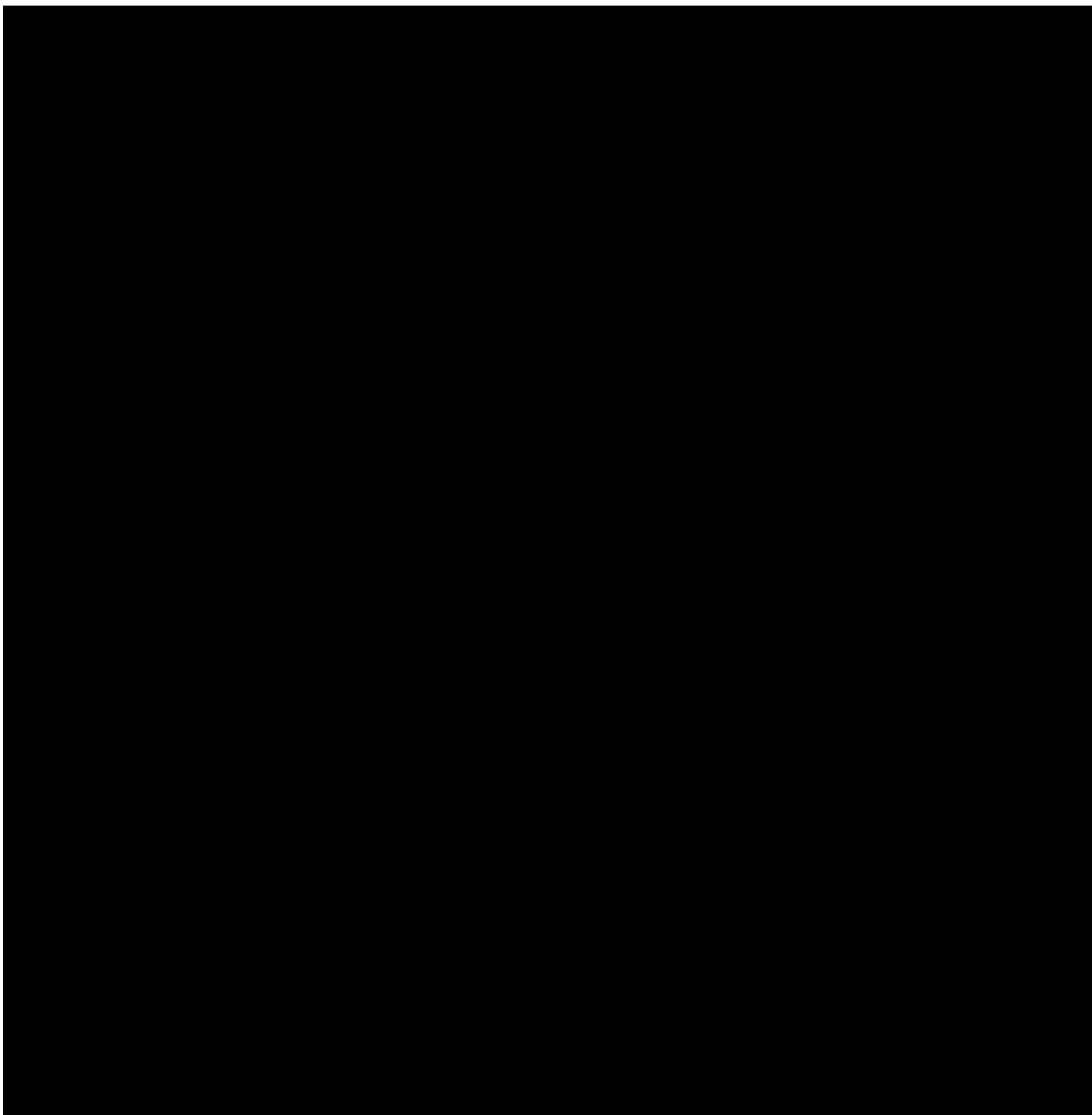
- Does not enable the full scope of powers available to a public Inquiry
- Does not demonstrate immediate action as the Premier promised publicly











FINANCIAL CONSIDERATIONS:

The Minister responsible for the Inquiry is required to prepare an estimate of the expenditures required for the conduct of the Inquiry in consultation with the Commission. In some instances, a Cabinet submission seeking approval for a Special Warrant (pursuant to the *Financial Administration Act*) may be required where the expenditure has not been provided for by the Legislature. Where an amount is appropriated, the expenditures incurred by the Commission shall be paid out of the Consolidated Revenue Fund without further approval;

however, issuance of payments will still require certification approval under the *Financial Administration Act* by the appropriate GNL officials. As well, given that the inquiry is expected to extend over more than one fiscal year, annual funding approvals via the budget process will be required. The Commission is required to comply with the provisions of the *Financial Administration Act* relating to expenditures by departments and agencies of the government of the province and policies established by the LGIC.

The Lamer Inquiry on the convictions of Ronald Dalton, Randy Druken and Gregory Parsons was established under former *PIA*. It was announced in March 2003, and the report was received May 2006. The approximate cost was \$7.6M. The Cameron Inquiry on the Hormone Receptor Testing was also established under *PIA*. It was established in July 2007 and the report was received March 2009. The approximate cost was \$5.7M. The recent Commission of Inquiry into the Death of Donald Dunphy was established in September 2016, submitted its report in June 2017, and cost approximately \$2.9M. With respect to the recently-announced inquiry into Innu Children in Care, including multiple Child Death Reviews, it has been estimated it will cost \$23.7 million.

The amount of funding required to conduct a public Inquiry will vary depending on the type of Inquiry chosen, its scope, and the composition of the Commission. In the case of a commission of Inquiry as recommended, while government prescribes the Terms of Reference for the Commission, the Commission itself will have greater autonomy to determine the staff it requires as well as the nature of its own proceedings (which will, in turn, affect the costs which will be incurred). The types of expenses that are anticipated to be incurred by the proposed commission of Inquiry include the following:

- Salaries and benefits (commissioners, chief administrative officer, administrative support, researchers, etc.);
- Professional services (commission counsel, IT/IM staff, expert witnesses);
- Travel and communication (commissioner/counsel/staff travel and expenses, telephones, Blackberries, etc.);
- Office supplies;

- Purchased services (rent for a facility if Government owned space is not available or suitable, media costs, printing costs for final reports, etc.); and,
- Property furnishings and equipment (copiers, office furniture, fax machines, computers, laptop, software etc.).

When the Order in Council is prepared, it will need to identify the remuneration for any commissioners who are not a sitting judge. Section 21.(1) of the *PIA* notes that “members of a commission appointed under Part I or a person or persons appointed to conduct an inquiry under Part II shall be appointed on the terms and with the remuneration set by the Lieutenant-Governor in Council in the order of appointment.” As such, prior to finalizing the Order in Council, the remuneration will need to be established with the selected commissioners. If one of the commissioners is a sitting judge, that person could be paid at their current remuneration rate, which was the case with the Commissioner at the Dunphy Inquiry.

Given the broad interest in the MFP, it is likely that the number of parties applying for standing at this Inquiry into the MFP will be very high. The party estimate at the time of drafting this submission, assuming that the draft Terms of Reference is not narrowed, is well over 30. In addition to the logistical costs of conducting the Inquiry, these parties will seek to have their costs covered, and thus legal and travel costs for each entity involved and many individual witnesses (i.e. former Premiers, former Cabinet Ministers, former and current government/Nalcor officials, Nunatsiavut Government, NunatuKavut Community Council, Innu Nation, Government of Canada, Newfoundland Power, industrial customers, consumer advocate, Land Protectors, Grand River Keepers, Canadian Federation of Independent Business, various chambers of commerce, David Vardy, Ron Penney, municipal governments, MFP contractors, and other unforeseen parties, etc.) may be borne by government. The total cost for the conduct of such an Inquiry (while impossible to accurately estimate at this time) would be extremely high. In essence, the broader and deeper the scope of the Terms of Reference, the more expensive and time-consuming it will be to deliver the final report. The public clearly demands answers to the questions surrounding the MFP, but not at any cost and duration. Government will also be responsible for the implementation of any recommendations made by the Commission of Inquiry. These costs

implementation costs cannot be anticipated and will not be assessed until the Commission's work has been completed.

Undertaking an immediate Inquiry may also require Nalcor to divert at least some resources from MFP completion in order to participate in the Inquiry. This could potentially cause some degree of delay in MFP completion resulting in a financial impact.



INTERDEPARTMENTAL CONSIDERATIONS:

An Inquiry into Missing and Murdered Aboriginal Women and Girls has been established, and Cabinet direction has been received for an Inquiry into Innu Children in Care. In addition, Government has committed to an Inquiry into Search and Rescue in the Province, and the Minister of JPS' mandate letter refers to an Inquiry into Humber Valley Paving. Given the number of public inquiries that have the potential to overlap, Government may wish to give future consideration to establishing an Inquiries Secretariat or other entity within government for the administration of all ongoing inquiries. Such an entity could be responsible for document compilation and management on behalf of government, coordination of redactions, and help to prevent conflicts of interest, as decisions related to the MFP involved a number of government departments.

Rural Lens and Public Engagement

Communications and Public Engagement Branch advises it has no concerns with this submission from a Rural Lens or Public Engagement perspective.

