



Darren C. Stratton
Direct +1 (709) 724 8236
darren.stratton@mcinnescooper.com

5th Floor
10 Fort William Place
PO Box 5939
St. John's NL
Canada A1C 5X4
Tel +1 (709) 722 8735 | Fax +1 (709) 722 1763

Our File: 161520

August 14, 2019

**Commission of Inquiry Respecting
the Muskrat Falls Project**

5th Floor, Beothuck Building
20 Crosbie Place
St. John's, NL A1B 3Y8

Attention: R. Barry Learmonth, Q.C., Commission Co-Counsel
Irene Muzychka, Q.C., Commission Co-Counsel

Dear Mr. Learmonth and Ms. Muzychka:

Re: CIMFP Exhibit P-03875
Correspondence from Martin Whalen Hennebury Stamp dated May 3, 2019

Exhibit P-03875 was prepared by legal counsel for Newfoundland and Labrador Building and Construction Trades Council and Resource Development Trades Council of Newfoundland and Labrador ("RDTC Legal Counsel Letter"). It purports to "provide some additional background on the owner's involvement in labour relations at the Muskrat Falls special project worksite" and to "illustrate the close relationship between the MFEA and its Lead Member, Nalcor Energy."

Exhibit P-03875 was entered on May 27, 2019 during the testimony of Mr. McCormick, Mr. Wade and Mr. Walsh. Nalcor was given leave to provide a response (transcript page 74). This response on behalf of Nalcor or Energy will address the following subject matter:

1. Purpose of the Muskrat Falls Employers' Association Inc. (the "MFEA") and the role of Nalcor as its Lead Member; and,
2. Role of the MFEA in the grievance and arbitration process

1. Purpose of the MFEA and Role of Nalcor as Lead Member

The observations contained in the RDTC's Legal Counsel Letter regarding Nalcor's ability, as Lead Member, to control the actions of the MFEA are correct; and for appropriate reasons. In planning for the Lower Churchill Project ("LCP" or the "Project"), the labour risks that were identified were labour productivity, labour stability, labour cost, and labour availability. As Nalcor was the proponent of the Project, Nalcor was exposed to both cost and schedule overruns that could potentially occur because of these risks. It was determined that it was important for Nalcor to be able to control and manage, if necessary, these risks where appropriate.

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Given the importance of managing these risks, Nalcor, upon incorporation of the MFEA, became the Lead Member. The structure of the MFEA has been utilized by other major projects in Newfoundland and Labrador, including the Long Harbour Employers' Association Inc., which is referred to in a case cited in the RDTC Legal Counsel Letter¹.

The purpose of the MFEA is set out in paragraph 4 of its Articles of Incorporation, which were filed on January 28, 2013, and is described as follows:

The Corporation is established for and shall restrict its activities to the following professional and educational purposes in connection with those portions of the construction of the dam and generation facilities that will occur at Muskrat Falls, Labrador, as may be more particularly described in a special project order issued in connection therewith pursuant to the Labour Relations Act, R.S.N.L. 1990, c. L-1, as amended, (hereinafter the "Project"):

- a. *Exclusive representation of all members of the Corporation in matters relating the employment on the Project including without limitation:

 - i. *collective bargaining for the establishment of a collective agreement for the purpose of the Project;*
 - ii. *the interpretation, application and administration of any collective agreement entered into for the purpose of the Project, including the completion of tasks undertaken by the Corporation pursuant to its terms; and,*
 - iii. *the coordination and resolution of jurisdictional disputes, grievance and arbitration proceedings, proceedings before the Newfoundland and Labrador Labour Relations Board or other disputes before any other person, board, tribunal, court or other body competent to hear and decide the same.**

- b. *To provide relevant and timely information and guidance to members of the Corporation with respect to the administration of any collective agreement entered into for the purpose of the Project and with respect to labour relations in general....*

Given that the MFEA was incorporated as a corporation without share capital, it has "members", not shareholders. The current members are described in Schedule B of the Articles of Incorporation at paragraph 5(b) and (c) as follows:

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

- c. Contractor Member. *A person, corporation, partnership, firm, joint venture or other entity employing trades personnel on the Project shall be eligible to be a Contractor Member. At meetings of members of the Corporation a Contractor Member shall have one (1) vote. The Contractor Members shall, as a class, have the right to elect and remove one or more directors of the Corporation to a maximum of five (5) directors. Entities supplying only materials, machinery or equipment to the Project, and the*

¹ *Long Harbour Employers Association Inc. v. Resource Development Trades Council of Newfoundland and Labrador*, 2013 NLCA 9

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representative of such vendors, are not eligible for membership as a Contractor Member."

The RDTC Legal Counsel Letter correctly notes that MFEA's By-Law No.1 is structured so that Nalcor, as Lead Member, where appropriate, can control member meetings. As well, for the Board of Directors, the Lead Member holds a majority of votes of members so that Nalcor can manage labour risks. This is consistent with the structure utilized on a number of other major projects.

The RDTC Legal Counsel Letter focuses on paragraph 78 of By-Law No. 1. In its entirety, the section in By-Law No. 1 entitled "Labour Relations" reads as follows:

76. *Subject to these By-laws, the Board of Directors may delegate the conduct of collective bargaining to a committee or committees to be appointed by the Board of Directors, and such committee or committees may be given any one or more of the powers to bargain collectively, conclude, and sign any collective agreement as agent for and on behalf and in the name and as the act and deed of the Corporation and each and every member or future member thereof.*
77. *A collective agreement relating to employment on the Project shall not be executed by or on behalf of the Corporation unless and until it has been ratified and approved by the members of the Corporation, such ratification and approval to be given within ninety (90) days of the conclusion of a draft collective agreement reached between the Board of Directors (or a committee delegated for such purpose) and a trade union or council of trade unions. Approval shall be by way of an ordinary resolution passed by the members of the Corporation. Any collective agreement executed with the approval of the Board of Directors and the members of the Corporation shall be binding upon the Corporation and upon every member and future member thereof.*
78. *Each and every Member of the Corporation shall abide by and comply with any direction or interpretation given to it by the Board of Directors with respect to the administration of any collective agreement in force respecting trades personnel employed at the Site and with respect to any dispute between Members or between a Member or Members and its or their trades personnel employed at the Site or any of them or any bargaining agent representing such trades personnel or any of them.*

During the planning period, before concluding a collective agreement for the Project, there was significant due diligence conducted, including extensive consultation with the RDTC and its leadership. Of necessity, this was conducted by Nalcor as there were no contractors during this phase of the Project. There was, however, extensive consultation with the contractor community to obtain its input as to the optimal labour model to manage labour risks for the Project.

Prior to negotiating a Collective Agreement and in the overall planning for the LCP, Nalcor did the following:

1. Engaged Morgan Cooper, then of McInnes Cooper, to make recommendations as to the optimal labour model for the Lower Churchill Project. Morgan Cooper provided a report entitled, "Labour Relations Framework for the Lower Churchill Project Development," which was completed in 2007.
2. In January 2010, engaged David Clark, then of McInnes Cooper, to update the Morgan Cooper report and prepare the document entitled, "Review of Labour Relations Framework for the Lower Churchill Hydroelectric Development Project."

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3. Engaged in extensive consultations to obtain input as to the optimal labour models for the LCP and produced a report entitled, "Lower Churchill Falls Stakeholder Engagement Overview and Strategy," which was prepared and reviewed by Lance Clark, Catherine Rowsell, and David Clark. Included in the Stakeholder Engagement were representatives of the contractor community, RDTCC Union affiliates, RDTCC, Canadian Building Trades, and other provincial labour relations stakeholders.
4. Conducted extensive benchmarking of major project and construction collective agreements throughout Canada to identify best practices and appropriate rates to attract and retain a highly qualified workforce.
5. Provided input into the review of Special Project Order provisions being conducted by James Oakley in 2012.
6. Engaged the RDTCC in developing common bargaining principles in advance of negotiations, culminating in the signing of bargaining principles on March 5, 2012.
7. In early 2012, Lance Clark, Debbie Molloy, Catherine Rowsell, and David Clark prepared a Labour Model Recommendation Report.

The Collective Agreement between MFEA and RDTCC for the construction of the Lower Churchill Hydroelectric Project at Muskrat Falls, Lower Churchill River, Newfoundland and Labrador, was signed on March 14, 2013.

As per By-Law No. 1, Paragraphs 76 and 77 noted above, Nalcor, as Lead Member, and prior to the hiring of any contractors, took a leadership role in establishing a collective agreement for the Project. However, in doing so, it engaged in extensive consultations and conducted extensive due diligence for the purposes of managing labour risks and creating the optimal labour model for the Muskrat Falls Site ("Site").

2. Role of MFEA in Grievance and Arbitration Process

After the Collective Agreement was established and MFEA Contractor members commenced working on the Site, the main role of the MFEA was to provide advice and recommendations respecting: the interpretation and application of the Collective Agreement; grievances and the grievance process; and, arbitrations.