LABRADOR OR ABORIGINAL CONSIDERATIONS:

Indigenous Affairs

Indigenous Affairs believes nine of the ten Indigenous governments and organizations (IGOs) consulted on the MFP would want a broad Inquiry and would not likely support

delaying the Inquiry or narrowing its scope. The sole exception to this might be the Innu Nation. IA notes six Quebec Innu bands and the Naskapi Nation of Quebec were consulted on the MFP, in addition to the Nunatsiavut Government (NG), Innu Nation and the NunatuKavut Community Council. Of these IGOs, Nunatsiavut Government, NunatuKavut (NCC), and the Ekanuashit in Quebec each commenced one or more legal actions in relation to the Project. Therefore, it is expected that the three Labrador IGOs will seek standing at the Inquiry and perhaps one or more of the Quebec IGOs will seek standing as well. IA notes that Indigenous governments and organizations in Labrador have expressed concerns with the MFP, particularly, the NG, regarding methylmercury contamination. NCC has asserted it has not been appropriately accommodated for impacts on its asserted rights. These IGOs will very likely support the Inquiry, and may request that the inquiry explore how the project could be sanctioned in light of their environmental and human health concerns.

IA supports the establishment of an Inquiries Office which may achieve enhanced inquiry expertise and other synergies, with associated total inquiries cost reduction.

Labrador Affairs Secretariat

LAS supports the recommendation to undertake a Commission of Inquiry into the MFP. There have been a number of protests at the LAS office in Happy Valley-Goose Bay this year including an extended closure of the office this past summer due to protests. It is unknown if an inquiry will ameliorate the protest issue.

Issues that have been noted of concern in Labrador include the hiring practices of Indigenous and Labrador residents on the project and whether the guidelines under the Impacts and Benefits Agreement have been followed. This appears to be addressed in the Terms of Reference. While not a part of the Terms of Reference for the inquiry, methylmercury concerns remain an issue in Labrador. The Independent Expert Advisory Committee that was announced in October 2016 is now operational with the office opening in Happy Valley-Goose Bay last month and the Experts committee members and the oversight committee holding meetings. Electricity rate increases have also been identified as a concern and as noted in the submission, a separate NR submission recommends that a reference question be

provided to the PUB seeking recommendations to smooth rates and mitigate rate increases related to the cost of the Project.

INTERGOVERNMENTAL CONSIDERATIONS:

In light of the Federal Loan Guarantee relating to MFP financing, IGAS recommends engaging with the Federal Government to advise of the Inquiry and its Terms of Reference.

OTHER JURISDICTIONS:

There are recent examples in the Canadian context of energy projects that for various reasons have resulted in cost overages which impacted public finances and rate payers to various degrees. An overview of the circumstances surrounding these projects is attached as Annex 6.

CONSULTATIONS:

Consultations have been limited to those outlined above.

ENVIRONMENTAL CONSIDERATIONS:

Environmental considerations primarily relate to those outlined in the North Spur, Methylmercury and Mud Lake sections above. These or any other environmental issues, in particular those that impacted costs, may be raised over the course of Inquiry, unless specifically excluded.

The Department of Municipal Affairs and Environment (MAE) notes the Provincial-Federal Environmental Assessment Joint Review Panel process and the release of the MFP from environmental assessment is an area the Inquiry could conceivably delve into. MAE suggests there is minimal value in revisiting the release from environmental assessment for two reasons: 1) the release has not been successfully challenged; and 2) environmental issues in general are not a significant public discourse with the exception of the issues noted in the paper (i.e. Mud Lake flooding, North Spur, and methylmercury.)

MAE notes there is little benefit in including Mud Lake flooding as an independent expert from the University of Saskatchewan has provided an independent report as well as a recommended path forward to improve monitoring, predictive ability, emergency planning, and mitigation options for future flooding in Lake Melville. MAE has already requested that Nalcor add additional monitoring capabilities to the Lower Churchill River and that request is being implemented. Additional public expenditures through an inquiry on this issue would likely be duplicative and such funding could be dedicated to acting on recommendations in the existing independent Mud Lake report.

MAE notes the Premier's October 2016 commitment to an Independent Expert Advisory Committee has been established and has submitted preliminary recommendations for additional and timely information to enable it to make recommendations on mitigation options related to methylmercury based on science. The experts panel contains a wide range of expertise on methylmercury that could clearly not be replicated through a public inquiry and treatment of the subject as such would result in duplicate public expenditures to address the same issue.

MAE supports the assertion in the background section, that if action is to be taken on the North Spur, it may be expedited by pursuing a separate exercise that could be brought to a conclusion well in advance of the conclusion of a public inquiry.

NR concurs with MAE comments while noting that explicitly excluding these issues in the Terms of Reference can be expected to raise objections from interested parties.

COMMUNICATIONS AND CONSULTATION SYNOPSIS:

See Annex 1.

ANNEXES:

Annex 1 – Communications Plan

Annex 2 – Potential Commissioners

Annex 3 – Terms of Reference

Annex 4 – Overview of Review Options besides the Commission of Inquiry

Annex 5 – 2015 Independent Review of the NL Electricity System

Annex 6 – Overview of Energy Projects

Hon. Siobhan Coady, MHA
Minister of Natural Resources

November 01, 2017

Annex 1 – Communications Plan

**COMMUNICATIONS PLAN
Department of Natural Resources**

Title: Review of the Decision to Sanction and the Management of the Muskrat Falls Project

Issue: Whether to undertake a Commission of Inquiry into the Muskrat Falls Project

<p>Consulted with: Corey Snook, Director of Electricity and Alternative Energy John Cowan, Assistant Deputy Minister, Energy Policy</p>	<p>Date drafted: October 12, 2017</p>	<p>Announcement date: TBD</p>
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COMMUNICATIONS ANALYSIS

Public Environment

A fulsome review of the Muskrat Falls Project has been discussed extensively in the public.

Government began the first external review process of the Muskrat Falls Project in December 2015 when it was announced that EY would be undertaking a review of the cost, schedule and associated risks. <http://www.releases.gov.nl.ca/releases/2015/exec/1221n04.aspx>

At the time, critics felt government had not gone far enough and should be reviewing the engineering aspects of the project, such as the stability of the North Spur, as well as the cost, budget and associated risks. Critics also argued that government should shut down the project.

The idea of a forensic audit first received recent public attention in May 2017. CBC reported that:

A senior engineer who worked on Muskrat Falls says Nalcor Energy should be subjected to a thorough forensic audit to find out how the Crown corporation arrived at the "ridiculously low" initial cost projection for the hydro megaproject. "The unit prices used to generate the estimate were far too low and did not represent the reality of harsh construction environment of central Labrador," the engineer said. "The risks were vastly understated and the contingencies absurdly low."

Former Muskrat Falls engineer calls for forensic audit to examine 'absurdly low' cost estimates – May 10, 2017

<http://www.cbc.ca/news/canada/newfoundland-labrador/muskrat-falls-engineer-cost-estimates-forensic-audit-call-1.4104690>

Uncle Gnarley argued that the Auditor General should conduct the audit:

Some critics of the Muskrat Falls project, including this scribe, had hoped that the Auditor-General (A-G) might review the activities of Nalcor several years ago... A skillful A-G would tell the Premier that he need not worry – that he (the A-G) intends to pursue a forensic audit... A forensic audit is orders of magnitude more complex than a commercial audit that most people are familiar with.

Anonymous Engineer Has Advice for the Auditor General (May 11, 2017)

<http://unclegnarley.blogspot.ca/2017/05/anonymous-engineer-has-advice-for.html#more>

During the June 2017 update, CEO Marshall was quoted by CBC as saying:

I think this project is a hell of a lot worse ... deal than the Upper Churchill. In the Upper Churchill, it didn't cost the consumers of this province a cent...I don't know what the motivation was. I don't know what happened and who made the decisions. Unfortunately I have seen a lot of evidence ... which suggests to me that intentionally or otherwise, the costs were significantly underestimated."

<http://www.cbc.ca/news/canada/newfoundland-labrador/stan-marshall-muskrat-falls-nupdate-1.4174569>

At this time, CBC also reported that the Premier called the Muskrat Falls project "poorly planned" and "ill conceived and reckless."

A forensic audit or public Inquiry could be held at some point, the premier said, but not now because it would slow down the project and further increase its cost.

<http://www.cbc.ca/news/canada/newfoundland-labrador/stan-marshall-muskrat-falls-nupdate-1.4174569>

The Minister of Natural Resources was quoted in a CBC story on June 26:

...the Liberals are committed to an Inquiry, adding "it's not a matter of if, it's a matter of when.

<http://www.cbc.ca/news/canada/newfoundland-labrador/paul-davis-muskrat-falls-costs-soaring-1.4177301>

In July 2017, CBC reported that Brian Peckford called for an audit:

Former premier Brian Peckford says the Muskrat Falls megaproject needs an audit — immediately. In an open letter to Premier Dwight Ball titled "Audit Muskrat Falls Project" the former premier calls Muskrat Falls an "ill-conceived project" from the moment of its announcement, and says his anxiety has increased over time.

Former premier Brian Peckford demands immediate audit of Muskrat Falls project (July 5, 2017)

<http://www.cbc.ca/news/canada/newfoundland-labrador/brian-peckford-muskrat-falls-audit-1.4190713>

In the House of Assembly on August 8, the Premier was asked by the Opposition about doing a forensic audit:

Now that the former Nalcor chair is no longer in his Cabinet, will the Premier now to commit to undertaking a forensic audit immediately on Muskrat Falls?

The Premier responded by saying:

What is not clear is why did the Leader of the Opposition, when this project was being sanctioned, not do his own audit and not let the people of this province have their say into this project and the impact that it would have on the future of Newfoundland and Labrador?...The forensic audit or an inquiry that's required to get to the bottom of the decision that they made and the decision that they refused to talk about, a decision that's having a profound impact on rates in this province, a decision that's having a profound impact on the financial situation of this province, a forensic audit or maybe an advanced inquiry, something to get to the bottom so the people in this province will have the answers that they deserve, the answers to the questions that they kept from the people of our province for nearly the whole time that this project was sanctioned in 2012 and beyond, we will get those questions answered.

<http://www.assembly.nl.ca/business/hansard/ga48session2/17-08-08.htm#1357>

On Thursday, September 28, the Premier announced that an inquiry would be undertaken this fall. The scope of the inquiry was further discussed publicly by:

- Des Sullivan (Uncle Gnarley) in blog postings: Nalcor meddling a threat to Muskrat inquiry (October 2), Inquiry needs engineering capability to uncloak "big scheme comprising many smaller schemes" (October 5), Will Premier Assuage One Person's Worries About Public Inquiry? (October 8), Public Inquiry Needs Broad Mandate Says Vardy (October 9)
- Telegram: Muskrat Falls Inquiry coming: Ball; Hallelujah — Muskrat Falls inquiry's a go; Inquiring minds want to know
- NTV: Premier announces Muskrat Falls Inquiry will be called this fall; Opposition parties want forensic audit before Muskrat Falls Inquiry; Aborting Muskrat Falls should be on table for Inquiry, former PUB chair argues
- CBC News: Muskrat Falls Inquiry to launch this fall, premier announces
- VOXM: Premier says Muskrat Falls Inquiry to be called this fall; Nothing Can Be Off Limits In Muskrat Falls Inquiry: Former PUB Chair
- Open Line: Paddy Daley, Paul Lane

Strategic Considerations

It is recommended that approval be given to establish a Commission of Inquiry into the Muskrat Falls Project examining Nalcor and Government's respective roles in sanctioning and executing the project.

This approach responds to public concerns to have the project reviewed as soon as possible, represents the best option to review decisions regarding the sanctioning and managing execution of the Muskrat Falls Project, maximizes transparency, and provides for an independent assessment of the issues raised in the terms of reference.

Potential questions include:

- What is the scope of the review?
- Who will undertake the review?
- How much will this review cost?

- Will you be including the Public Utilities Board in your analysis?
- Is the work of the Auditor General going to be used in the review?
- Will the Inquiry include a forensic audit?
- Are you going to discuss the possibilities of shutting down the project as part of the Inquiry?
- Are you going to do a review of the North Spur?
- Are you going to do a review of environmental issues?

Target Audiences

Internal

- Premier's Office
- Communications and Public Engagement Branch
- Natural Resources
- Justice and Public Safety
- Finance
- Office of Labrador Affairs
- Intergovernmental and Indigenous Affairs Secretariat
- Cabinet
- Caucus

External

- Nalcor
- Government of Canada (Natural Resources Canada)
- Local media (traditional and social)
- Official Opposition
- Third Party
- Indigenous groups including Innu Nation, Nunatsiavut Government, NunatuKavut Community Council, Six Quebec Innu bands, Naskapi Nation of Quebec, Miawpukek First Nation (Conne River), Qalipu First Nation
- Consumer Advocate
- Public Utilities Board
- Members of the House of Assembly
- Critics of the Muskrat Falls Project
- Investors in NL (new and existing)

Consultations

The Departments of Justice and Public Safety and Finance were consulted in the development of the cabinet paper. The Premier's Office and Communications and Public Engagement Branch will be consulted with regard to the communications approach for the announcement of the Inquiry details.

Communications Objectives

- To inform the people of the province regarding the details of the Muskrat Falls Commission of Inquiry.
- To reassure the people of the province that government is taking the steps necessary to manage the Muskrat Falls Project to its completion and to find out why decisions were made about the project prior to sanctioning and during construction.
- To facilitate balanced reporting in local and national media; and balanced comments on social media and in blogs.

COMMUNICATIONS STRATEGY

Overall Approach

The Premier will lead a news conference to announce the details of the Inquiry (timing, terms of reference, and names and qualifications of those undertaking the review). The Minister of Natural Resources and Minister of Justice and Public Safety will also be in attendance. The location for the news conference is to be determined.

Materials to be developed include media advisory, news release, speaking notes, key messages, questions and answers and tweets.

Social Media

Tweets will be posted regarding the details of the Inquiry and government's position.

Key Messages

Today, we are announcing that a Commission of Inquiry will examine the Muskrat Falls Project. Specifically:

- Nalcor's development and analysis of options to address electricity requirements that informed the decision to sanction the Muskrat Falls Project;
- the reasons for the differences between the estimated costs of the Muskrat Falls Project at the time of sanction versus the actual costs incurred during project execution;
- the decision to exempt sanction of the MFP and MFP costs from PUB oversight, the impact these decisions had on the MFP, and whether these decisions were reasonable;
- the adequacy of government's decision making processes around the approval and oversight of the Muskrat Falls Project; and,
- make recommendations that the Commission of Inquiry considers necessary and advisable relating directly to the matters of public concern.

The terms of reference for the Commission of Inquiry is being released today and outlines the specific questions we are asking the Commission to consider.

- Whether the assumptions and/or forecasts on which the analysis of options to address Newfoundland and Labrador's electricity needs was based were reasonable.

- Whether additional options or alternatives besides the Muskrat Falls Project and the thermal-based isolated Island option were reasonably considered and dismissed by Nalcor.
- Whether the determination that the Muskrat Falls Project was the least cost option was reasonable.
- How the views of Indigenous people and organizations of Newfoundland and Labrador were solicited and considered in the decision to sanction the Muskrat Falls Project.
- How and why the determination was made that Muskrat Falls Project costs should be exempted from PUB oversight and whether this contributed to cost overruns and project delays.
- Whether policies and procedures respecting the hiring of contractors were reasonable.
- Whether and how the terms of the contractual arrangements between Nalcor and the various contractors retained in relation to the Muskrat Falls Project contributed to delays and cost overruns, and whether or not these terms provided sufficient risk transfer from Nalcor to the contractors.
- Whether the overall procurement strategy developed by Nalcor for the project, to subdivide the project into multiple construction packages managed directly by Nalcor, followed industry best practices, and whether or not there was fair consideration of risk transfer/retention in this strategy relative to other procurement models.
- What risk assessments were performed by or for Nalcor, and whether Nalcor took appropriate action to mitigate the risks identified.
- The circumstances pertaining to the April 2013 Risk Assessment Report produced by SNC-Lavalin, including when and how Nalcor first became aware of the report, when any versions of the report came into Nalcor's possession.

The Commission of Inquiry will finish its work and deliver a final report to the Minister of Natural Resources, who shall be the Minister responsible for the Inquiry, before June 30, 2019.

The Commission of Inquiry shall not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.

Secondary Messages

- The Muskrat Falls was originally sold to the people of the province as a \$6.2 billion project (\$7.4 billion with financing). The cost has risen to \$10.1 billion (\$12.7 billion

with financing) with Nalcor's June 2017 update - literally billions of dollars in inherited problems.

- We have consistently questioned the decision-making process of the former government on this project. Knowing why decisions were made as they were, what assumptions were used to justify the project, and why costs were not accurate must be clearly understood so it never happens again.
- Most of the legal and contractual arrangements were already committed to by the time our government took office including some \$7 billion in contractual obligations, a legal commitment to supply energy to Nova Scotia, and a completion requirement under the Federal Loan Guarantee.
- Since coming to office, our government has worked methodically and diligently to ensure the Muskrat Falls Project is managed better, and that there is greater accountability and transparency.
- A number of significant actions related to the Muskrat Falls Project have been undertaken:
 - New Nalcor Energy CEO appointed in April 2016. He subsequently made changes in the organizational structure separating generation and transmission resulting in a positive impact on the management of the project;
 - In November 2016, the additional federal loan guarantee of \$2.9 billion was secured
 - New members were appointed to Nalcor's Board of Directors in November 2016 including new chair, global business leader Brendan Paddick;
 - A contract completion agreement with Astaldi was finalized;
 - Four new independent members were appointed to the Muskrat Falls Project Oversight Committee in April 2017 and methods for reporting in the public were revised;
 - Progress has been made resolving other commercial disputes with major contractors;
 - A new Quantitative Risk Assessment (QRA) for the project was completed by EY
 - Updates on the project's cost and schedule were given in June 2016 and June 2017.
- On behalf of the province's taxpayers and ratepayers, we will continue in our efforts to move the project forward as effectively as possible despite the challenges of the project we inherited.
- Providing stable, secure, reliable, and affordable power for Newfoundland and Labrador is a primary focus of our government.

Briefing of Members of the House of Assembly

Caucus will be provided with key messages

Follow-up Activities

Once the announcement is made, government will be prepared and open to continue the discussion publicly through social media, Open Line, media invitations, and speaking engagements.

Evaluation Criteria

Public discourse and media coverage regarding the Inquiry will be monitored.