The allegation that the MFEA, or Nalcor as its Lead Member, controls each Contractor's management of grievances and arbitrations is not correct. In fact, it is not uncommon for Contractors to not follow the recommendations, requests, or advice of the MFEA. For example, Don Delarosbil of Astaldi testified to the Inquiry that he retained and asserted full authority for employee discipline and for whether grievances would proceed to arbitration or would be settled (transcript May 9, 2019 pages 101-103).

At no time has paragraph 78 of By-Law No. 1 been utilized, and at no time has any contractor been threatened with expulsion from the MFEA because it failed to comply with a request or directive from the MFEA Board of Directors or any other MFEA representative.

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The RDTC Legal Counsel Letter refers to the arbitration decision in Grievance #132, suggesting that it supports the contention that Nalcor controls the MFEA. The full text of that decision, which the RDTC Legal Counsel Letter states was appended, should be referred to. It is, in fact, an example of a Contractor not following the advice of the MFEA.

The subject matter of Grievance 132 was unusual as the MFEA was attempting to persuade Speuata, the Site Security Contractor, to reinstate a Security Officer who had been terminated after the Security Contractor had been directed to do so by legal counsel on behalf of the Hotel and Restaurant Workers (HRW). The stated reason for the direction to terminate the Security Officer was the revocation of his membership in the HRW. Investigation by the MFEA indicated that the membership had been improperly terminated.

In dismissing the grievance at page 53 of his award, Arbitrator Cooper stated:

"On the basis of the evidence and by the foregoing considerations, I am persuaded that Local 779's revocation of Mr. Smith's union membership was on the basis of his provision of a statement in the context of a workplace investigation, which fell within the faithful discharge of his duties and responsibilities as a Security Officer. In my view, any action by Speuata Security to terminate his employment by reason of Local 779's revocation of union membership on July 7, 2015, is inconsistent with its Collective Agreement obligations, more particularly, its obligation to have just cause to terminate the employment of a bargaining unit member. To the extent that there is an inconsistency between the application of the union security provisions (Article 6) or hiring provisions (Article 7) of the Collective Agreement, arising from Local 779's revocation of Mr. Smith's union membership, and the Collective Agreement requirement of just cause for discharge from employment (Article 5.02(c) and 15.03), it is my view (on the principles in Orenda, Pacifica and British Columbia Transit) that the latter requirement must govern.

I find that the re-hiring of Mr. Smith did not violate the collective agreement and accordingly, the grievance is dismissed."

Accordingly, the situation giving rise to Grievance 132, as referred to in the RDTC Legal Counsel Letter, is an example of a Contractor refusing to follow the advice and recommendations of the MFEA.

The RDTC Legal Counsel Letter also refers to Grievance 243, being a grievance filed by the RDTC and Labourers International Union of North America, Local 1208 ("Labourers") against Astaldi. The MFEA recommended to both Astaldi and the Labourers that the grievance be settled with payment of full back pay, which recommendation was rejected by both the Labourers and Astaldi.

Although the MFEA has continued to act mainly in an advisory role to Contractors, in exceptional circumstances the MFEA has agreed with RDTC – at times without consultation with or consent from the Contractor – that an arbitrator may issue a Directed Award. This has occurred where, in MFEA's view, the grievances were indefensible and/or where a Directed Award would help workers receive unpaid compensation from a Contractor. Those grievances are as follows:

1. Grievance 030 by Labourers against Astaldi whereby the Labourers claimed wrongful dismissal. The MFEA consented to a Directed Award.

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2. Grievance 124 by Labourers against Astaldi whereby the Labourer claimed a medical layoff constituted wrongful dismissal. The MFEA agreed with the Labourers and consented to a Directed Award, which was not supported by Astaldi.
3. Grievance 276 by RDTC against Astaldi whereby the RDTC claimed Astaldi failed to make union remittances, including health welfare and pension, for all workers employed by Astaldi for the month of July 2018. The MFEA consented to a Directed Award against Astaldi, with Astaldi's agreement, to help facilitate the payment of remittances.
4. Grievances 280/281 by RDTC against Astaldi whereby the RDTC claimed Astaldi failed to make union remittances, including health welfare and pension, for all workers employed by Astaldi for the month of August 2018. The MFEA consented to a Directed Award against Astaldi, with Astaldi's agreement, to help facilitate the payment of remittances.
5. Grievance 291 by RDTC against Astaldi whereby the RDTC claimed Astaldi failed to make union remittances, including health welfare and pension, for all workers employed by Astaldi for the month of October 2018. The MFEA consented to a Directed Award against Astaldi to help facilitate the payment of remittances.

We trust you find the foregoing to be in order.

Yours very truly,



Darren C. Stratton
Partner/Labour & Employment Practice Group Leader