Budget

N/A

Prepared by: Diana Quinton, Director of Communications

Approved by: Gordon McIntosh, Deputy Minister

Annex 2 – Potential Commissioners

Mr. Victor Young

- Mr. Young was deputy minister of the Treasury Board and special advisor to the premier in 1974 and held the following positions:
 - Chairman and chief executive officer of the Newfoundland and Labrador Hydro and Churchill Falls (Labrador) Corporation from 1978 to 1984;
 - Chairman and chief executive officer of Fishery Products International (1984-2001);
 - Executive-in-residence at the Business School at Memorial University in 2001 and chaired the Royal Commission on Newfoundland and Labrador's Place in Canada from 2002 to 2003;
- Mr. Young is an officer of the Order of Canada; a member of the Newfoundland and Labrador Business Hall of Fame and a fellow of the Institute of Corporate Directors; has received the Paul Harris (Rotary) Lifetime Achievement Award and the Queen Elizabeth II Diamond Jubilee Medal; and is Honorary Japanese Counsel. The Pierre Elliot Trudeau Foundation appointed him a Trudeau mentor in 2016.

Dr. Linda Inkpen

- Dr. Inkpen served as a Commissioner of the Royal Commission on Employment and Unemployment, Province of Newfoundland and Labrador;
- Dr. Inkpen has been active on boards and as Chairwoman of a number of organizations and boards, including Fortis Properties and Newfoundland Power Inc.;
- Dr. Inkpen was named a member of the Order of Canada in 1998 and awarded the Queen's Jubilee Medal. She served as President of the College of the North Atlantic. She graduated from Memorial University of Newfoundland with a Bachelor of Science, a Bachelor of Education, a Bachelor of Medical Science and a Doctor of Medicine.

Mr. Edward Roberts

- Called to the bar in 1965, Mr. Roberts was appointed Queen's Counsel in 1979 and a Master of the Supreme Court in 1989. He practiced for many years with one of the predecessor firms of Cox & Palmer;
- Mr. Roberts served the province of Newfoundland and Labrador as the 11th Lieutenant Governor from 2002 to 2008;
- Prior to this role, Mr. Roberts had a long career as a Member of the House of Assembly, holding several Cabinet posts under Premier Smallwood, Premier Wells, and Premier Tobin;
- Mr. Roberts is a member of the Order of Canada.

Gail Hamilton, FCPA, FCA, ICD.D

- Ms. Hamilton from 2011 to present day, is President and Co-owner of Hamilton Sullivan Professional Corporation, an Accounting firm located in St. John's;
- Ms. Hamilton is currently a member of the Audit Committee for the House of Assembly, and a member of the Board of Directors of the Public Service Pension Plan Corporation and Emera NL;
- Ms. Hamilton has also served on two Audit, Tax and Advisory firms as follows; from 2012-2015 as a Business Consultant with the St. John's Newfoundland and Labrador Office of KPMG LLP; and from 2000-2011 was a Partner with Ernst and Young LLP in St. John's.

Sister Elizabeth Davis, LL.D.

- Sister Davis served from 1985 to 1994 as Assistant Medical Director, Assistant Executive Director, and Executive Director at St. Clare's Mercy Hospital in St. John's;
- Sister Davis served from 1994 to 2000 as President and CEO of the Health Corporation of St. John's;

- Sister Elizabeth has served on many national and international bodies, including the Council of Licensed Practical Nurses, the Association of Canadian Teaching Hospitals, the Canadian Institute of Health Information, the National Board of Medical Examiners (USA), the Royal College of Physicians and Surgeons of Canada, the Royal Commission on Renewing and Strengthening Newfoundland Labrador's Place in Canada, the Catholic Biblical Association of Canada, the Trudeau Foundation, and the Mercy International Association;

Annex 3 – Terms of Reference

1. This Order may be cited as the *Commission of Inquiry Respecting the Muskrat Falls Project Order*.
2. There is established a commission of inquiry respecting the “Muskrat Falls Project”, as defined in subsection 2.1(1) of the *Energy Corporation Act*, and the following individuals are appointed as members of the commission: [names of members to be approved by Cabinet]
3. The commission of inquiry shall:
 - a. inquire into the consideration by Nalcor Energy and its subsidiaries (collectively hereinafter “Nalcor”) of options to address the electricity needs of Newfoundland and Labrador Hydro’s Island interconnected system customers that informed Nalcor’s decision to recommend that the Government of Newfoundland and Labrador sanction the Muskrat Falls Project, including, and without limiting the generality of the foregoing:
 - i. whether the assumptions and/or forecasts on which the analysis of options was based were reasonable;
 - ii. whether Nalcor considered and reasonably dismissed options other than the Muskrat Falls Project and the “Isolated Island Option” (as defined in the June 17, 2011 reference question to the Board of Commissioners of Public Utilities);
 - iii. whether Nalcor’s determination that the Muskrat Falls Project was the least-cost option for the supply of power to the Island interconnected system over the period 2011 - 2067 was reasonable;
 - iv. whether the views of Indigenous people of Newfoundland and Labrador were solicited and reasonably considered by Nalcor prior to its decision to recommend that the Government of Newfoundland and Labrador sanction the Muskrat Falls Project;
 - b. inquire into why there are significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction and the costs incurred by Nalcor during project execution, including, without limiting the generality of the foregoing:
 - i. whether Nalcor’s conduct in retaining and subsequently dealing with contractors and suppliers was in accordance with best practice, and, if not, whether Nalcor’s conduct contributed to project cost increases and project delays;
 - ii. whether and how the terms of the contractual arrangements between Nalcor and the various contractors retained in relation to the Muskrat Falls Project contributed to delays and cost overruns, and whether or not these terms provided sufficient risk transfer from Nalcor to the contractors;

- iii. whether the overall project management structure Nalcor developed and followed was in accordance with best practice, and whether it contributed to cost increases and project delays;
 - iv. whether the overall procurement strategy developed by Nalcor for the project, to subdivide the project into multiple construction packages managed directly by Nalcor, followed industry best practices, and whether or not there was fair consideration of risk transfer/retention in this strategy relative to other procurement models;
 - v. whether any risk assessments were conducted in respect of the Muskrat Falls Project, including any prepared externally, whether they were conducted in accordance with best practice, how Nalcor took possession of such reports, and whether Nalcor took appropriate measures to mitigate the risks identified;
 - vi. whether the commercial arrangements Nalcor negotiated were reasonable;
- c. inquire into whether the determination that the Muskrat Falls Project should be exempt from oversight by the Board of Commissioners of Public Utilities was reasonable and the effect of this exemption on the development and operation of the Muskrat Falls Project;
 - d. inquire into the role of the Government of Newfoundland and Labrador in the sanction and oversight of the Muskrat Falls Project, particularly as it relates to the matters set out in (a) to (c), focusing on governance arrangements and decision-making processes associated with the Muskrat Falls Project; and
 - e. make recommendations that the commission of inquiry considers necessary and advisable relating to the matters of public concern referred to in paragraphs (a) to (d).
4. The commission of inquiry, in carrying out the terms of reference referred to in section 3 shall consider the following:
 - a. the need to provide consumers in the province with electricity at the lowest possible cost consistent with reliable service;
 - b. the powers, duties and responsibilities of a Crown corporation;
 - c. the need to balance commercial considerations and public accountability and transparency in carrying out a large-scale publicly-funded project; and
 - d. the need to balance the interests of ratepayers and the interests of taxpayers in carrying out a large-scale publicly-funded project.

5. The commission of inquiry shall not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.
6. The commission of inquiry may engage the services of persons having special technical or expertise or knowledge, including those with financial investigative experience.
7. The commission of inquiry shall terminate its work and deliver the final report to the Minister of Natural Resources, who shall be the minister responsible for the commission of inquiry, on or before June 30, 2019.

Annex 4 – Overview of Review Options besides the Commission of Inquiry

Other than a public Inquiry under Part I of the *Public Inquiries Act (PIA)*, a number of options are available to government to review issues around MFP decision-making processes and construction, including requesting an audit from the Department of Finance or the Auditor General (AG); requesting a PUB investigation; or establishing an Inquiry under Part II of *PIA*. As discussed further below, with the exception of an Inquiry under Part II Inquiry of the *PIA*, these options have the potential to result in an expert or specialized analysis into some aspects of the MFP, but would not allow a consideration of the full range of issues that is possible under a Part I public Inquiry. It may be considered whether any of the following could be used to supplement a public Inquiry, by allowing the specialized investigation of specific issues.

Department of Finance

The Professional Service and Internal Audit Division of the Department of Finance could perform a forensic audit or a performance audit of decision-making and costs related to the MFP. The scope of a forensic audit can be defined by Cabinet, and could include the calculation of a loss, evidence of fraud or other wrongdoing, and recommendations to prevent further wrongdoing. Unless there is a suggestion of wrongdoing, a forensic audit may not be the appropriate approach. A performance audit is an independent auditing process aimed at evaluating the internal controls and measures instituted by management to ensure that resources have been acquired economically and utilized efficiently and effectively. The desired outcome could be to identify inefficiencies and gaps in accountability; make recommendations to ensure that adequate measures are in place to ensure the efficiency and effectiveness of project management; and to implement a structured reporting process. This could be a valuable tool in reviewing Nalcor's internal processes and controls.

The Department of Finance may need to retain outside experts to undertake either type of audit. Both options could be carried out in conjunction with an outside accounting firm and under the supervision of the Audit Committee to increase independence.

Advantages

- Represents the review of sanctioning and execution of the MFP by accounting and finance experts available to GNL (albeit additional experts may be necessary depending on the type of audit that will be decided necessary)
- Will help explain Nalcor's assumptions, analysis, planning and execution of the MFP
- Less costly option available to examine the decision to sanction and execute the MFP

Disadvantages

- Ignores government's role in sanctioning the project and approving the financing model
- May appear to be less impartial than review done outside of the Government
- FIN would have to assess its current capacity to perform the desired scope of work and determine the additional resources and funding required

Auditor General

Under the *Auditor General Act*, the LGIC may request the Auditor General (AG) to inquire into and report on a matter relating to the financial affairs of the province or public property. Under this provision, the AG could be asked to review the finances of the MFP, including performing a forensic audit. This would likely not include a review of decision making efficiency or structures, and the AG is precluded from accessing cabinet confidences. The cost of such a review would be included in the AG's budget. The AG is currently undertaking a targeted audit of certain aspects of Nalcor.

Advantages

- Represents the review of sanctioning and execution of the MFP by independent accounting and finance experts;
- Will help explain Nalcor's assumptions, analysis, planning and execution of the MFP; and
- Less costly option available to examine the decision to sanction and execute the MFP;

Disadvantages

- Ignores government's role in sanctioning the project and approving the financing model.
- The AG would have to assess its current capacity to perform the desired scope of work and determine the additional resources and funding required

Public Utilities Board

Under section 5 of the *Electrical Power Control Act, 1994*, Cabinet may refer a question on a matter related to rates or power to the PUB. Where a question is referred to the PUB, it is required to investigate, hold a public hearing, and report back to the Minister of NR. In carrying out the investigation, the PUB has all the powers of commissioners under the *PIA*, including the power to compel evidence and the power to inspect premises. Questions that would be within the PUB's authority to investigate under this section would include those concerning MFP assumptions and costs, such as an analysis of 1) whether options other than the isolated island and the MFP should have been considered; 2) whether Nalcor's forecasts were reasonable; 3) based on Nalcor's forecasts, whether there a need for MFP power when the MFP was sanctioned; and 4) whether MFP construction costs were reasonable. While the PUB is a subject matter expert on rates, rate forecasts and the reasonableness of construction costs, the PUB's mandate would not allow it to review provincial policy decisions. The Province would likely incur the costs associated with this review.

On June 17, 2011, LGIC issued a reference directing the Board to review and report on whether the development of the Muskrat Falls generation facility and the Labrador-Island Link transmission line was the least-cost option for the supply of power to Island Interconnected customers over the period of 2011-2067, as compared to the isolated Island development scenario. The PUB found that the information provided by Nalcor for the purposes of the review was not detailed, complete or current enough to answer the question. In relation to Nalcor's forecasts, the PUB commented that Nalcor's 2010 load forecast was not prepared in accordance with best practice in relation to end-use modelling, and that the model had an inherent bias and depended on the maintenance of 2010 industrial load (40).

Advantages

- Enlists the expertise of the PUB to review the MFP sanction decision
- Transparent process that involves public hearings and likely a broad number of parties
- Evidence can be compelled

Disadvantages

- Does not provide insight into Cabinet's role in sanctioning the project

- PUB may have schedule and staffing constraints if it is also asked to make recommendations related to rate mitigation
- There may be concerns with overlap with the 2011 reference question
- The PBU would have to assess its current capacity to perform the desired scope of work and determine the additional resources and funding required

Inquiry under Part II of the *Public Inquiry Act, 2006*

LGIC could call an Inquiry under Part II of *PIA* into a matter that the LGIC considers to be of public concern. Although similar to a Part I Inquiry, under a Part II order the LGIC has the authority to provide greater direction to the Commission in terms of the structure of the Inquiry. Under Part II:

- the Lieutenant-Governor in Council may appoint one or more persons to carry out an inquiry into any matter “that the Lieutenant-Governor considers to be of public concern”.
- Under this type of inquiry, the Lieutenant-Governor in Council (as opposed to the commission) has the authority to determine how the inquiry is to be conducted (i.e., through interviews/surveys, research, inspections/investigations, written submissions, or informal/formal hearings). The Lieutenant-Governor in Council may also specify the nature and scope of the report to be submitted.

Under Part II, the Lieutenant-Governor in Council is given a broader authority to circumscribe the procedures of the Inquiry, for example: the authority to determine whether or not persons who believe they have an interest in the subject of the Inquiry have a right to participate; whether the person conducting the Inquiry can receive written or oral evidence; whether hearings are to be public; or whether the person conducting the Inquiry has the same powers to compel the production of evidence as a commission under Part I.

This would allow the LGIC, for example, to request a paper audit (forensic or performance) prior to beginning public hearings. The scope of the terms of reference of a Part II Inquiry may be as broad as that of a Part I inquiry.

Advantages (assuming full broad scope of Terms of Reference is adopted)

- The Government will be able to specify mechanisms by which the inquiry is conducted (for instance, by setting out rules and procedures and requesting an audit stage to the inquiry);

- Represents an equally thorough option to review the sanctioning and execution of the MFP as a Part I inquiry;
- Provides maximum transparency with regard to elements of the Inquiry;
- Provides for an impartial, independent assessment of the issues raised in the Terms of Reference;
- Provides a response to the stakeholder requests to have the MFP made subject to a review as soon as possible;
- Will help explain Nalcor's assumptions, analysis, planning and execution of the MFP; and
- May demonstrate Nalcor's interactions with government in selecting the options and recommending the MFP for meeting forecast power supply needs.

Disadvantages (assuming full broad scope of Terms of Reference is adopted)

- Appearance with the public that the inquiry process is less independent than under Part I inquiry; and
- Same concerns as those set out for a Part I inquiry, in alternatives section above.

Annex 5 – 2015 Independent Review of the NL Electricity System

In 2014, GNL called for an independent review “to look at the current electricity system in Newfoundland and Labrador – how it operates, is managed and regulated as the province moves from an isolated system to an interconnected system” The terms of reference included a request to present options to ensure that the NL electricity system has the optimal structure, governance and regulatory process as it transitions into an interconnected system. Power Advisory, a consulting firm, was selected for the work, and submitted a report entitled “Review of the Newfoundland and Labrador Electric System” on July 20, 2015. The report recommended the implementation of a number of electricity industry best practices, including some related to the oversight of Nalcor and PUB regulatory authority. The current government has implemented the majority of the recommendations related to Nalcor oversight. However, many of the recommendations related to PUB regulatory oversight have not been implemented, including: 1) utilizing the PUB regulatory process to review the need and cost-effectiveness of new projects; 2) requiring the PUB to exercise oversight over integrated resource planning; 3) granting the PUB greater discretion to act according to the public interest (as opposed to being limited by a lowest cost mandate); 4) ensuring NLH has appropriate resources and leadership to meet regulatory requirements; 5) ensuring that NLH obtains frequent rate reviews; and 6) granting the PUB regulatory oversight over contracts for the export of power, where ratepayers bear the risks of such contracts.

With regards to using the PUB regulatory process for the review of new projects, Power Advisory notes that since the mid-1990s, major supply additions in the province have been exempted from PUB oversight (127). Although such exemptions are common across Canada, they undercut public confidence in the regulatory process and Government decision-making. They note that it may not be appropriate for the PUB to make a final decision on large scale projects, since these decisions require broad public interest decisions that take into account the project’s strategic significance to the province” (127). However, Power Advisory noted that the PUB could have a role in making recommendations to government with respect to such projects, with the final decision made by Cabinet. This approach is consistent with the National Energy Board’s recommendation power with respect to major pipelines, and would

increase transparency by allowing the PUB to engage stakeholders in a public manner prior to a recommendation being made.

Annex 6 – Overview of Energy Projects

Site C Hydroelectric Dam – Currently Under Construction

BC Hydro's 1,110 MW Site C project on the Peace River near Fort St. John in northeastern British Columbia is at the early stages of construction. The project has drawn considerable opposition from various stakeholder groups for a variety of reasons including: its planned major flooding agricultural land; a perceived lack of support from First Nations groups and local landowners; a perception that projected revenues do not justify project costs; and uncertainty of future demand for electricity, future electricity prices, possible alternatives, and overall cost to the environment. BC's current government, which assumed office on July 18, 2017 has directed the BC Utilities Commission (BCUC) to review the project to determine whether BC Hydro can complete the project on budget and on time by 2024. But it will also ask the Commission to provide advice on the costs and implications of various scenarios, including proceeding as planned, suspending the project but keeping the option open to resume construction until 2024, or cancelling the project altogether and proceeding with other projects that could provide energy for a lower cost than Site C. BCUC's preliminary report is due on September 20, 2017 with the final report due on November 1, 2017.

Keeyask Hydroelectric Dam – Currently Under Construction

Manitoba Hydro is constructing the 695 MW Keeyask project approximately 725 km north of Winnipeg on the Nelson River, which was originally estimated to cost \$6.5 billion and expected to be in service by November of 2019. As of March 2017, that project was estimated to come in \$2.2B over budget and 21 months behind schedule. While this project has begun to give rise to similar public concerns as have arisen in the case of MF, it is not yet apparent that any sort of review of that project will be undertaken in a within timeframe that would allow NL to glean any guidance from the process.

Refurbishment of Point Lepreau Nuclear Reactor – Completed

In the case of Point Lepreau, the cost overages were examined the NB AG, and there was no broader review by any other mechanism such as a public Inquiry. Generally, however, the

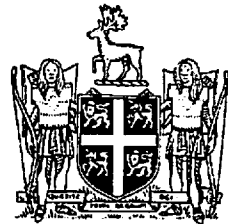
cost overages associated with Point Lepreau were largely attributable to technical difficulties and various accidents/incident which occurred during the refurbishment process. While there was public criticism of the decision to undertake the refurbishment of Point Lepreau versus other alternatives, it does not appear that there was substantially public perception that the cost estimates associated with refurbishment were intentionally underestimated, rather the blame was focused more on poor project management and execution.

Cancellation of Ontario Gas Plants

The ON decision to cancel the construction of power plants, was subject to significantly more scrutiny for a variety of reasons. The cancelation was largely attributed to political reasons in advance of the 2011 ON general election, the costs of which were actively obscured and/or under reported by the administration of then Premier Dalton McGuinty. This decision was subject to review by the ON AG and the Justice Policy Committee of the ON legislature. Review processes undertaken to examine this issue ultimately resulted in criminal charges being brought against Premier McGuinty's chief and deputy chief of staff (these charges are still before the court).

Draft reviewed by Cabinet on Nov 19, 2017

November 19, 2017



(approved with minor edits to be incorporated)

NEWFOUNDLAND AND LABRADOR REGULATION /17

Commission of Inquiry Respecting the Muskrat Falls Project Order under the Public Inquiries Act, 2006 (O.C. 2017 -)

(Filed , 2017)

Under the authority of section 3 of the Public Inquiries Act, 2006, the Lieutenant-Governor in Council makes the following Order.

Dated at St. John's,

Ann Marie Hann Clerk of the Executive Council

ORDER

Analysis

- 1. Short title 2. Definitions 3. Commission of inquiry established 4. Terms of reference 5. Commission's considerations 6. Conclusion or recommendations limited 7. Special expertise services 8. Final report

Short title 1. This Order may be cited as the Commission of Inquiry Respecting the Muskrat Falls Project Order.

Definitions 2. In this Order (a) "government" means the government of the province;

Commission of Inquiry Respecting the Muskrat Falls Project

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- (b) "Isolated Island Option" means the isolated island option as defined in the June 17, 2011 reference question to the Board of Commissioners of Public Utilities;
- (c) "Muskrat Falls Project" means the Muskrat Falls Project, as defined in subsection 2.1(1) of the *Energy Corporation Act*; and
- (d) "Nalcor" means Nalcor Energy and its subsidiaries;

Commission of inquiry established

3. There is established a commission of inquiry respecting the Muskrat Falls Project and the Honourable Richard D. LeBlanc is appointed as the sole member of the commission.

Terms of reference

- 4. (1) The commission of inquiry shall inquire into
 - (a) the consideration by Nalcor of options to address the electricity needs of Newfoundland and Labrador Hydro's Island interconnected system customers that informed Nalcor's decision to recommend that the government sanction the Muskrat Falls Project, including whether
 - (i) the assumptions or forecasts on which the analysis of options was based were reasonable,
 - (ii) Nalcor considered and reasonably dismissed options other than the Muskrat Falls Project and the Isolated Island Option,
 - (iii) Nalcor's determination that the Muskrat Falls Project was the least-cost option for the supply of power to Newfoundland and Labrador Hydro's Island interconnected system over the period 2011-2067 was reasonable with the knowledge available at that time, and
 - (iv) the views of Aboriginal peoples, whose established or asserted Aboriginal or treaty rights to areas in Labrador were potentially adversely affected by the Muskrat Falls Project, were solicited from their leadership and reasonably considered by Nalcor before its decision to recommend that the government sanction the Muskrat Falls Project;

*Commission of Inquiry Respecting the Muskrat Falls
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- (b) why there are significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction and the costs by Nalcor during project execution, to the time of this inquiry together with reliable estimates of the costs to the conclusion of the project including whether
- (i) Nalcor's conduct in retaining and subsequently dealing with contractors and suppliers of every kind was in accordance with best practice, and, if not, whether Nalcor's supervisory oversight and conduct contributed to project costs increases and project delays,
 - (ii) the terms of the contractual arrangements between Nalcor and the various contractors retained in relation to the Muskrat Falls Project contributed to delays and cost overruns, and whether or not these terms provided sufficient risk transfer from Nalcor to the contractors,
 - (iii) the overall project management structure Nalcor developed and followed was in accordance with best practice, and whether it contributed to cost increases and project delays,
 - (iv) the overall procurement strategy developed by Nalcor for the project to subdivide the Muskrat Falls Project into multiple construction packages managed directly by Nalcor, followed industry best practices, and whether or not there was fair and competent consideration of risk transfer and retention in this strategy relative to other procurement models,
 - (v) any risk assessments, financial or otherwise, were conducted in respect of the Muskrat Falls Project, including any assessments prepared externally and whether
 - (A) the assessments were conducted in accordance with best practice,
 - (B) Nalcor took possession of the reports, including the method by which Nalcor took possession,
 - (C) Nalcor took appropriate measures to mitigate the risks identified, and

Commission of Inquiry Respecting the Muskrat Falls Project

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- (D) Nalcor made the government aware of the reports and assessments, and
- (vi) the commercial arrangements Nalcor negotiated were reasonable and competently negotiated;
- (c) whether the determination that the Muskrat Falls Project should be exempt from oversight by the Board of Commissioners of Public Utilities was justified and reasonable and what was the effect of this exemption, if any, on the development and operation of the Muskrat Falls Project; and
- (d) whether the government was fully informed and was made aware by Nalcor of any risks or problems anticipated with the Muskrat Falls Project, so that the government had sufficient and accurate information upon which to appropriately decide to sanction the project and whether the government employed appropriate measures to oversee the project particularly as it relates to the matters set out in paragraphs (a) to (c), focusing on governance arrangements and decision-making processes associated with the project.

Commission's considerations

5. The commission of inquiry, in carrying out the terms of reference referred to in section 4 shall consider the following:

- (a) the need to provide consumers in the province with electricity at the lowest possible cost consistent with reliable service;
- (b) the powers, duties and responsibilities of a Crown Corporation;
- (c) the need to balance commercial considerations and public accountability and transparency in carrying out a large-scale publicly-funded project; and
- (d) the need to balance the interests of ratepayers and the interests of taxpayers in carrying out a large-scale publicly-funded project.

Conclusion or recommendations limited

6. The commission of inquiry shall not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.

*Commission of Inquiry Respecting the Muskrat Falls
Project*

/17

Special expertise
services

7. The commission of inquiry may engage the services of persons having special expertise or knowledge including those with financial, engineering and construction expertise.

Final report

8. The commission of inquiry shall terminate its work and deliver the final report to the Minister of Natural Resources, who shall be the minister responsible for the commission of inquiry, on or before December 31, 2019.

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November 20, 2017



**NEWFOUNDLAND AND LABRADOR
REGULATION /17**

Commission of Inquiry Respecting the Muskrat Falls Project Order
under the
Public Inquiries Act, 2006
(O.C. 2017 -)

(Filed , 2017)

Under the authority of section 3 of the *Public Inquiries Act, 2006*,
the Lieutenant-Governor in Council makes the following Order.

Dated at St. John's,

Ann Marie Hann
Clerk of the Executive Council

ORDER

Analysis

- | | |
|--------------------------------------|--|
| 1. Short title | 6. Findings and recommendations |
| 2. Definitions | 7. Conclusion or recommendations limited |
| 3. Commission of inquiry established | 8. Special expertise services |
| 4. Terms of reference | 9. Final report |
| 5. Commission's considerations | |

Short title

1. This Order may be cited as the *Commission of Inquiry Respecting the Muskrat Falls Project Order*.

Commission of Inquiry Respecting the Muskrat Falls Project

/17

Definitions

2. In this Order

- (a) "government" means the government of the province;
- (b) "Isolated Island Option" means the isolated island option as defined in the June 17, 2011 reference question to the Board of Commissioners of Public Utilities;
- (c) "Muskrat Falls Project" means the Muskrat Falls Project, as defined in subsection 2.1(1) of the *Energy Corporation Act*; and
- (d) "Nalcor" means Nalcor Energy and its subsidiaries;

Commission of inquiry established

3. There is established a commission of inquiry respecting the Muskrat Falls Project and the Honourable Richard D. LeBlanc is appointed as the sole member of the commission.

Terms of reference

4. The commission of inquiry shall inquire into

- (a) the consideration by Nalcor of options to address the electricity needs of Newfoundland and Labrador's Island interconnected system customers that informed Nalcor's decision to recommend that the government sanction the Muskrat Falls Project, including whether
 - (i) the assumptions or forecasts on which the analysis of options was based were reasonable,
 - (ii) Nalcor considered and reasonably dismissed options other than the Muskrat Falls Project and the Isolated Island Option, and
 - (iii) Nalcor's determination that the Muskrat Falls Project was the least-cost option for the supply of power to Newfoundland and Labrador Island interconnected system over the period 2011-2067 was reasonable with the knowledge available at that time;
- (b) why there are significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction and the costs by Nalcor during project execution, to the time of

*Commission of Inquiry Respecting the Muskrat Falls
Project*

/17

this inquiry together with reliable estimates of the costs to the conclusion of the project including whether

- (i) Nalcor's conduct in retaining and subsequently dealing with contractors and suppliers of every kind was in accordance with best practice, and, if not, whether Nalcor's supervisory oversight and conduct contributed to project cost increases and project delays,
- (ii) the terms of the contractual arrangements between Nalcor and the various contractors retained in relation to the Muskrat Falls Project contributed to delays and cost overruns, and whether or not these terms provided sufficient risk transfer from Nalcor to the contractors,
- (iii) the overall project management structure Nalcor developed and followed was in accordance with best practice, and whether it contributed to cost increases and project delays,
- (iv) the overall procurement strategy developed by Nalcor for the project to subdivide the Muskrat Falls Project into multiple construction packages followed industry best practices, and whether or not there was fair and competent consideration of risk transfer and retention in this strategy relative to other procurement models,
- (v) any risk assessments, financial or otherwise, were conducted in respect of the Muskrat Falls Project, including any assessments prepared externally and whether
 - (A) the assessments were conducted in accordance with best practice,
 - (B) Nalcor took possession of the reports, including the method by which Nalcor took possession,
 - (C) Nalcor took appropriate measures to mitigate the risks identified, and
 - (D) Nalcor made the government aware of the reports and assessments, and

*Commission of Inquiry Respecting the Muskrat Falls
Project*

/17

- (vi) the commercial arrangements Nalcor negotiated were reasonable and competently negotiated;
- (c) whether the determination that the Muskrat Falls Project should be exempt from oversight by the Board of Commissioners of Public Utilities was justified and reasonable and what was the effect of this exemption, if any, on the development, costs and operation of the Muskrat Falls Project; and
- (d) whether the government was fully informed and was made aware of any risks or problems anticipated with the Muskrat Falls Project, so that the government had sufficient and accurate information upon which to appropriately decide to sanction the project and whether the government employed appropriate measures to oversee the project particularly as it relates to the matters set out in paragraphs (a) to (c), focusing on governance arrangements and decision-making processes associated with the project.

Commission's
considerations

5. The commission of inquiry, in carrying out the terms of reference referred to in section 4 shall consider

- (a) participation in the inquiry by the established leadership of Indigenous people, whose settled or asserted Aboriginal or treaty rights to areas in Labrador may have been adversely affected by the Muskrat Falls Project;
- (b) the need to provide consumers in the province with electricity at the lowest possible cost consistent with reliable service;
- (c) the powers, duties and responsibilities of a Crown Corporation;
- (d) the need to balance commercial considerations and public accountability and transparency in carrying out a large-scale publicly-funded project; and
- (e) the need to balance the interests of ratepayers and the interests of taxpayers in carrying out a large-scale publicly-funded project.

Commission of Inquiry Respecting the Muskrat Falls Project /17

Findings and recommendations

6. The commission of inquiry shall make findings and recommendations that it considers necessary and advisable related to section 4.

Conclusion or recommendations limited

7. The commission of inquiry shall not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.

Special expertise services

8. The commission of inquiry may engage the services of persons having special expertise or knowledge including those with financial, engineering and construction expertise.

Final report

9. The commission of inquiry shall terminate its work and deliver the final report to the Minister of Natural Resources, who shall be the minister responsible for the commission of inquiry, on or before December 31, 2019.

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Jordan, Melissa

From: Joyce, Luke
Sent: Thursday, November 02, 2017 6:53 PM
To: Osmond, Christine M
Subject: Re: NR2017-0[REDACTED]

That works Christine. Thanks.

Luke Joyce
Director of Strategic Communications (Operations)
Executive Council - Communications and Public Engagement Branch
Government of Newfoundland and Labrador
709-729-0084
709-725-4165
www.gov.nl.ca

From: Osmond, Christine M
Sent: Thursday, November 2, 2017 6:48 PM
To: Joyce, Luke
Subject: FW: NR2017-[REDACTED]

Hi Luke,
Received from NR

Christine

From: Cowan, John
Sent: Thursday, November 02, 2017 5:26 PM
To: Osmond, Christine M
Cc: Snook, Corey; Quinton, Diana
Subject: RE: NR2017-[REDACTED]

NR is happy to work with CPEB to ensure the strategic considerations and key messages are updated.

John

From: Osmond, Christine M
Sent: Thursday, November 2, 2017 4:33 PM
To: Cowan, John <JCowan@gov.nl.ca>
Cc: Snook, Corey <coreysnook@gov.nl.ca>
Subject: NR2017-[REDACTED]

Received from CPEB:

In your response can you indicate if you are in agreement and what the anticipated reaction will be from stakeholders.

The branch has reviewed the communications plan and agrees with the suggested approach.

The branch recommends that the Strategic Considerations section be updated to include anticipated reaction from various stakeholders and critics. Responses should be considered for each of those anticipated reactions.

As well, key messages should be updated to explain why a forensic audit is not being conducted. These messages could include some of the rationale that is contained in the cabinet paper.

Christine Osmond

Cabinet Officer

Cabinet Secretariat, Executive Council

Government of Newfoundland and Labrador

Tel: 709.729.5215

Jordan, Melissa

From: Sullivan, Brad
Sent: Thursday, November 02, 2017 12:58 PM
To: Osmond, Christine M
Cc: Jones, Sharlene; Blanche, Pauline; Harty, Kayla; Hanrahan, Denise; Penney, Jodi
Subject: NR2017-█ (Review of the Decision to Sanction and the Execution)

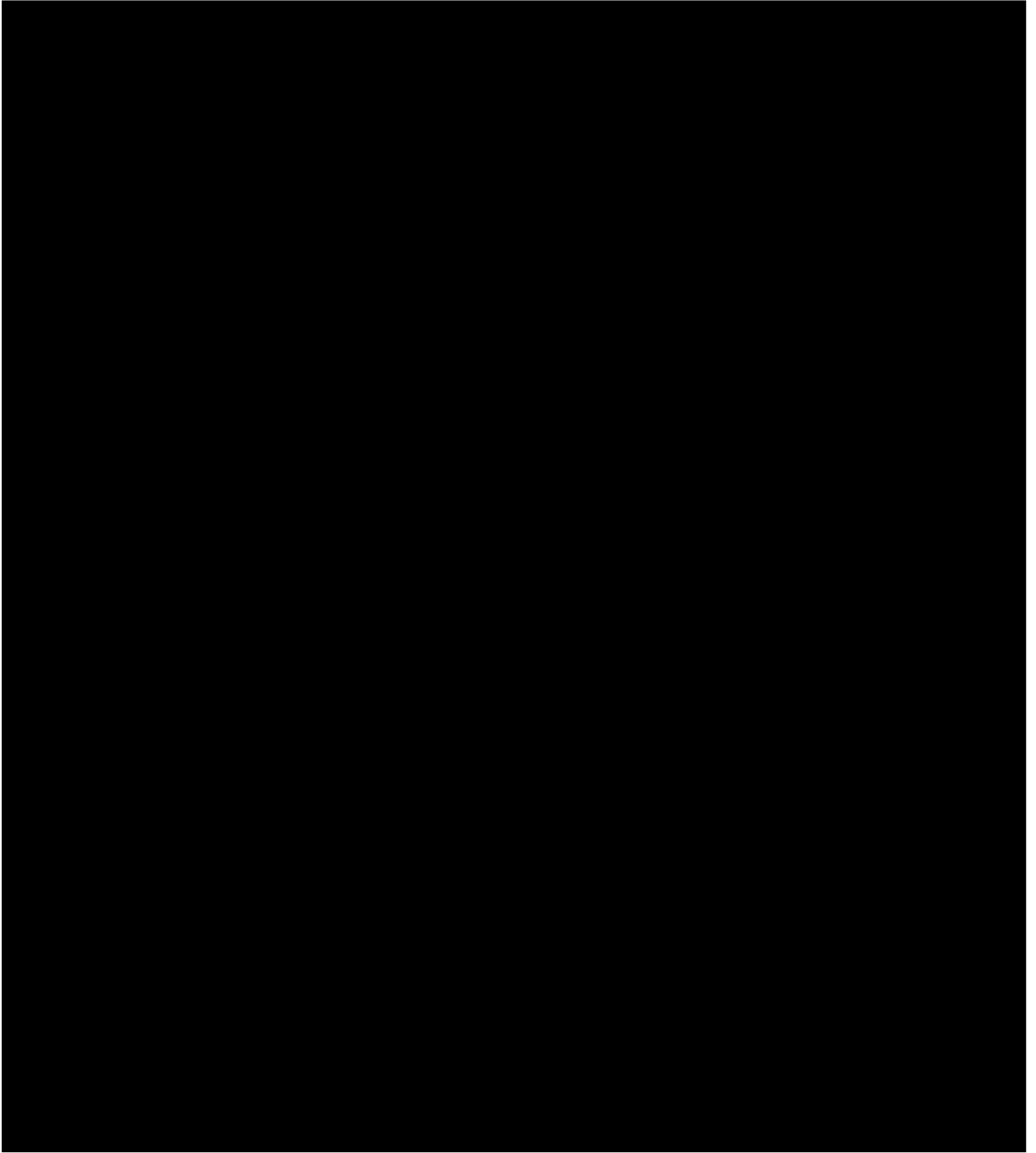
Christine,

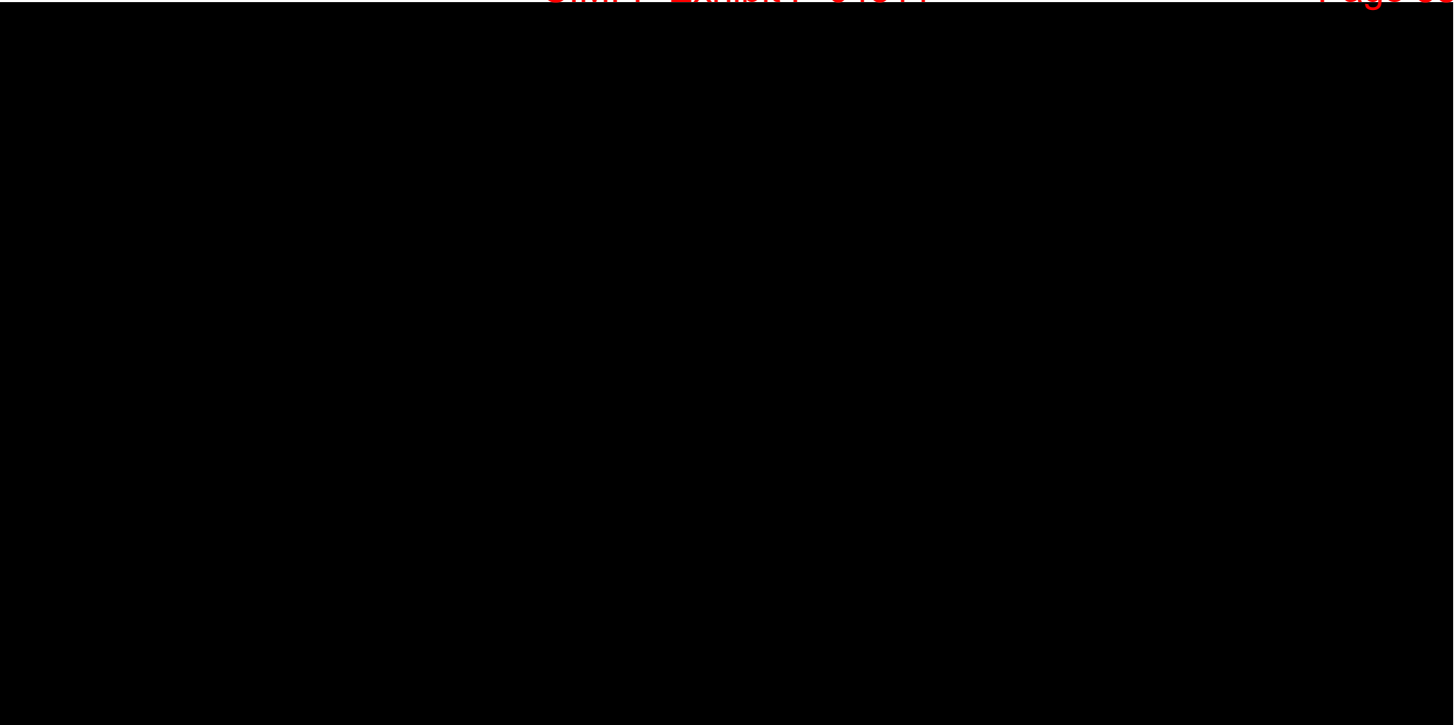
The Department of Finance (Finance) has reviewed the above referenced paper and based on the information provided, has the following comments/questions:

- The Minister responsible for the Inquiry is required to prepare an estimate of the expenditures required for the conduct of the Inquiry in consultation with the commission in accordance with Section 22(1) of the PUBLIC INQUIRIES ACT, 2006 ? When does the Department of NR anticipate being in a position to prepare this estimate?
- In regards to Section 29 of the PUBLIC INQUIRIES ACT, 2006 - relating to policies respecting remuneration and expenses - Has the Department of NR given any thought in establishing policies in order to control costs relating to this inquiry? Will other controls be put in place to contain costs as the paper stated "the public clearly demands answers to the questions surrounding the MFP, but not at any cost and duration."?
- The paper stated that a Cabinet submission seeking approval for a Special Warrant (pursuant to the Financial Administration Act) may be required where the expenditure has not been provided for by the Legislature. Has the Department of NR also considered the use of supplemental supply or contingency funding?

Thanks,
Brad

Brad Sullivan, CPA, CA | Treasury Board Officer
Department of Finance, Treasury Board Support
Government of Newfoundland and Labrador
P.O. Box 8700
St. John's, NL A1B 4J6
✉: bradsullivan@gov.nl.ca
☎: (709) 729-2475





Jordan, Melissa

From: Cowan, John
Sent: Thursday, November 02, 2017 5:35 PM
To: Osmond, Christine M
Cc: Snook, Corey
Subject: RE: NR2017- [REDACTED] (Review of the Decision to Sanction and the Execution)

From: Osmond, Christine M
Sent: Thursday, November 2, 2017 4:05 PM
To: Cowan, John <JCowan@gov.nl.ca>
Cc: Snook, Corey <coreysnook@gov.nl.ca>
Subject: FW: NR2017- [REDACTED] (Review of the Decision to Sanction and the Execution
Importance: High

Hi
Just checking in on response to FIN.

From: Osmond, Christine M
Sent: Thursday, November 02, 2017 1:00 PM
To: Cowan, John
Cc: Snook, Corey
Subject: FW: NR2017- [REDACTED] (Review of the Decision to Sanction and the Execution
Importance: High

Received from FIN for response.

Thanks

From: Sullivan, Brad
Sent: Thursday, November 02, 2017 12:58 PM
To: Osmond, Christine M
Cc: Jones, Sharlene; Blanche, Pauline; Harty, Kayla; Hanrahan, Denise; Penney, Jodi
Subject: NR2017- [REDACTED] (Review of the Decision to Sanction and the Execution)

Christine,

The Department of Finance (Finance) has reviewed the above referenced paper and based on the information provided, has the following comments/questions:

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Once the commissioners are identified, and more information is provided on the operation side we will be in a better position to identify structural costs. The paper identifies costs for other inquiries, with the most recent inquiry from Indigenous Affairs being at close to \$25M. Given it is unclear how many interveners there will be, and how many may challenge some of the proceedings it is extremely difficult to determine a final amount.

- In regards to Section 29 of the PUBLIC INQUIRIES ACT, 2006 - relating to policies respecting remuneration and expenses - Has the Department of NR given any thought in establishing policies in order to control costs relating to this inquiry? Will other controls be put in place to contain costs as the paper stated "the public clearly demands answers to the questions surrounding the MFP, but not at any cost and duration."?

The details around cost are to be finalized, but is fair to say that NR would look to work with JPS and FIN to ensure the costs are controlled.

- The paper stated that a Cabinet submission seeking approval for a Special Warrant (pursuant to the Financial Administration Act) may be required where the expenditure has not been provided for by the Legislature. Has the Department of NR also considered the use of supplemental supply or contingency funding?

The department would look to Finance as to the appropriate funding mechanism at the time it is required.

Thanks,
Brad

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P.O. Box 8700
St. John's, NL A1B 4J6
✉: bradsullivan@gov.nl.ca
☎: (709) 729-2475

From: Cowan, John
Sent: Thursday, November 02, 2017 11:21 AM
To: Osmond, Christine M
Cc: Snook, Corey
Subject: RE: NR2017 [REDACTED]

Hi Christine, Paul Carter may have the answer to question 1. If he does not we will try elsewhere.

With respect to question 2 the primary benefits would be future recommendations on any similar project and potential governance models for other large projects. The primary benefit would be understanding the process for sanctioning and the increase in costs. The purpose of the Commission is not to recover any money or increase revenues, or reduce expenses so there would be no direct benefit to the taxpayer. If the province was to undertake another project there would likely be benefits. In terms of timeframe the paper sets out June 2019, and in terms of money, while it is difficult to determine exactly NR and JPS did look at recent inquiries. While there is quite a range as noted in the paper, it is anticipated that costs would be similar to the inquiry being undertaken by Indigenous Affairs which is anticipated at near \$25M. Depending on the number of interveners, any challenges and the scope that the Commission finally settles on, those costs could be higher.

From: Osmond, Christine M
Sent: Thursday, November 2, 2017 9:52 AM
To: Cowan, John <JCowan@gov.nl.ca>
Cc: Snook, Corey <coreysnook@gov.nl.ca>
Subject: NR2017 [REDACTED]
Importance: High

Hi John,

1. Can you give me an estimate of how many contractors would have been involved with MFP , and potentially how many staff (executive). I am trying to give context to how many people may seek standing.
2. In addition to answering questions that have been raised on the sanctioning and execution, and future recommendations that may be made are there any other benefits to the tax payers of the province? Would this be considered good value for money spent? This is tied to the comment "The public clearly demands answers to the questions surrounding the MFP, but not at any cost and duration." There appears to be limited/no control on costs and duration from the recommended approach, so how will it be determined if it is too much time or money?

Thanks

Christine Osmond
Cabinet Officer
Cabinet Secretariat, Executive Council
Government of Newfoundland and Labrador

Tel: 709.729.5215

From: [Sullivan, Brad](#)
To: [Osmond, Christine M](#)
Cc: [Jones, Sharlene](#); [Blanche, Pauline](#); [Harty, Kayla](#); [Hanrahan, Denise](#); [Penney, Jodi](#)
Subject: NR2017 [REDACTED] (Review of the Decision to Sanction and the Execution
Date: Thursday, November 2, 2017 12:58:05 PM

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☎: (709) 729-2475

From: [Cowan, John](#)
To: [Osmond, Christine M](#)
Cc: [Snook, Corey](#)
Subject: RE: NR2017-█ (Review of the Decision to Sanction and the Execution)
Date: Thursday, November 2, 2017 5:35:20 PM

From: Osmond, Christine M
Sent: Thursday, November 2, 2017 4:05 PM
To: Cowan, John <JCowan@gov.nl.ca>
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✉: bradsullivan@gov.nl.ca
☎: (709) 729-2475

From: [Joyce, Luke](#)
To: [Osmond, Christine M](#)
Subject: Re: NR2017-[REDACTED]
Date: Thursday, November 2, 2017 6:53:03 PM

That works Christine. Thanks.

Luke Joyce
Director of Strategic Communications (Operations)
Executive Council - Communications and Public Engagement Branch
Government of Newfoundland and Labrador
709-729-0084
709-725-4165
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